TWENTY-FIFTH ANNUAL
NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION
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2013 Bench Memorandum

KEEP CONFIDENTIAL

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Civ. No. 2012-1245

NEW UNION WILDLIFE FEDERATION,
Plaintiff-Appellant,

v.

JIM BOB BOWMAN,
Respondent-Appellee,

v.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Appellant.

Analysis of the Problem
For Use by Brief Graders and Judges

This Analysis of the Problem is for the use by brief graders and judges and must be kept completely confidential at all times.

Please be aware that the legal analysis contained herein is not the only way that the Problem can be analyzed. It may not even be the best way that one or more of the issues can be analyzed. Full credit should be given to those teams that present different, though properly developed and fully appropriate arguments.

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REGULATORY AND FACTUAL FRAMEWORK

PARTIES

The New Union Wildlife Federation (NUWF) is a not for profit corporation organized under the laws of New Union and fully funded by membership dues and contributions. Its purpose is to protect the fish and wildlife of the state by protecting their habitats. Members of NUWF use the Muddy River and adjacent wetlands for recreational activities and aesthetic enjoyment. NUWF was the plaintiff in the District Court and is an appellant on appeal.

Jim Bob Bowman (Bowman) owns one thousand acres of wetlands adjacent to the Muddy River near the Town of Mudflats in the State of New Union. Bowman leveled and filled in the vast majority of his wetlands without obtaining a permit to do so under the Clean Water Act. Under an agreement with the New Union Department of Environmental Protection, he has reserved the remaining, untouched portion of his property as a public easement and permanent wetland. Bowman was the respondent in the District Court and is the appellee on appeal.

The New Union Department of Environmental Protection (NUDEP) is a state agency responsible for enforcing environmental laws in the State of New Union. NUDEP entered into a settlement agreement with Bowman under which he will maintain a small portion of his property as a public easement and permanent wetland. NUDEP incorporated this agreement into an administrative order but did not assess any monetary penalties against Bowman. NUDEP was an intervenor in the District Court and is an appellant on appeal.

Summary of Parties' Procedural Postures by Issue

NUWF Complaint	District Court Holding	NUWF Posture on Appeal	Bowman Posture on Appeal	NUDEP Posture on Appeal
NUWF has standing.	**No. NUWF does not have standing.**	Appeals	(Agrees)	Appeals
There is a continuing violation.	**No. There is no continuing violation.**	Appeals	(Agrees)	(Agrees)
There is no diligent prosecution by the State.	**No. NUDEP's action meets all of the statutory requirements to bar NUWF's suit.**	Appeals	(Agrees)	(Agrees)
There is a Clean Water Act violation.	**No. There is no addition.**	Appeals	(Agrees)	Appeals

APPLICABLE RULES OF LAW

- Federal Water Pollution Control Act (Clean Water Act) § 301, 33 U.S.C. § 1311 (2006)
- Clean Water Act § 309, 33 U.S.C. § 1319 (2006)
- Clean Water Act § 402, 33 U.S.C. § 1342 (2006)
- Clean Water Act § 404, 33 U.S.C. § 1344 (2006)
- Clean Water Act § 502, 33 U.S.C. § 1362 (2006)
- Clean Water Act § 505, 33 U.S.C. § 1365 (2006)

SUMMARY OF FACTS

The undisputed facts established in the court below are as follows:

Bowman owns one thousand acres of property with a 650-foot long border along the Muddy River, which is more than 500 feet wide and six feet deep at that point, forms the border between the states of New Union and Progress, and is used for recreational navigation.

Bowman's property, which lies within the river's one hundred year floodplain, is partially inundated each year and is hydrologically connected to the Muddy. It was previously covered with vegetation characteristic of a wetland, including trees. All parties agree that it meets the definition of a wetland as provided in the Army Corp of Engineer's Wetlands Delineation Manual.

NUWF members Zeke Norton, Effie Lawless, and Dottie Milford use the Muddy River and sometimes the bank along Bowman's property for recreational purposes such as boating, fishing, and picnicking. For years, Norton has hunted for frogs for recreational and subsistence purposes on Bowman's property despite appropriately posted "No Trespassing" signs and acknowledged in deposition testimony that he was "probably trespassing" while doing so.

This controversy arose when Bowman, between June 15, 2011 and July 15, 2011, used bulldozers to level his property, pushing the vegetation into rows and burning it. He buried the ashes, moved soil from high portions of the property to low-lying portions and formed a large ditch to drain the field into the Muddy. He did this without obtaining a CWA permit. He left a 150-foot wide strip of vegetation along the river untouched. In September 2011, Bowman seeded the drained field with winter wheat.

Although they cannot see any changes from the Muddy River as a result of Bowman's actions (there are trees on Bowman's remaining wetlands blocking the view), Milford, Lawless, and Norton are concerned over the effects of the loss of the wetland habitat. They are aware of the environmental degradation this can cause and fear that the river is more polluted. Additionally, Milford stated that the Muddy River looks more polluted to her than it did prior to Bowman's activities. Norton stated that he finds significantly fewer frogs than he did previously on Bowman's property, only two or three where he used to find a dozen.

On July 1, 2011, NUWF sent a notice of intent to sue Bowman under § 505 of the CWA to Bowman, the Environmental Protection Agency (EPA) and the State of New Union. NUDEP then sent Bowman a notice of violation. Bowman denied violating the CWA but entered into a consent agreement with NUDEP. He agreed:

1. Not to clear any more wetlands on his property;
2. To construct a 75-foot wide buffer zone containing year-round wetlands bordering the remaining 150-foot strip of wetlands along the river; and
3. To grant a conservation easement allowing public entry for recreational use in this 650 x 275-foot area.

NUDEP incorporated this agreement into an administrative order on August 1, 2011. NUDEP did not include a penalty against Bowman although a state statute almost identical to § 309 (a) and (g) of the CWA authorized it to do so. 33 U.S.C. § 1319, (a), (g) (2006).

On August 10, 2011, NUDEP brought suit under § 505 of the CWA against Bowman. On August 30, 2011, NUWF also brought suit under § 505 of the CWA against Bowman seeking injunctive relief (remediation of the wetlands) and civil penalties for a violation of §§ 301(a) and 404. NUDEP filed a motion to intervene in NUWF's § 505 action. On September 5, 2011, NUDEP filed a motion in its own § 505 action to enter a consent decree with Bowman identical to the earlier administrative order. This motion is still pending.

On November 1, 2012, the District Court granted NUDEP's motion to intervene in NUWF's § 505 action. The parties filed cross-motions for summary judgment. Bowman asserted that:

1. NUWF lacked standing because it could not show an injury in fact fairly traceable to Bowman's alleged violations;
2. The court lacked subject matter jurisdiction because all violations were wholly past;
3. The court lacked subject matter jurisdiction because the State of New Union had already taken an enforcement action and fully resolved the violations; and
4. The court lacked subject matter jurisdiction because a key element of a CWA cause of action – addition – is not satisfied.

NUWF asserted that Bowman violated the CWA because he added dredged and fill material to navigable waters without a § 404 permit. NUDEP joined Bowman in his motion on the continuing violation and diligent prosecution issues and joined NUWF in its motion on the standing and addition issues.

