UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,	**:**	
Plaintiff-Appellant,	**:**	
v.	**:**	
NEW UNION DEPARTMENT OF	**:**	
ENVIRONMENTAL *PROTECTION*,	**:**	**C.A. No. 13-1246**
Intervenor-Appellant,	**:**	
v.	**:**	
JIM BOB BOWMAN,	**:**	
Defendant-Appellee.	**:**	

ORDER

Following the issuance of the Order of the District Court dated June 1, 2012, in Civ. 149-2012, the New Union Wildlife Federation ("NUWF" or "Plaintiff") and the New Union Department of Environmental Protection ("NUDEP") each filed a Notice of Appeal. NUWF takes issue with the decision of the lower court with respect to its holding: that NUWF lacked standing to bring a citizen suit against Jim Bob Bowman ("Bowman" or "Defendant") pursuant to Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2006), for a violation of §§ 301(a) and 404 of the CWA, *id.* §§ 1311(a), 1344; that there is no continuing violation as required for subject matter jurisdiction under § 505(a) of the CWA, *id.* § 1365(a); that NUWF's citizen suit is barred by NUDEP's diligent prosecution of Bowman under § 505(b) of the CWA, *id.* § 1365(b); and that Bowman did not violate § 404 of the CWA, *id.* § 1344, because he did not discharge dredged or fill material to a water of the United States. NUDEP takes issue with the decision of the lower court with respect to its holdings that NUWF did not have standing to bring its citizen suit and that Bowman did not violate § 404 of the CWA, *id.* § 1344.

Therefore, it is hereby ordered that the parties brief all of the following issues:

1. Whether NUWF has standing to sue Jim Bob Bowman for violating the CWA. (NUWF and NUDEP argue that NUWF does have standing and that the court below erred in granting the Bowman's motion for summary judgment on this issue; Bowman argues that

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NUWF does not have standing and that the court below was correct in granting summary judgment on this issue.)

2. Whether there is a continuing or ongoing violation as required by § 505(a) of the CWA for subject matter jurisdiction. (NUWF argues that there is a continuing violation because dredge and fill material is still present in the former wetlands and that the court below erred in granting Defendant's motion for summary judgment on the issue; Bowman and NUDEP argue that the violations are wholly past because Bowman ceased his activities on July 15 and that the court below was correct in granting summary judgment on this issue.)

3. Whether NUWF's citizen suit has been barred by NUDEP's diligent prosecution of Bowman as set out in § 505(b) of the CWA. (NUWF argues that NUDEP's actions do not satisfy the diligent prosecution requirements of § 505 and that the court below erred in granting summary judgment on this issue; Bowman and NUDEP argue that NUDEP's prosecution of and consent decree with Bowman satisfy the requirements for diligent prosecution and the court below was correct in granting summary judgment on this issue.)

4. 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 and NUDEP argue that Bowman's actions satisfy all of the elements required for a violation of §§ 301(a) and 404, including addition, and that the court below erred in granting summary judgment on this issue; Bowman argues that NUWF cannot satisfy the elements of a CWA violation and that the court below was correct in granting summary judgment on this issue.)

SO ORDERED.

Entered this 14th day of September, 2012.

[NOTE: No decisions decided or documents dated after September 1, 2012 may be cited either in the briefs or in oral argument.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

NEW UNION WILDLIFE FEDERATION,	**:**	
Plaintiff,	**:**	
v.	**:**	
NEW UNION DEPARTMENT OF	**:**	
ENVIRONMENTAL *PROTECTION*,	**:**	**Civ. No. 149-2012**
Intervenor-Plaintiff,	**:**	
v.	**:**	
JIM BOB BOWMAN,	**:**	
Defendant.	**:**	

The New Union Wildlife Federation ("NUWF" or "Plaintiff") filed an action under Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2006), against Jim Bob Bowman ("Bowman" or "Defendant") for filling wetlands without a permit in violation of §§ 301(a) and 404 of the CWA. *Id.* §§ 1311(a), 1344. The New Union Department of Environmental Protection ("NUDEP") intervened in this action. After discovery, Plaintiff and Defendant filed cross motions for summary judgment. This Court grants Defendant's motion on all grounds and denies Plaintiff's motion on all grounds.