ISSUES

Summary of Parties' Positions				
	NUWF	**Bowman**	**NUDEP**	**District Court**
Does NUWF have standing?	Yes	No	Yes	No
Is there a continuing violation?	Yes	No	No	No
Is there diligent prosecution by the state?	No	Yes	Yes	Yes
Is there a Clean Water Act violation?	Yes	No	Yes	No

The parties have been ordered to brief the following issues on appeal:

- Whether NUWF has standing to sue Jim Bob Bowman for violating the CWA.
    - On appeal, NUWF argues that it has standing.
    - NUDEP also argues that NUWF has standing.
    - Bowman argues that NUWF does not have standing because there is no injury in fact.
- Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction.
    - On appeal, NUWF argues that there is a continuing violation because fill material is still present in the former wetlands.
    - Bowman argues that the violations are wholly past because Bowman ceased filling the wetlands on July 15, 2011.
    - NUDEP also argues that the violations are wholly past because Bowman ceased filling the wetland on July 15, 2011.
- Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA.
    - On appeal, NUWF argues that NUDEP's actions do not satisfy the diligent prosecution requirements of § 505.
    - Bowman argues that NUDEP's prosecution of and agreement with Bowman satisfy the requirements for diligent prosecution.
    - NUDEP also argues that its prosecution of and agreement with Bowman satisfy the requirements for diligent prosecution.
- Whether Bowman violated the CWA when he moved dredged and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland.
    - NUWF argues that Bowman's actions satisfy all of the elements required for a violation of §§ 301(a) and 404, including addition.
    - NUDEP also argues that Bowman's actions satisfy all of the elements required for a violation of §§ 301(a) and 404, including addition.

- Bowman argues that NUWF cannot satisfy the addition element of a CWA violation.

STANDING: Did the lower court err in holding that the New Union Wildlife Federation did not have standing to sue because there was no injury in fact fairly traceable to Bowman's activities?

NUWF and **NUDEP** contend that NUWF *has* standing to sue Bowman for violating the CWA because it can show a concrete injury to its members' aesthetic, recreational, and economic interest in the of the Muddy River that is traceable to Bowman's activities and that will be redressed by a favorable decision in this case. **Bowman** contends that NUWF *does not have* standing because it cannot show a concrete harm to its members resulting from his activities.

Generally, in order to have Article III standing, a party must show a legally protected "concrete and particularized" injury that is "actual or imminent," "fairly traceable" to the actions of the defendant, and "likely . . . [to be] redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury may be aesthetic, recreational, or economic. *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). To sue on behalf of its members, an organization must show that it has members who would otherwise have standing to sue as individuals (*i.e.*, who could satisfy the three prongs of *Lujan*), that its interest in the case is related to its purpose as an organization, and that the suit does not necessitate the participation of a member as an individual. [1] *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 168, 180-81 (2001); *see also Atlantic States Legal Corp. v. Hamelin*, 182 F. Supp. 2d 235, 239 (N.D.N.Y. 2001).

In this case, as framed by the lower court, the resolution of the standing issue turns on whether NUWF can show that its members satisfy the "injury in fact" prong of *Lujan*.[2] NUWF and NUDEP are faced with a difficult argument on the facts but, nonetheless, should make a good faith effort to show a concrete, particularized injury to the NUWF members' legally protected aesthetic, recreational, and economic (frogging) interests. They need not show an injury to the environment, but should focus on injuries to their interests. *See Laidlaw*, 528 U.S. at 181 (the "relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff."); *see also Am. Canoe Ass'n v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 39 (D.C. Cir. 2004) ("[A] plaintiff does not lose standing simply because . . . [something other than] polluted water . . . is the injury she suffers as a result of a CWA violation.").

[1] NUWF's mission to protect the habitats within New Union is germane to the citizen suit. It would not be more appropriate for a single member of NUWF to bring the case.

[2] There is also a valid question as to whether the alleged injuries are fairly traceable to Bowman's actions – the second prong of *Lujan*. However, there is little factual information relevant to this prong. In response to any argument that the alleged injury is not fairly traceable to Bowman's actions, **NUWF** and **NUDEP** may point to the fact that they did not notice a change in the Muddy or a decrease in the frog population until after Bowman filled his wetlands. Additionally, they did not have cause to be concerned about the negative effects on the river until after they were aware of Bowman's actions. The third, redressability prong is most likely satisfied; NUWF is suing for civil penalties which will deter future § 404 violations and injunctive relief to restore the wetlands, thereby remedying the alleged harm if they are successful in this suit.

NUWF and **NUDEP** will argue that NUWF has successfully shown a concrete injury in fact to its members. Milford, Norton, and Lawless all testified that they use the Muddy River for recreational purposes. They are aware of the ecological damage that results from impaired wetlands and "feel a loss" in the river's ecology and habitat since Bowman filled in his wetlands. They also testified that they are afraid that the Muddy is more polluted as a result of Bowman's activities. Importantly, while they cannot see an aesthetic injury to Bowman's property from the river, Milford testified that the Muddy looks more polluted than it did prior to Bowman's activities. NUWF will liken the testimony of its members to that of the organizational plaintiff members in *Laidlaw*. Similar to Milford's testimony, one member of a plaintiff organization in *Laidlaw* made a sworn statement that the river "looked and smelled polluted" when he drove over it and that he was "concerned that the river was more polluted as a result of [the defendant's] discharges." *Laidlaw*, 528 U.S. at 181-82. The Supreme Court found that this sworn statement and others to the same effect demonstrated an injury in fact. *Id.* at 182. Additionally, Norton testified that he has suffered an injury to his recreational and economic interest in frogging. *See infra* Evidence Obtained While Trespassing. NUWF and NUDEP will therefore argue that NUWF has shown what the Supreme Court required in *Laidlaw* – that their members use the Muddy River and that the economic, "aesthetic and recreational values" that it holds for them have been lessened as a result of Bowman's wetland destruction. *Id.* at 182 (quoting *Morton*, 405 U.S. at 735).

In response, **Bowman** will argue that mere concern for the environment is insufficient to show an injury in fact under *Sierra Club v. Morton*. He will contrast the NUWF members' testimony with the testimony in *Laidlaw*, contending that the NUWF members have not suffered a sufficient injury to show standing. Unlike NUWF's members, the *Laidlaw* plaintiff members noted that they had refrained from partaking in those aesthetic enjoyments and recreational activities as a result of the defendant's CWA violations. *See Laidlaw*, 582 U.S. 182-83. For example, the *Laidlaw* plaintiff who thought the river looked and smelled more polluted stated that he would like to "fish, camp, swim, and picnic" on and near the river but would not do so as a result of his concern over the pollution. *Id.* at 182. Other *Laidlaw* plaintiffs testified that they *used to* wade, bird watch, and canoe on and near the river but *refrained from doing so* because they were afraid of the pollution. *Id.* at 182-83. In contrast, Milton, Lawless, and Norton gave no testimony that their activities on and near the Muddy have changed as a result of their concern over pollution from Bowman's activities. In fact, Norton stated that he still frogs the area.

Bowman will also point to cases in which similar alleged injuries were insufficient. For example, *Informed Citizens United v. USX Corp.*, held that the plaintiff organization did not have standing to sue for a § 404 violation. The plaintiff proffered an affidavit from a member who used to bird watch near the wetlands and claimed his chances for watching birds would be diminished as the wetland vegetation disappeared; this was insufficient to show standing. 36 F. Supp. 2d 375, 378 (S.D. Tex. 1999) (those "allegations fall far short of rising to the level of proof necessary to demonstrate a cognizable, redressable injury that can confer standing"). If Bowman cites *Informed Citizens*, the opposing parties should point out that it preceded *Laidlaw* and the Supreme Court's clarification of the injury in fact requirement.