I. Findings of Fact

Bowman owns one thousand acres of wooded or previously wooded land adjacent to the Muddy River near the town of Mudflats in the State of New Union. The Muddy River forms the border between New Union and Progress at that point and for at least forty miles both upstream and downstream from Bowman's property. The river is more than five-hundred feet wide and more than six feet deep where it borders Bowman's property. It is commonly used for miles both upstream and downstream of this point for recreational navigation. Bowman's thousand acres includes 650 feet of shoreline on the Muddy River. The property is wholly within the one-hundred year flood plain of the Muddy. Portions of the flood plain and Bowman's property are inundated every year when the river is high. Bowman's property is hydrologically connected to the Muddy and is covered with trees and other vegetation characteristic of wetlands. The parties

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agree that the property is a wetland, as determined by the U.S. Army Corps of Engineers' (the Corp's) Wetlands Determination Manual.

On June 15, *2011*, Bowman commenced land clearing operations. He used bulldozers to knock down trees, level other vegetation, and push the trees and vegetation into windrows. Bowman then burned the windrows. Next, he used a bulldozer to dig trenches and pushed the trees and leveled vegetation remains and ashes into them. He leveled the resulting field, again pushing soil from high portions of the field into the trenches and low lying portions of the field. Finally, he formed a wide ditch or swale *that ran from the back of his property to the river in order* to drain the field into the Muddy. Bowman completed this work on or about July 15, *2011*. Bowman left a strip of land approximately 150 feet wide adjacent to the Muddy to clear after it had drained because it was the most difficult part of the property to work with the bulldozer, especially when it was saturated. *This strip runs along the 650 foot length of river frontage on his property.*

NUWF is a not for profit corporation organized under the laws of New Union. Its purpose is to protect the fish and wildlife of the state by protecting their habitats, among other things. It is a membership organization funded by members' dues and contributions. Members elect its Board of Directors, the governing body of the organization, which in turn elects the officers, including the President.

II. Procedural History

On July 1, *2011*, shortly after its members became aware of Bowman's activities, NUWF sent a notice of its intent to sue Bowman under § 505 of the CWA, *id.* § 1365, the citizen suit provision, to Bowman, EPA, and the State of New Union/NUDEP. *The EPA has properly delegated authority to implement the CWA to NUDEP.* Bowman does not contest the validity of the notice.

NUDEP contacted Bowman shortly thereafter and sent him a notice of violation informing him that he had violated both state and federal law by clearing the field. Although Bowman maintained he had not violated state or federal law, he entered into a settlement agreement with NUDEP, under which he agreed not to clear more wetlands in the area. He also agreed to convey to NUDEP a conservation easement on the *150 foot wide strip* of still wooded property adjacent to the Muddy that he had not yet cleared plus an additional 75 foot buffer zone between that wooded area and the new field. He agreed to construct and maintain a year-round wetland on that 75 foot buffer zone. The conservation easement allows public entry for appropriate, day-use-only, recreational purposes, requires Bowman to keep the easement area in its natural state, and forbids him from developing it in any way other than constructing and maintaining the artificial wetland. NUDEP and Bowman incorporated their agreement into an administrative order issued by NUDEP to Bowman, which Bowman consented to on August 1, *2011*. A state statute virtually identical in relevant parts to §§ 309 (a) and (g) of the CWA, *id.* §§ 1319 (a), (g), grants NUDEP authority to issue such administrative orders. Although the statute authorizes NUDEP to include an administrative penalty of up to $125,000 in such orders, NUDEP included no penalty is the order to Bowman.

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On August 10, *2011*, after issuing the administrative order to Bowman, NUDEP chose to bring suit in federal court and filed a complaint against Bowman in this Court under § 505 of the CWA. *See id.* § 1365(g) (defining "citizen as "a person or persons having an interest which may be or is adversely affected"); *id.* § 1362(5) (including "State, municipality, commission, or political subdivision of a State" within the definition of "person").

On August 30, *2011*, NUWF filed its own § 505 complaint with this Court seeking civil penalties and an order requiring Bowman to remove the fill material and restore the wetlands. On September 15, 2012, it filed a motion to intervene in the NUDEP § 505 action, to consolidate the NUDEP and NUWF actions, and an opposition to entry of the decree proposed by NUDEP in the NUDEP § 505 action. At about the same time, NUDEP filed a motion to intervene in the NUWF case, which this Court subsequently granted.

On September 5, *2011*, in its own § 505 case, NUDEP filed a motion to enter a decree, the terms of which are identical to the state administrative order. Bowman consented to both the motion and the decree. This motion is still pending.

Also in September *2011*, Bowman observed that the field had sufficiently drained to plant and sowed it with winter wheat. *The field includes all of his property except the 225 foot wide easement adjacent to the river.*

On November 1, *2011*, at a status conference on both cases, this Court notified the parties that it was not acting on any of the motions in either the NUDEP or the NUWF cases for the present besides NUDEP's motion to intervene in the NUWF case; this was done without prejudice to NUDEP's rights to enforce violations of its proposed decree or of NUWF's rights to continue with its cause of action. This Court granted NUDEP's motion to intervene in NUWF's § 505 action, the case which we address herein.