In sum, **Bowman** will argue, NUWF can only show that its members are merely concerned about the alleged pollution and think that the river looks more polluted. They have no evidence of

pollution or environmental damage and have not changed their habits in relation to the river, a recurrent element in *Laidlaw*.

In reply, **NUWF** and **NUDEP** will emphasize that the Supreme Court has only required that aesthetic and recreational enjoyment be lessened, as it has here, not ended or completely destroyed in order for organizational standing to attach. *See Morton*, at 135; *see also Hamelin*, 182 F. Supp. 2d at 239 (the "injury 'need not be large, an identifiable trifle will suffice.'" (quoting *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64 (3d Cir. 1990)). They should also emphasize that their burden of proof for standing at this point in the litigation is lower than the burden at the trial stage – the plaintiff need only aver facts showing standing (using sworn statements, etc.) but do not need to prove those facts. *Lujan* at 504 U.S. at 561. In this case, NUWF contends that it has averred specific facts via its members' sworn statements showing all three requirements for standing and it need not do more to overcome Bowman's motion for summary judgment.

Evidence Obtained While Trespassing

NUWF and **NUDEP** will argue that Norton's recreational and economic interest in frogging has been lessened – there are significantly less frogs on Bowman's property than before the wetlands were filled in. However, because Norton was clearly trespassing on Bowman's property while frogging (there was clear signage and he admitted that he was probably trespassing) and he could not have been aware of the decrease in the frog population but for this illegal act, there is room for argument over the validity of this evidence.

Bowman will argue that interference with an illegal recreational activity cannot give rise to an injury in fact sufficient for Article III standing. In *Morton*, which underlies much of NUWF and NUDEP's standing argument, the Supreme Court addressed "legal wrongs" or "legal interests" as the constitutional basis for an injury in fact giving rise to standing. 405 U.S. at 733; *see* Steven G. Davison, *Standing to Sue in Citizen Suits Against Air and Water Polluters Under Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 17 TUL. ENVTL. L.J. 63, 70 (2003). This implies that illegal interests, or those protected by law, cannot be a basis for an injury in fact giving rise to standing. Adding further validity to Bowman's argument, a careful reading of *Lujan* reveals that an injury in fact requires an invasion of a "legally protected interest." 504 U.S. at 560. Therefore, illegal recreational activities such as poaching and illegal frogging are not recognized by the standing doctrine. However, there appear to be no specific cases addressing the specific issue of an injury in fact to an illegal hunting interest.[3]

[3] **Bowman** might also point out that, while the Supreme Court has recognized fishing as a legal, recreational interest that can give rise to standing, it has never recognized harm to recreational hunting of wildlife (such as frogging) as an injury in fact. *Davison* at 70. However, **NUWF** and **NUDEP** will counter that lower federal courts, including the D.C. Circuit, have found an injury in fact sufficient to support standing when recreational hunting interests were invaded. *See, e.g., S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1234 (10th Cir. 2011) (recognizing injury to hunting as one typical of standing argument and sufficient for injury in fact); *In re Polar Bear Endangered Species Act Listing & § 4(d) Litig.*, 627 F. Supp. 2d 16, 25-26 (D.C. Cir. 2009) (injury in fact to sport hunting of polar bears); *Ottowa Tribe of Okla. v. Speck*, 447 F. Supp. 2d 835, 838-39 (N.D. Oh. 2006) (injury in fact to tribe's claim for hunting and fishing rights).

The parties may introduce the issue of whether the frog evidence was admissible given that it was obtained while trespassing. The parties should not consume an excess amount of time arguing about this issue, which was not addressed in the court below and therefore may not be reviewable on appeal.[4] *See Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 240 F.3d 1, 13 (1st Cir. 2001) ("It is axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal absent plain error" or "exceptional circumstances").

Improved Frog Habitat

Bowman may argue, as the lower court did, that any injury to Norton's interest in frogging along the Muddy is lessened or negated by the NUDEP biologist's testimony that the new wetland habitat that Bowman has consented to build will create "a higher quality habitat, and more of it" for the frogs. Based on this testimony, Norton can actually expect to benefit from Bowman's consent agreement with NUDEP, finding more frogs in the year-round, partially inundated wetland that will be built and having legal accessing those lands via the public easement.

However, **NUWF** and **NUDEP** will point to *American Bottom Conservancy v. Army Corps of Engineers*, in which the defendants made a similar argument. No. 09-603-GPM, 2010 WL 3894033, at *1 (S.D. Ill. Sept. 30, 2010). There, the court found that the plaintiff had no standing because "her anticipated injury disregard[ed] the fact that . . . nearly twice the amount of affected wetlands will be created in mitigation" and would benefit the wildlife that the plaintiff sought to protect. *Id.* at *7. This position and the court's reasoning that an injury in fact can be negated by planned wetlands mitigation – Bowman's argument – were clearly rejected on appeal. *Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 661 (7th Cir. 2011). While the planned wetlands might be "a boon to the environment" in the future, this issue is irrelevant to the plaintiffs' injury within the context of standing. *Id.* at 659-60 (It is actually

[4] **Bowman** may also argue that the frog evidence is inadmissible because it was obtained illegally and allowing it would be unfair and encourage illegal action by plaintiffs. There is rather obscure case law on both sides of this issue. He may point to the exclusionary rule – the common practice in criminal cases of excluding evidence that has been obtained in violation of the Fourth Amendment – for support by analogy. *See* RONALD S. BEITMAN, GETTING YOUR HANDS ON THE EVIDENCE (ABA 2005). Whether evidence illegally obtained by a civil litigant is admissible is left up to the trial judge in most jurisdictions, although the court below did not reach this issue. *Id.* at 35 (citing *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436 (1st Cir. 1991)). At common law, illegal means of obtaining evidence did not affect admissibility. However, the judicially developed exclusionary rule has been applied in state civil cases where a party obtained it via inequitable or immoral means. *See, e.g.*, *Lebel v. Swincick*, 354 Mich. 427 (1958). In any case, this is the lesser of Bowman's two arguments regarding the frog evidence.

NUWF and **NUDEP** will respond that several federal courts have noted that illegally obtained evidence may be used in civil cases. *Arista Records LLC v. Does 1-16*, No. 1:08–CV–765, 2009 Westlaw 414060 at *7 (N.D.N.Y. Feb. 18, 2009) ("Even if the information was illegally obtained, this does not necessarily foretell its inadmissibility during a civil trial."); *United States v. One 1953 Oldsmobile Sedan*, 132 F. Supp. 14, 18 (W.D. Ark. 1955) (". . . [I]n a civil case ordinarily evidence, although illegally obtained, is nevertheless admissible."). Additionally, the Supreme Court has stated that it has *not* excluded evidence obtained by illegal search and seizure from civil cases. *United States v. Janis*, 428 U.S. 433, 447 (1976). **Bowman** might make several arguments that those cases are not persuasive. *Janis* discusses evidence illegally seized by the government in a criminal investigation and later used in a related civil case. This is different than the situation here, where there is no relation to a criminal case and where the plaintiff is seeking to benefit from evidence that it admittedly obtained in violation of state law, not for law enforcement purposes. Bowman may also argue that *Oldsmobile's* statement about illegally obtained evidence is dicta from over sixty years ago and that *Arista* merely cites that dicta.

relevant to the merits of the plaintiff's claim against the defendant). NUWF and NUDEP may also echo the *American Bottom* plaintiff's concerns that the positive effects of the planned wetlands are speculative and temporally distant. These future plans do nothing to increase or preserve the wildlife population or the plaintiff's interest at this time and do not guarantee that the wildlife will return in the same or greater numbers in the future. *Id.* at 659.

CONTINUING VIOLATION: Did the lower court err in holding that it lacked subject matter jurisdiction because any violation of the Clean Water Act was wholly past at the time New Union Wildlife Federation filed its complaint?

In *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49 (1987), the Supreme Court held that § 505(a) of the CWA requires that an alleged violation be ongoing, continuing, or intermittent at the time the plaintiff files its complaint in order for the District Court to have subject matter jurisdiction. In other words, there is no federal jurisdiction over citizen suits for wholly past violations of the CWA. *Id.* at 385.

The alleged violation in this case is the discharge of pollutants (dredged spoil and biological materials) into a navigable water (Bowman's wetlands) without a § 404 permit.[5] 33 U.S.C. §§ 1311(a), 1362. All parties have agreed that Bowman's wetlands constitute navigable waters and that the dredged and fill materials are pollutants. The only contested element of the violation is "addition." *See infra* Addition section.

NUWF contends that the District Court *has* subject matter jurisdiction over its citizen suit because the presence of unpermitted, unremediated dredged and fill material in the wetlands on Bowman's property without a permit is a continuing violation of the CWA. Bowman and NUDEP contend that the District Court *does not* have subject matter jurisdiction over NUWF's citizen suit because Bowman ceased violating the CWA prior to the filing of NUWF's complaint. There appears to be a split of authority in the courts on this issue.

NUWF's main argument will be that the continued presence of dredged and fill material in the wetlands is a continuing violation of the CWA. Under this line of reasoning, the fact that Bowman stopped adding pollutants to his wetlands on July 11, 2011 is irrelevant. Several cases support NUWF's continuing violation theory. In particular, in *Sasser v. Administrator*, the Fourth Circuit held that there was subject matter jurisdiction over an EPA enforcement action because the continued presence of illegally placed dredged and fill material in a wetland was a continuing violation of the CWA. 990 F.2d 127, 129 (4th Cir. 1993) ("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation.").

[5] **Bowman** may argue that his discharge of materials is exempt from CWA jurisdiction under § 404(f) as a "normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices" and other farming activities. 33 U.S.C. § 1344(f)(1). However, § 404(f) goes on to say that the exemption does not apply to an action "having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2); *see Avoyelles*, 715 F.2d 897 (5th Cir. 1983) (affirming that §404(f)(2) removes the farming exemption in cases where the defendant converts wetlands to a non-wetlands use). . NUWF has a strong argument that Bowman's actions fall under the latter definition and require a permit.

Additionally, **NUWF** may make strong comparisons between this case and *Center for Biological Diversity v. Marina Point Development Associates*, which held that a § 404 violation was continuing where the defendant illegally dumped fill material into a wetland and where the defendant could remove the pollutants from the wetland but failed to do so. 434 F. Supp. 2d 789, 797 (C.D. Cal. 2006). Like Bowman, the *Marina Point* defendant deposited pollutants into a wetland by clearing the site with bulldozers without a § 404 permit and had yet to receive a § 404 permit for the fill at the time the citizen suit was filed. *Id.* at 798. Also like Bowman, the *Marina Point* defendant entered into an agreement (an "Internal Corrective Measure Order") with a government agency (the Army Corps of Engineers) after illegally material in the wetlands. *Id.* at 794. NUWF will argue that the Twelfth Circuit should follow these examples and find that the continued presence of illegally placed fill material in a wetland is a continuing violation of the CWA regardless of whether the defendant stopped adding fill material or entered into an agreement with a government agency prior to the filing of the complaint.

NUWF will strengthen its argument by drawing attention to Justice Scalia's concurrence in *Gwaltney*, which explains that § 505's "to be in violation" language refers to "a state rather than an act" and that a defendant "remains . . . 'in violation' of [an effluent] standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation." 484 U.S. at 69 (Scalia, J. concurring). Using this "state rather than an act" reasoning, NUWF will argue that a CWA violation includes not just the illegal placement of fill material but also the consequences of that act. The failure to remedy those consequences or to obtain a § 404 permit is itself part of the continuing violation. *See N.C. Wildlife Fed'n v. Woodbury*, No. 87–584–CIV–5, 1989 Westlaw 106517 at *2 (E.D.N.C. Apr. 25, 1989) (finding a continuing violation where defendants failed to remove pollutants from a wetland). This reasoning is also supported by public policy. If courts considered wetlands violations wholly past once the act of illegally adding the fill ceases, few plaintiffs would be able to enforce § 404 and violators would have even stronger incentive to conceal their actions. *Id.* at *3.

In the court below, **NUWF** differentiated between § 402 and § 404 violations on this issue – effluent violations may not continue beyond the violation itself while the presence of fill material allows a wetlands violation to continue beyond the violation. However, on appeal, it may show that some § 402 violations (and even violations of other statutes) continue well beyond an illegal act for the purposes of § 505. For example, one court found a continuing violation under *Gwaltney* where the consequences of an effluent limitation violation continued to be felt years after the violation took place. *Umatilla Water Quality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1321-22 (D. Or. 1997) (ongoing migration of pollutants from brine pond when pollutants were no longer being added was a continuing violation); *see also United States v. Werlien*, 746 F. Supp. 887, 896-97 (D. Minn. 1990), *vacated on other grounds*, (discussing *Gwaltney* and finding that continued presence of pollutants in soil dumped years earlier was continuing violation of RCRA); *Fl. Dep't of Envtl. Prot. v. Fleet Credit Corp.*, 691 So.2d 512, 514 (Fla. Dist. Ct. App. 1997) (continuing but abatable seepage of pollutants into groundwater from abandoned property was continuing violation of state CERCLA). The continuing violation from an effluent left in soil or a pond is analogous to Bowman's violation and lends credence to NUWF's argument that a violation may continue beyond the illegal act.

Bowman and **NUDEP's** main argument will be that there is no continuing or intermittent violation that satisfies § 505 in this case. Bowman ceased violating the CWA by adding fill

material to his wetlands on July 15, 2011, well before NUWF filed its complaint. There is no indication that he will violate the CWA again; he has no need to add more fill material to his property and entered into the consent agreement promising to maintain the remaining wetlands on his property. In order to support this argument, Bowman and NUDEP must refute NUWF's contention that the continued presence of fill material is a continuing violation by distinguishing this case from those supporting NUWF's theory and by presenting cases with opposite holdings.

Bowman and **NUDEP** will attempt to distinguish this case from *Sasser* by highlighting the fact that *Sasser* was an enforcement action by the administrator of the CWA and not a citizen suit. 990 F.2d at 127. They will also distinguish this case from *Marina Point* by emphasizing that the defendants in that case showed clear signs that they would have continued to illegally fill the wetlands but for a court injunction and were uncooperative with and even disobeyed government orders. 434 F. Supp. 2d at 798. In contrast, Bowman has clearly stopped adding fill to his wetlands, shows no sign that he will resume such activities, and has cooperated with NUDEP.