After discovery, the parties filed cross-motions for summary judgment. Jim Bob Bowman filed a motion for summary judgment on four grounds: 1) NUWF lacks standing because neither it nor its members suffered an injury in fact fairly traceable to Bowman's alleged violations; 2) this Court lacks subject matter jurisdiction because any violations are wholly past; 3) this Court lacks subject matter jurisdiction because the State of New Union has already taken an enforcement action and fully resolved the violations; and 4) this Court lacks subject matter jurisdiction because a key element of a CWA cause of action is not satisfied: addition. NUWF filed a motion for summary judgment on one ground: Bowman violated the CWA because he added dredge and fill material to navigable waters from a point source without a § 404 permit. NUDEP joined Bowman in his motion for summary judgment on the second (continuing violation) and third (diligent prosecution) issues and joined NUWF in its motion for summary judgment on the first (standing) and fourth (CWA violation) issues.

III. Standing

Under settled law, to have standing to sue, a plaintiff must prove: (1) an injury in fact (2) that is fairly traceable to the alleged violations and (3) that is redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In environmental cases, injury in fact may be aesthetic rather than economic. *Sierra Club v. Morton*, 405 U.S. 727 (1972). Where an organization such as NUWF is a plaintiff, it must prove that it represents individual members who can demonstrate standing. In support of standing, NUWF submitted affidavits from three of its members, Dottie Milford, Zeke Norton, and Effie Lawless. Bowman deposed all three. In summary, the three testified that they use the Muddy for recreational boating and fishing, often picnicking on its banks, on or in the vicinity of Bowman's property. They testified they are aware that wetlands serve valuable functions in maintaining the integrity of rivers, including the Muddy, both acting to absorb sediment and pollutants and serving as buffers for flooding. Although they cannot see a difference in the land from the river or its banks, they are aware of the differences and feel a loss from the destruction of the wetlands, fearing the Muddy is more polluted as a result and will be far more polluted if other adjacent wetlands are cleared and drained for agricultural uses. Milford testified that the Muddy looks more polluted to her than it did prior to Bowman's activities. In addition, Norton testified that he has frogged the area for years *for recreational and subsistence purposes*. The Bowman property had been especially good for frogging; Norton could always count on getting a dozen good sized frogs in the right season. Now there are no frogs in the drained field and he is lucky to find two or three good sized frogs in the remaining woods and buffer area. Norton admitted on cross-examination at his deposition that the Bowman property was properly posted under state law against trespassing and he "supposed he might have been trespassing" when he had gone frogging there.

These allegations do not constitute an injury in fact fairly traceable to the clearing of Bowman's field. The only direct injury is that one of NUWF's members can no longer illegally use the cleared area for frogging. The inability to continue illegal activities cannot give rise to an injury to support standing. Moreover, at a deposition, a NUDEP biologist testified that, once fully-established, the new, year-round, partially-inundated wetland in the buffer zone will provide richer wetland habitat than the former, occasionally-inundated wetland presently occupied by the field. Indeed, it will provide a higher quality habitat, and more of it, for frogs.

The remaining alleged injuries are only speculative. Indeed, considering the richer wetland habitat that will occur in the buffer zone, the environment may be benefitted rather than injured by the changes. And, as the three members of NUWF testified, the conservation easement effectively shields the field from the river, so that the aesthetics of navigational use of the river is unaffected.

IV. No Continuing Violation

The Supreme Court held in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), that § 505 of the CWA requires that alleged violations be continuing or ongoing as a matter of subject matter jurisdiction. Here Bowman's land clearing activities ceased on July 15, *2011* and there is no reason to believe he will resume them; he has placed the only remaining land he owns in the area in a conservation easement with NUDEP. His only subsequent activities have included planting wheat seeds and draining the property through the drainage ditch or swale he constructed earlier. Neither activity constitutes adding dredged spoil or fill to the property, nor do plaintiffs allege that they constitute such addition. Plaintiffs allege that the continued presence of dredged and fill material in the former wetland constitutes a continuing or ongoing violation and some courts have so held. *See Sasser v. Administrator*, 990 F.2d 127 (4th Cir. 1993). However, as Jim Bob Bowman testified at deposition on another matter, "that pig won't fly." The idea that a CWA violation continues unless and until it is undone is nonsense. That would render without meaning the jurisdictional requirement for a continuing violation, since all violations would be continuing. It would also obviate application of the statute of limitations, for it would never start to run.