Bowman and **NUDEP** will also cite cases in which courts have held that the continued presence of a pollutant in a wetland does not constitute a continuing violation of the CWA. For example, in *United States v. Rutherford Oil Co.*, the court found no continuing violation where the alleged violations had occurred prior to the filing of the complaint and only the effects of the violation remained. 756 F. Supp. 2d 782 (S.D. Tex. 2010) ("A discharge in violation of an obligation under § 311 [of the CWA] is not a continuing violation on the basis that the discharger fails to remedy its effects."); *see also United States v. Scruggs*, No. G-06-776, 2009 WL 81921 at *11 (S.D. Tex. Jan. 12, 2009) (a single violation of § 404 with continued effects on the environment is not a continuing violation). They will proceed to compare Bowman's actions to the isolated, past violations in these cases and argue that his violations are wholly past despite any continued effects or failure to remedy.

In response to any cases that NUWF presents finding a continuing violation of § 402 due to the continued effects of a past illegal act, **Bowman** and **NUDEP** will present cases holding that the violation is not continuing where it merely affects the environment after the illegal act has ended. For example, in *Hamker v. Diamond Shamrock Chemical Co.*, the Fifth Circuit found that continued negative effects on grasslands from pollutants previously leaked into the ground did not constitute a continuing violation of § 402. 756 F.2d 392 (5th Cir. 1985). While this is a pre-*Gwaltney* case, other courts have held post-*Gwaltney* that there is no ongoing § 402 violation simply because the pollutants still affect the environment. *See Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1353-54 (D.N.M. 1995) ("Migration of residual contamination resulting from previous releases is not an ongoing discharge . . ."); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 939, 975-76 (D. Wyo. 1993) (continued migration of residual contamination was not a continuing violation of § 402); *Conn. Coastal Fishermen's Assoc. v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (no continuing violation even where lead shot left in ground was leaching pollutants into navigable waters). Bowman and NUDEP may also frame this issue as irrelevant to this case, which does not address § 402 violations.

In the alternative, **Bowman** and **NUDEP** may argue that Bowman has in fact attempted to remedy his violations by entering into the consent agreement with NUDEP and promising to maintain an easement and year-round wetlands on his property. Bowman may also argue that the

consent decree with NUDEP excuses him from any further remediation. **NUWF** should respond by pointing out that, under the agreement, Bowman will only be required to preserve and restore just over a single acre of wetlands or .001% of the wetlands that he cleared and filled; this is not sufficient remediation of the damage done to show that the § 404 violation has ceased.

Effect on Statute of Limitations

The lower court noted that the idea that a CWA violation is continuing until the illegally placed material is removed is untenable because the statute of limitations would never begin to run. This is not a major issue in this case because Bowman's actions clearly fall within the traditional five-year statute of limitations for federal civil offenses. Therefore, if the parties address this sub-issue, it should only be within a policy-type argument and should not involve significant time or resources.

While **Bowman** and **NUDEP** will argue with the lower court, **NUWF** will respond that many courts have recognized the use of the continuing violation doctrine as a valid, equitable defense to a statute of limitations bar. The purpose of the statute of limitations is to prevent the litigation of stale cases. However, cases such as this one, where evidence of the defendant's actions and their effects are still clear, are not stale and, therefore, should not be barred. NUWF will cite *Stillwater of Crownpoint Homeowners Association v. Kovich*, where the court held that "the five-year statute of limitations for [CWA] claims that a person unlawfully placed fill in a wetland does not begin to run as long as the fill remains in place." 820 F. Supp. 2d 859, 896 (N.D. Ind. 2011); *see also Am. Canoe Ass'n*, 306 F. Supp. 2d at 40-41 (statute of limitations does not run if there is an ongoing violation); *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fl. 1996).

DILIGENT PROSECUTION: Did the lower court err in holding that it lacked subject matter jurisdiction because the State of New Union had already taken an enforcement action and fully resolved any violation of the Clean Water Act?

Under § 505(b)(1)(B) of the CWA, a citizen suit is barred if the "State has commenced and is diligently prosecuting a civil . . . action in a court of the United States . . . to require compliance . . ." with the CWA. 33 U.S.C. § 1365(b)(1)(B) (2006). **NUWF** contends that its citizen suit *should not* be barred. **NUDEP** and **Bowman** contend that NUWF's citizen suit *should* be barred because they have entered into an agreement incorporated into an administrative order addressing the violation and because NUDEP is currently suing Bowman over the same facts. Diligent prosecution is a complicated, fact-intensive issue and there are arguments and supporting case law on both sides in this case.

Bowman and **NUDEP** will emphasize that courts presume diligent prosecution by the state enforcement agency. *Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 890 F. Supp. 470, 487 (D.S.C. 1995). "The state . . . agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Id.* at 486 (citing *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 842 F. Supp. 1140, 1147 (E.D.Ark.1993), aff'd, 29 F.3d 376 (8th Cir.1994)). Citizen-plaintiffs – NUWF in this instance – have the heavy burden of demonstrating that the state has not diligently prosecuted the violation. *Id.* at 486-87. In determining whether a violation has been diligently prosecuted, the court will consider whether the settlement with the state provides for a lack of substantial relief. *Id.* at 490. In considering

this factor, the citizen-plaintiff must show more than the "fact that [the] settlement reached by the state is less burdensome to the defendant than the remedy sought in the [citizen suit] complaint . . ." *Id.* This fact alone is not enough to show that the agency has failed to diligently prosecute the violation. *Id.*

NUWF will argue[6] that NUDEP's actions to enforce § 404 against Bowman are both (1) procedurally insufficient due to the excessive speed with which the agency reached an agreement with Bowman and (2) substantially insufficient in that they failed to include a civil penalty and only required minimal remediation or mitigation. *See Laidlaw*, 890 F. Supp. at 479-80 (D.S.C.).[7]

Procedural Insufficiency

In *Laidlaw*, the District Court noted that the settlement agreement between the defendant and state was "entered into with unusual haste," which raises concern over the citizen-plaintiff's ability to intervene and participate in the enforcement process. *Id.* at 489. **NUWF** will argue that NUDEP has also acted with unusual haste. It received notice of Bowman's violation on July 1 and entered an administrative order incorporating its consent agreement with Bowman on August 1 – a mere thirty days later. It filed suit on August 10 for no apparent reason besides blocking NUWF's citizen suit. **Bowman** and **NUDEP** should respond by citing the District Court's statement that, "although suspect," the unusual procedural aspects (including the fact that the defendant drafted the agreement and even paid the filing fee for the suit against it) were not enough to show lack of diligent prosecution. *Id.* at 489-90. They may also argue that they merely acted expeditiously in a case that did not require a large investment of time and resources to resolve.

Substantive Insufficiency

NUWF will also argue that NUDEP's enforcement of the CWA is substantively insufficient in that they have not required Bowman to sufficiently remediate or mitigate his § 404 violations. The consent agreement and administrative order only require Bowman to preserve and rebuild just over one acre of property on the 650 x 275 foot portion of land closest to the Muddy – about .001% of the wetlands he destroyed. In contrast, for permitted damage to wetlands – which Bowman's was not – the Army Corps of Engineers requires a one-to-one ratio of compensatory wetlands mitigation or sufficient mitigation to offset the loss of the wetlands. General Compensatory Mitigation Requirements,73 Fed. Reg. 19627, 19633 (Apr. 10, 2008) (codified at 33 C.F.R. pt. 332.3 and 40 C.F.R. pt. 230.93).

Furthermore, **NUWF** will contend that NUDEP's enforcement is substantively insufficient because it did not include civil penalties. There is currently a split of authority among the federal circuits as to how the assessment of civil penalties (or lack thereof) by the state agency affects the diligent prosecution bar for citizen suits. Some courts have held that a citizen suit will not be

[6] **NUWF** may argue that NUDEP's § 505 suit against Bowman is barred because NUDEP failed to wait the requisite sixty days to commence its suit. 33 U.S.C. 1365(b)(1)(A). (NUDEP did not discover Bowman's violation until July 1 and commenced suit on August 10, twenty days earlier than allowed.) This nullifies Bowman and NUDEP's claim that the state has commenced suit in a court of the U.S. as required by the diligent prosecution provision, forcing it to rely solely on the administrative order to show diligent prosecution. *See* § 1365(b)(1)(B).

[7] The subsequent Supreme Court opinion did not directly address this issue of diligent prosecution.

barred unless the state has assessed civil penalties in an amount comparable to the amount provided for in the CWA's civil enforcement provision. NUWF will highlight those opinions, arguing that because NUDEP did not include a penalty in its administrative order to Bowman despite being authorized to include a penalty of up to $125,000, NUDEP's action does not constitute "diligent prosecution." *See Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 861 F. Supp. 889, 911 (N.D. Cal. 1994) (holding that a CWA citizen suit was not barred because the $2 million payment made by defendant did not constitute a "penalty" under the CWA); *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1390 (D. Haw. 1995) (holding that "in order for state enforcement action to bar citizen's suit under . . . state enforcement must seek penalties, not mere compliance"); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1344 (D.N.M. 1995) (holding a CWA citizen suit not barred where state agency had only "compelled Defendants to remediate the site and contain acid mine discharges," but had not sought penalties).

In contrast, other circuits have held that state administrative enforcement actions will bar a CWA citizen suit even in the absence of civil penalties if those enforcement actions are directed at the same actions as the citizen suit. **Bowman** and **NUDEP** will argue that NUDEP's action constitutes "diligent prosecution," and thus this CWA citizen suit should be barred despite the fact that there were no penalties. They will argue that the remedial actions that Bowman and NUDEP incorporated into the administrative order and NUDEP's suit against Bowman are sufficient to bar NUWF's citizen suit even in the absence of civil penalties. *See N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991) (holding that a CWA citizen suit for penalties may be barred even if the state did not seek to sanction the offender monetarily where the "corrective action already taken and diligently pursued by the government seeks to remedy the same violations as [the] duplicative civilian action"); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 777 F. Supp. 173, 183 (D. Conn. 1991) (holding that a CWA citizen suit was barred even though state "enforcement was limited to an order terminating lead discharges and mandating remediation of lead contamination" and did not "assess monetary penalties, . . . compel defendant to obtain an NPDES permit, and . . . require the termination of discharges other than lead"); *Pape v. Menominee Paper Co., Inc.*, 911 F. Supp. 273, 277 (W.D. Mich. 1994) (holding that a consent order between paper manufacturing company and state agency barred CWA citizen suit); *Sierra Club v. Colo. Ref'g Co.*, 852 F. Supp. 1476, 1476 (D. Colo. 1994) (holding that the "state need not [attempt] to assess penalties, to exclusion of other remedies, in order to satisfy 'prosecution' requirement of CWA section barring citizen suits . . . [for] violations . . . which state has commenced and is diligently prosecuting action under comparable state law").

Bowman and **NUDEP** should point out the redundant or duplicative nature of NUWF's citizen suit and NUDEP's agreement with and subsequent suit against Bowman – both are aimed at the same exact party and the same alleged violations. *See Town of Scituate*, 949 F.2d at 556. They may also emphasize that citizen suits are meant to supplement state enforcement actions where the state is unable or unwilling to act. *See Gwaltney*, 484 U.S. at 60; *Town of Scituate*, 949 F.2d at 555. In this case, they will contend, NUDEP has acted and there is no room for NUWF to supplement its enforcement action.

In response, **NUWF** may re-emphasize the insufficient remediation and mitigation NUDEP has required. It will argue that NUDEP has not diligently prosecuted Bowman by showing the

drastic difference between remediation required in those cases cited by Bowman and remediation required by NUDEP. For example, as part of the settlement in *Town of Scituate*, the defendant sewage treatment plant was required to submit daily, weekly, and monthly test results to the agency, spend $1 million on a remediation plan, and enforce a moratorium on sewer hookups. 949 F.2d at 556. In contrast, Bowman merely had to stop clearing his land, which he had already stopped clearing and had no reason to begin again, and build a wetland on a small piece of property. This is insufficient to show diligent prosecution in the absence of civil penalties.

NUWF may also turn to a policy argument to show that NUDEP has not diligently prosecuted Bowman by failing to assess civil penalties. Civil penalties are meant to "reduce pollution of the nation's waterways by deterring persons from violating" the CWA and, to be effective, must require polluters to disgorge the economic benefit of violating. *Laidlaw*, 890 F. Supp. at 491-92 (citing *Tull v. United States*, 481 U.S. 412, 422–23, (1987) and *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1141 (11th Cir.1990)). Because Bowman did not have to pay a penalty for turning almost one thousand acres of wetlands into a wheat field in violation of § 404, he may realize an economic benefit from the wheat production, making it more attractive to violate than to comply and lessening the deterrent effect of the CWA penalty provisions. *See id.; see also Laidlaw*, 528 U.S. at 185-88.

In response, **Bowman** and **NUDEP** may make a policy argument that issuing a monetary penalty against Bowman may restrict his ability to perform the remediation. If NUDEP ordered Bowman to pay a fine for his CWA violations, then he would have less money to put toward the constructing and maintaining the year-round wetland on his property, which will benefit the environment and NUWF.

ADDITION: Did the lower court err in holding that Bowman's activities on his wetland property did not violate the Clean Water Act because they did not amount to the "addition" of a pollutant to a navigable water?

The CWA prohibits the "addition" of a pollutant, including dredged and fill material, to navigable waters without a permit – in this case a § 404 permit.[8] 33 U.S.C. §§ 1311(a), 1362(12). There is no question as to whether the wetlands on Bowman's property, which are adjacent and hydrologically connected to the navigable Muddy River, are considered "navigable water" under the CWA.[9] The issue here is whether Bowman's actions amount to the "addition" of a pollutant to navigable water. **Bowman** contends that he did not add a pollutant to navigable water – he merely moved materials within a single wetland, adding nothing new – and therefore he *did not* violate the CWA. **NUWF** and **NUDEP** contend that Bowman's land clearing activities resulted in the addition of pollutants to navigable water and therefore he *did* violate the CWA.

There are two theories on which Bowman may rely to argue that there was no addition: (1) the material was not added because it did not come from the outside world; and (2) it was not added because the wetland and Muddy are one water body (the unitary waters theory). He may also

[8] *See supra* note 5 for discussion of whether Bowman's actions fall under a farming exception to § 404.
[9] The term "navigable waters" includes "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Rapanos v. United States*, 547 U.S. 715, 742 (2006). All parties have agreed that Bowman's property is navigable water.

argue that his alleged addition is not regulated under the incidental fallback exception to § 404. While these are tough arguments for Bowman to make in this case, there are authorities on both sides of each sub-issue for parties to cite.

"Outside World"

It is EPA's position, adopted by the D.C. Circuit, "that addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the *outside world.*" *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) (emphasis added). **Bowman** will contend that, because his land clearing activities merely pushed pollutants from one part of his property to another, he did not add those pollutants from the "outside world". Thus, he will argue, there is no addition and no CWA violation.