Plaintiff responds that while § 404 violations are continuing unless and until the fill material is removed, § 402 violations, which *Gwaltney* addressed, are not. Plaintiff claims § 402 violations are irreversible because once pollutants are discharged into water they flow away and cannot be removed. That, however, depends on the facts; many § 402 violations involve the discharge of solids or sediment which settle on the water bottom below or shortly downstream from the outfall and can be removed. Indeed, a number of CERCLA sites involve removal of bottom sediment from former point sources, notably the Hudson River PCB site.

Plaintiff's continuing violation theory is ingenious but cannot be credited for it would obviate the continuing violation jurisdictional requirement articulated in § 505 of the CWA and recognized by the Supreme Court in *Gwaltney*.

V. Prior State Action

Section 505(b)(1)(B) of the CWA bars a citizen suit 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). Here, NUDEP has commenced a civil action in a court of the United States. It diligently prosecuted that action by filing a complaint with this Court just a month after receiving NUWF's notice letter and by negotiating a settlement with Defendant within a month thereafter. The settlement, embodied in a consent decree submitted to this Court for approval, required Bowman to immediately cease further violations of § 404 and in lieu of a penalty, to deed a conservation easement over a large portion of his property, relinquishing its agricultural and development value, preserving it in a natural state, and opening it to appropriate public use. The decree also required Bowman to construct and maintain a year-

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round, partially-inundated wetland at considerable initial expense and an indeterminable future expense. These measures will preserve the viewscape of the Muddy River and enhance the wetlands environment on the site. They will allow Mr. Norton to legally frog in an area that eventually will provide an enhanced environment for frogs. This Court finds that NUDEP's actions meet all of the requirements in the statute to bar NUWF's suit.

VI. Violation of § 404

Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person," except in compliance with a permit issued under §§ 402 or 404 of the CWA. *Id.* § 1311(a). Section 502(12) of the CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). Section 404 of the CWA authorizes the Corps to issue permits "for the discharge of dredged or fill materials into the navigable waters." *Id.* § 1344. Section 502 of the CWA defines "pollutant," navigable waters" and "point source," but does not define "addition." We will first determine if the three defined elements of the offense are met and then examine "addition." *Id.* § 1362.

A. Pollutant

Section 502(6) defines "pollutant" to mean a list of specific and general material, the first of which is "dredged spoil," *Id.* § 1362(6), uncannily close to the "dredged . . . material" the disposal of which the Corps is authorized to issue permits for. The CWA does not define "dredged spoil" or "dredged . . . material." *See* 33 U.S.C. § 1362. Dredging, however, is an activity that occurs on open water to excavate a channel or port docking area to make them available for commercial navigation. The activity in this case was moving soil and related material from one part of a field to another to clear it for agricultural use. Land clearing is not dredging, so we have no dredged spoil to discharge here. The CWA's definition of "pollutant" does not include "fill material." Of course, "fill material" may be composed of other pollutants. The tree and leveled vegetation remains, for instance, are "biological material," which is listed as a "pollutant." *Id.* No party contests that the material Bowman moved about the property included pollutants. This element is satisfied.

B. Point source

Section 502(14) defines "point source" as "any discernible, confined and discrete conveyance," including a list of examples not including "bulldozer." *Id.* § 1362(14). A bulldozer, however, is a mechanism designed to convey dirt and other material from one place to another. Other courts have held that bulldozers are point sources. *See Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 927 (5th Cir. 1983). No party contests that the bulldozers were point sources. This element is satisfied.

C. Navigable waters

Section 502(7) defines "navigable waters" as "the waters of the United States," a singularly unhelpful definition. 33 U.S.C. § 1362(7). Contemplating Bowman's former woods does not conjure up the image of navigable waters, supporting waterborne transportation. Nor does it conjure up the image of the Nation's waters. However, the Supreme Court has held that wetlands adjacent to navigable waters are themselves navigable waters. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985). All the parties agree that the Muddy River is navigable water; indeed, it supports recreational navigation. All the parties also agree that Bowman's former woods met the Corp's Wetlands *Delineation* Manual criteria for wetlands and that the former woods therefore are wetlands. This element is satisfied.