NUDEP and **NUWF** will emphasize that the *Gorsuch* court's "outside world" interpretation of addition was made in the context of § 402 of the CWA. However, **Bowman** will point out that courts have held that the same term used in different parts of the same statute has the same meaning unless Congress clearly provides otherwise. *See Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986). Therefore, Bowman will argue that the "outside world" interpretation of addition applies to both § 402 *and* § 404 of the CWA. In essence, Bowman will contend that he has not violated the CWA because he has not added anything (or at least nothing new) to his wetland from the "outside world." *See Gorsuch*, 693 F.2d at 165 (quoting 33 U.S.C. § 1311(a)).

In response, **NUDEP** and **NUWF** will argue that the addition element has two different meanings under § 402 and § 404, despite the fact that both sections appear in the same statute. *See* Alison M. Dornsife, *From a Nonpollutant into a Pollutant: Revising EPA's Interpretation of the Phrase "Discharge of any Pollutant" in the Context of NPDES Permits*, 35 ENVTL. L. 175, 192 (2005). Under § 402 (addressing NPDES permits), the discharge of a pollutant only requires a permit if there is an addition of a material from the outside world. *See id.* However, under § 404 (addressing dredged and fill permits), the discharge of a pollutant encompasses moving material from one place in the water body to another, even within the same water body. *See id.*

NUDEP and **NUWF** will also cite case law to support their argument that Bowman's intra-wetland activities amount to the addition of a pollutant even if he didn't add new materials from outside of the wetland. For example, in *United States v. Deaton*, the Fourth Circuit held that "sidecasting" [10] within a single wetland – a lesser activity than Bowman's large-scale land clearing – constitutes the discharge of a pollutant under the CWA. 209 F.3d 331, 332-33 (4th Cir. 2000). *Deaton* clearly *rejected* the argument (comparable to Bowman's) that there was no CWA violation because the defendant merely moved soil and plant matter within a single wetland resulting in no "net increase" of material in that wetland. *Id.* The court was "not impressed" by the "no net increase" of material theory. *Id.* It emphasized that the defendants violated the CWA not when they merely added material to the wetland, but when they dug up vegetation and returned it (even in the same amount to the same wetland) as dredged spoil – a pollutant. *Id.* at 336. Just as the *Deaton* defendant did, Bowman dug up material, turned it into a pollutant, and returned it to the wetland, adding pollutants where there had been none before. *Id.* **Bowman** will

[10] Sidecasting occurs when one piles excavated dirt next to the excavation site within the same wetland. *See Deaton*, 209 F.3d at 333.

respond by citing N*ational Wildlife Federation v. Consumer Powers Company*, in which the Sixth Circuit held that there was no addition where a power facility sucked live fish into its turbines and returned dead fish to the navigable waters. 862 F.2d 580, 585-86 (6th Cir. 1988). Bowman will compare his removal of live plants and return of dead plant material to the wetland with the power plant and the fish, which did not constitute an addition of material.

Additionally, **NUDEP** and **NUWF** may argue that the environmental harm that results from dredge and fill activities necessitates their regulation even if they occur solely within a single wetland. The *Deaton* court explained that dredging and filling, no matter the scale, are harmful. When Congress "[classified] dredged spoil as a pollutant, [it] determined that plain dirt, once excavated from waters of the United States, could not be redeposited into those waters without causing harm to the environment." *Id.* at 336. The court described many harmful consequences of dredging in wetlands, noting that the redeposit of dredged spoil into a water body or wetland can release pollutants that had previously been trapped. *Id.* (citing Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* 48-50 (1984)). NUWF and NUDEP should emphasize the court's statement that it is "*no less harmful* when the dredged spoil is redeposited in the *same wetland* from which it was excavated. The effects on hydrology and the environment are the same." *Id.* (emphasis added). Therefore, they will argue that even though Bowman did not add any pollutants to his wetland from the "outside world," his activities must still be regulated because they result in harm to the environment, and because courts (including the Fourth Circuit) have upheld the regulation of such intra-wetland activities.

Unitary Waters Theory

Under the unitary navigable waters theory, all navigable waters are one for the purposes of § 301(a) of the CWA. EPA's application of the theory is inconsistent and primarily relied upon to support its Waters Transfer Rule. *See Friends of the Everglades v. S. Fla. Water Management Dist.*, 570 F.3d 1210, 1217-18, 1228 (11th Cir. 2009) (explaining that the theory has a "low batting average" but granting deference to EPA's Water Transfer Rule incorporating the theory).

As the lower court did, **Bowman** may use the unitary waters theory to argue that his land clearing activities did not technically add any pollutants to the wetlands since the pollutants were merely moved within a single body of navigable water. Therefore, the "addition" element of the § 404 violation has not been satisfied as the CWA requires. This is essentially an extension of his "outside world" argument: If moving pollutants between two water bodies is not an addition under the unitary waters theory, then how can his moving material within a single wetland be an addition? Unfortunately, Bowman's argument on this point is theoretical and weak.

NUWF and **NUDEP** will respond that the unitary waters theory has been struck down in almost every court of appeals as contrary to the purpose of the CWA (except for the Eleventh Circuit, which recognized it in granting EPA *Chevron* deference). *Id.* For example, in *Catskill Mountains I* and *II*, the Second Circuit clearly rejected the unitary waters theory, finding that a transfer of water and pollutants between two distinct water bodies violated the CWA. *Catskill Mountains Ch. of Trout Unltd., Inc. v. City of New York (Catskills I)*, 273 F.3d 481, 491 (2d Cir.2001); *Catskill Mountains Ch. of Trout Unltd., Inc. v. City of New York (Catskills II)*, 451 F.3d 77, 83 (2d Cir.2006) (". . . This theory would lead to the absurd result that the transfer of water from a heavily polluted . . . water body to one that was pristine . . . would not constitute an

'addition' of pollutants and would not be subject to the [CWA]."); *see also Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir.1996) ("[T]here is no basis in law or fact for the district court's 'singular entity' [unitary waters] theory.").. Although the Supreme Court has not directly rejected the theory, it has suggested that it is inconsistent with portions of the CWA. *Friends of the Everglades*, 570 F.3d at 1218 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106-07 (2004)).

Bowman may also try to rely on the Water Transfer Rule itself, which states that where one transfers water from one distinct water body to another distinct water body and does not add any pollutants to that water during the transfer process, that activity is *not* subject to the CWA's NPDES permitting requirements.[11] In response to any allegation that he added pollutants to the Muddy in violation of § 301 (although that is not the main focus of this citizen suit), he might argue that the Muddy and his property are hydrologically connected and are one unit under the theory, precluding his transfer of water and pollutants into the river via a ditch from being an addition. This is not a strong argument.

NUDEP and **NUWF** can easily show that Bowman's addition of dredged and fill material to his property does not meet the definition of a "water transfer." *See supra* note 11. He did not convey or connect two different waters of the United States when he added dredged and fill material to a wetland in violation of § 404. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697, 33,702 (June 13, 2008) (codified at 40 C.F.R. pt. 122) ("water transfers convey one water of the U.S. into another").

NUWF and **NUDEP** will also point out that the final water transfer rule specifically states that it "has *no effect on the 404 permit program*, under which discharges of dredged or fill material may be authorized by a permit," because "Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in . . . § 301." 73 Fed. Reg. at 33,703 (citing 33 U.S.C. § 1344 (2006)) (emphasis added). Additionally, the final rule "focuses exclusively on water transfers and does not affect any other activity that may be subject to NPDES permitting requirements." *Id.* at 33,697. Bowman's land clearing and wetlands filling are clearly not water transfers and thus fall under § 404. Therefore, Bowman cannot apply the water transfer rule and underlying unitary waters theory to show that there has been no addition.

Incidental Fallback

Not all dredge and fill activity is regulated under the CWA. Under federal regulation, the "incidental fallback"[12] of material during dredging does not fall within CWA jurisdiction because it is not considered an addition. "[B]ecause incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge." *Nat'l Mining Assoc. v. Army*

[11] A water transfer is defined as "an activity that conveys or connects waters of the [U.S.] without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." 40 C.F.R. § 122.3(i) (2012). Water transfers "embody how States and resource agencies manage the nation's water resources and balance competing needs for water." Memo. from Ann R. Klee, Gen. Counsel, and, Benjamin H. Grumbles, Assistant Adm'r for Water, U.S. EPA, to Regional Administrators Regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 9 (Aug. 5, 2005).

[12] Incidental fallback is a "situation in which material is removed from waters of the [U.S.] and a small portion of it happens to fall back." *Nat'l Mining Assoc. v. Army Corps of Eng'rs*, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998). The regulation and definition of incidental fallback has taken a convoluted, confusing path over the past few decades. While excavation activity, including incidental fallback, was originally exempt from CWA regulation, EPA and the Corps attempted to regulate it as the redeposit of material several times (known as the Tulloch Rules). This regulation was rejected by the courts. However, there is still ambiguity as to the definition of incidental fallback. *See* Radcliffe Daniel IV, *Clean Water Act Jurisdiction Over Excavation Activities: The Tulloch Rule Revised*, 38 COLO. LAW. 83 (July 2009).

Bowman may attempt to play on this lack of clarity as to what is incidental fallback and argue that his activities are exempt from CWA regulation. While incidental fallback was earlier[13] treated as a *de minimis* exemption, *National Association of Home Builders v. U.S. Army Corps of Engineers* interpreted *National Mining Association* and noted that the volume of materials does not determine whether redeposit qualifies as incidental fallback. No. 01-0274(JR), 2007 WL 259944 (D.D.C. Jan. 30, 2007). Rather, the amount of time material is held and distance it travels between excavation and redeposit are important factors. *Id.* at *3 (known as the "Silberman Factors"). Therefore, Bowman may contend that, even if he dropped a large amount of material into the wetland, he did not hold it for a long time or move it large distances and therefore it should be exempt as incidental fallback. He may also point to the language of *National Mining Association* to argue that his actions did not result in a net addition of materials to the wetland and therefore they did not amount to a discharge. 145 F.3d at 1404.

NUWF and **NUDEP** will differentiate Bowman's activities from mere incidental fallback and argue that there was a non-exempt addition. They will characterize Bowman's activities as the redeposit of large amounts of pollutants in the wetland – he moved almost one thousand acres of plant material and soil within his property in order to turn it into a wheat field. In response to Bowman's argument based on the "Silberman Factors," NUDEP and NUWF will argue that his activities necessitated holding materials for longer than and moving materials farther than activities typically resulting in incidental fallback, such as shoveling material into a dump truck. Although the facts are not specific here, the parties do know that Bowman moved materials from the high portions of his thousand acres to the low portions, from which one might infer that he moved them significant distances. They may point to *Green Acres Enterprises, Inc. v. United States*, which upheld the Corps' regulation of "bulldozer work where soil was redeposited from one place to another in waters of the United States by bulldozer blades, while trees, limbs, vegetation, root wads and brush were pushed into stockpiles, and land was leveled. These kinds of activities result in more than 'incidental fallback.'" 418 F.3d 852, 855 (8th Cir. 2004).

This is not intended to be an exhaustive analysis of the problem, merely an indicative list of issues to be discussed in written submission by teams. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.

[13] *See id.*

Sample Questions

These questions are suggested as a starting point. Please feel free to develop your own.

- **Issue 1 (Standing) Questions**
  - NUWF and NUDEP
    - Is there a sufficient injury in this case under *Laidlaw* if the NUWF members have not refrained from using the Muddy River in response to Bowman's actions?
    - If *Lujan* requires an injury to a "legally protected interest," how can you argue that an injury to Mr. Norton's illegal frogging supports standing?
    - If there is no clear injury to the environment, how can NUWF have standing?
  - Bowman
    - Under *Laidlaw*, aren't the NUWF members' concerns and fears about the effects of your client's wetland destruction enough to show an injury-in-fact?
    - Hasn't the Supreme Court stated that aesthetic enjoyment need only be lessened – not completely eliminated – to create a cognizable injury-in-fact?
    - Has the Supreme Court ever prevented the use of illegally-obtained evidence in a civil case?

- **Issue 2 (Continuing Violation) Questions**
  - NUWF
    - Does *Marina Point*, in which the defendant showed clear signs that it would violate again and disobeyed orders from a government agency, apply to this case? Hasn't Mr. Bowman been very cooperative and compliant with the government?
    - *Sasser* was an administrative enforcement action while this one is a citizen suit. Does that change your argument in favor of finding a continuing violation?
    - You argue that accepting your opponents' continuing violation theory would prevent enforcement of § 404 against violators, but wouldn't the government be able to enforce the law?
  - Bowman and NUDEP
    - *Sasser* was an administrative enforcement action while this one is a citizen suit. Does that affect your argument against finding a continuing violation?
    - If a continuing violation ends once the act of filling the wetland does, doesn't this present a major enforcement problem for § 404?
    - Isn't the continuing violation doctrine a long-recognized, equitable defense to the statute of limitations bar?

- **Issue 3 (Diligent Prosecution) Questions**
  - NUWF

        - NUDEP has required that Bowman stop destroying his wetlands, grant a public easement on his property, and build a year-round wetland for frogs. They have even brought suit to enforce these requirements. How has NUDEP not been diligent in prosecuting this matter?
        - Would insisting that Bowman pay a penalty for his CWA violation hinder his ability to perform the remediation that NUDEP has ordered him to do?
        - Citizen suits are meant to supplement state enforcement where the state is unwilling to act. Since the state has acted, what is the purpose of this citizen suit?
    - Bowman and NUDEP
        - Isn't it true that some courts have found that the failure to assess civil penalties amounts to a lack of diligent prosecution? How do you differentiate this case from those?
        - Is the remediation required of Bowman comparable to the remediation required in other cases where no civil penalty was assessed?
        - Would failing to issue a penalty to Bowman cause him to realize an economic benefit as a result of his polluting actions?

- **Issue 4 (Addition) Questions**
    - NUWF and NUDEP
        - How can Bowman's land clearing activities be considered an "addition" of a pollutant when they simply resulted in moving materials from one area of his wetland property to another area of that property?
        - If there was no "net addition" of material to Bowman's property, how does this amount to an addition of pollutants under the CWA?
        - Courts have held that the same term used in different parts of the same statute has the same meaning unless Congress has clearly provided otherwise. Why should the "outside world" definition of pollution, made in the context of § 402 of the CWA, not apply to § 404 of the CWA?
    - Bowman
        - Isn't the EPA's interpretation of "addition" in the § 404 context different than its interpretation of that term in the § 402 context? If so, can the unitary waters theory apply here?
        - If the redeposit of dredged spoil into a wetland has harmful consequences to the environment, why shouldn't it be regulated under the CWA?
        - How can we apply the unitary waters rule in this case when the water transfers rule explicitly states that it "has no effect on the 404 permit program?"