D. Addition

The CWA does not define "addition." EPA and the Corps do not define "addition" in their regulations. EPA has defined "addition" in various contexts as "from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). Here, Bowman pushed pollutants from one part of his former woods/wetlands to another part of his former woods/wetlands. Bowman did not add the pollutants from outside his former woods/wetlands, thus not meeting EPA's definition of "addition." NUWF protests that EPA developed its "outside world" definition as a litigation position in § 402 cases and has never applied it to § 404 cases. But 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 (1986). Congress did not provide otherwise in the CWA; it did not indicate that "addition" means one thing for § 402 and another thing for § 404. NUWF argues that Congress did so provide, for applying the "outside world" definition to § 404 would read the dredge and fill permit program out of the statute, contrary to congressional intent. NUWF's argument is plainly not the case; the "outside world" definition of "addition" would not read § 404 out of the statute. Under the "outside world" definition, the dredged spoil or fill material must come from somewhere other than the wetland into which it is being placed to require a § 404 permit. This is not an unreasonable way to read § 404, particularly in recognition of its original intent to provide a permitting scheme for disposal of dredged spoil from dredging harbors and navigation channels at a considerable distance from their point or origin. *United States v. Bay-Houston Towing Co., Inc.*, 33 F. Supp. 2d 596, 604 (E.D. Mich. 1999). That reading of § 404 may result in a narrower application of its permitting program, but it would not read the program out of existence.

Alternatively, EPA has interpreted "addition" in its Water Transfer Rule to incorporate the "unitary navigable waters" theory, under which all navigable waters are one for the purposes of § 301(a) of the CWA. National Pollutant Discharge Elimination System (NPDES) Water Transfer Rule, 73 Fed. Reg. 33,697 (June 13, 2008) (codified at 40 C.F.R. pt. 122). Bowman argues that EPA did so in a regulation, entitling its interpretation to *Chevron* deference, as recognized by the Eleventh Circuit in *Friends of the Everglades v. South Florida Water*

Management District. 570 F.3d 1210 (11th Cir. 2009). The Eleventh Circuit's decision is particularly relevant because petitions for judicial review of that rule have been consolidated in the Eleventh Circuit. NUWF argues EPA's interpretation of "addition" is not entitled to deference because the rule itself does not define "addition" or even use the word, and therefore was not an interpretation of the CWA made in a formal administrative proceeding. *See United States v. Mead Corp.*, 533 U.S. 218 (2000). But EPA's interpretation of "addition" in the preamble to the proposed and final rule was the very basis of its rule and was subject to the public comment that was a part of the rulemaking.

Under EPA's interpretation, transferring pollutants from one navigable water to a second navigable water does not add those pollutants to the second navigable water because the first and second navigable waters were always one; the pollutants were always in navigable water and therefore could not be added to the second navigable water. NUWF answers that EPA stated the unitary navigable waters theory had "no effect on the § 404 permit program" because the definition of "pollutant" specifically included "dredged spoil," and therefore "explicitly forbade discharges of dredged material except as in compliance" with a § 404 permit. The inclusion of "dredged spoil" in the definition of "pollutant," however, explicitly forbids nothing; it only satisfies one of the four requisite elements. It has nothing to do with "addition." NUWF may argue that the unitary theory applies only to § 402 and not to § 404. But, again, words used in a statute have the same meaning unless Congress explicitly provides otherwise and it has not here. *See Sorenseon v. Sec'y of the Treasury of the U.S.*, 475 U.S. 851 (1986).

Finally, NUWF cites *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000), in which the defendant argued that he added nothing to a wetland when he dug a drainage ditch in a wetland and sidecast soil removed from the ditch to the adjacent wetland, since the soil was already in the wetland. The government argued and the court held that the defendant removed soil from the ditch but returned dredged spoil to the wetland, adding a pollutant to the wetland where there had been no pollutant before. This imaginative piece of verbal metaphysics only masks reality: nothing is added when a defendant moves soil, no matter what you call it, a mere few feet within a wetland. And under EPA's unitary navigable water theory it doesn't matter that defendant moved the soil more than a few feet within the wetland. Nor does it matter that the defendant's actions changed the nature of some of the material from living to dead. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988).

To be sure, there are any number of decisions holding that land clearing activities violate the CWA without a § 404 permit. None of them, however, analyzed the full ramifications of EPA's "outside world" interpretation of "addition," and none of them considered EPA's "unitary navigable waters" theory as it applies to "addition." Once these two agency interpretations of "addition" are considered, it is clear Bowman added nothing to his wetland when he moved material from one part of field-in-preparation to another part of the field-in-preparation. Therefore, this element is not satisfied.

For the reasons stated above, this Court grants Defendant's motion for summary judgment on all counts and denies Plaintiff's motion for summary judgment on all counts:

1. Plaintiff lacks standing;

2. This Court lacks subject matter jurisdiction because all violations are wholly past;

3. This Court lacks subject matter jurisdiction due to prior state action; and

4. There is no violation of the CWA.

SO ORDERED.

Romulus N. Remus

United States District Judge

June 1, 2012