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Measuring Brief

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TWENTY-FIFTH ANNUAL PACE UNIVERSITY LAW SCHOOL MOOT COURT COMPETITION

Measuring Brief*

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CA. No. 13-1246
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,
Plaintiff-Appellant
v.
NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Appellant
v.
JIM BOB BOWMAN,
Defendant-Appellee

ON APPEAL FROM
THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for THE STATE OF NEW UNION,
Plaintiff-Appellant

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTIONAL STATEMENT

Appellant New Union Wildlife Federation filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C. § 1331. On June 1, 2012, the district court granted Jim Bob Bowman's motion for summary judgment on all counts and denied New Union Wildlife Federation's summary judgment motion. The district court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether New Union Wildlife Federation has standing to represent the interests of its individual members in a suit against Jim Bob Bowman for violating the Clean Water Act.

II. Whether Bowman remains in violation of the Clean Water Act because of the continued existence of dredged and fill material in the wetland, as required by section505(a) of the Clean Water Act.

III. Whether New Union Department of Environmental Protection's administrative compliance order, which did not seek injunctive relief or civil penalties, is diligent prosecution, therefore barring New Union Wildlife Federation's suit under section 505(b) of the Clean Water Act.

IV. Whether Bowman violated sections 301(a) and 404 of the Clean Water Act when he moved dredged and fill material from one part of a wetland to another part of the same wetland.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union granting Jim Bob Bowman's ("Bowman") motion for summary judgment and denying New Union Wildlife Federation's ("NUWF") motion for summary judgment. (R. 11). NUWF brought a civil action under the Clean Water Act's ("CWA") citizen suit provision, 33 U.S.C. § 1365, seeking civil penalties and injunctive relief requiring Bowman to

restore the destroyed wetlands on his property. (R. 5). The New Union Department of Environmental Protection ("NUDEP") intervened in the NUWF case because the state agency had its own section 505 complaint pending against Bowman. Id. NUDEP filed its section 505 complaint on August 10, 2011. Id. In NUDEP's suit, the agency sought a decree enforcing the terms of its compliance order issued under a New Union law identical to section 309 of the CWA, 33 U.S.C. § 1319(a) and (g). (R. 4–5).

After discovery, Bowman filed a motion for summary judgment. (R. 5). NUWF and NUDEP both filed cross-motions for summary judgment. Id. The district court held that (1) NUWF lacked standing to sue Bowman for violations of the CWA, (2) the court lacked subject matter jurisdiction to rule on NUWF's section 505 complaint because Bowman's violations were wholly past, (3) NUWF's suit was barred because there was prior state action, and (4) Bowman's land-clearing activities did not violate sections 301(a) and 404 of the CWA. (R. 11).

NUWF filed a Notice of Appeal challenging all four holdings of the district court. (R. 1). NUDEP filed a Notice of Appeal challenging the district court's holdings that NUWF lacked standing to bring its citizen suit and that Bowman did not violate the CWA. Id.

STATEMENT OF THE FACTS

On June 15, 2011, Jim Bob Bowman began land-clearing operations on 1,000 acres of wetlands on his property adjacent to the Muddy River in the state of New Union. (R. 3–4). These land-clearing operations converted the entire parcel into land suitable for agricultural purposes except for approximately 3.5 acres along the 650-foot shoreline of the Muddy River. *Id.* The river is commonly used for recreational navigation for miles upstream and downstream of Bowman's property. *Id.*

The wetlands are hydrologically connected to the Muddy River and are covered with trees and other vegetation that are characteristic of wetlands. *Id.* The entire parcel is within the 100-year flood plain of the Muddy, and portions of Bowman's property are inundated every year when the river is high. *Id.* It is undisputed that the property is a wetland as determined by the

U.S. Army Corps of Engineers' Wetlands Delineation Manual. (R. 3–4).

To clear the wetlands, Bowman used bulldozers to level all the trees and other vegetation on the property, pushed the vegetation into windrows, and burned the piles. (R. 4). Then, Bowman dug trenches into which he pushed the ashes and vegetation remains. *Id.* He leveled the now-cleared land, pushing soil from high portions of the field into low-lying portions. *Id.* Bowman excavated a ditch that ran from the back of his property to the river to drain the field into the Muddy. *Id.* He left a 150-foot strip along the bank of the Muddy River untouched because it was too difficult to bulldoze while it was saturated with water. *Id.* Eventually, when the field was sufficiently drained, Bowman sowed it with winter wheat. (R. 5).

About two weeks after Bowman started clearing his land, on July 1, NUWF sent a valid notice of intent to sue Bowman under the citizen suit provision of the CWA. (R. 4). NUWF is a non-profit corporation that aims to protect the fish and wildlife of New Union by preserving their habitats. *Id.* It is a membership organization funded by its members' dues and led by a member-elected Board of Directors, who in turn selects the organization's officers. *Id.* Three of NUWF's members, Dottie Milford, Zeke Norton, and Effie Lawless, regularly use the Muddy River for recreational purposes, including boating, fishing, picnicking, and frogging. (R. 6). The members noticed that the Muddy looked more polluted, and they stated that they felt a loss from the destruction of the habitat as a result of Bowman's activities. *Id.*

Shortly after NUWF sent notice of its suit, NUDEP sent Bowman a notice of violation informing him that he had violated both state and federal law. (R. 4). Bowman maintained that his activities did not violate the CWA and continued to level and drain the wetlands. *Id.* Upon completing land-clearing on July 15, 2011, Bowman entered into a settlement agreement with NUDEP. Bowman agreed to convey a conservation easement to NUDEP on the 150-foot strip of remaining wetland next to the Muddy. *Id.* Bowman conveyed an additional 75-foot strip between that conservation area and the new field, on which he agreed to construct and maintain a buffer zone. *Id.* The easement allows public entry for recreational purposes and requires Bowman to keep the 225-foot buffer in its natural state.

Id. However, the agreement allows Bowman to put approximately 996 acres of former wetlands to agricultural use. (R. 4–5). Pursuant to a New Union state statute nearly identical to section309(a) and (g) of the CWA, NUDEP issued an administrative order incorporating the terms of this agreement. (R. 4). Bowman signed the agreement on August 1, 2011. *Id.* Although state law authorized NUDEP to include an administrative penalty of up to $125,000, the state did not assess a penalty. *Id.*

STANDARD OF REVIEW

The district court granted Bowman's motion for summary judgment. This Court reviews a district court's grant of summary judgment *de novo*. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

The district court erred in holding that NUWF did not have standing, that the dredged and fill material in Bowman's wetland was not a continuing violation as required by section 505(a) of the CWA, that NUDEP's prior state action barred NUWF's citizen suit, and that Bowman did not violate sections 301(a) and 404 of the CWA. NUWF has organizational standing because its individual members alleged sufficient facts to establish that they suffered an injury from Bowman's activities. Moreover, NUWF's suit does not lack subject matter jurisdiction under *Gwaltney* because Bowman continues to be in violation of the CWA until he removes the dredged and fill material from his wetlands. NUDEP's prior administrative action does not bar NUWF's suit because the agency did not diligently prosecute Bowman. Finally, Bowman's land-clearing activities violated the CWA because he discharged dredged and fill material on his wetland without a permit.

The district court erred in holding that NUWF lacked standing. The court found that NUWF's members did not allege an actual or imminent injury that could be traced to Bowman's operation. To meet the standing requirement at this early stage

of the litigation, only one of NUWF's members has to establish a "reasonable fear and concern" that Bowman's activities harmed their aesthetic or recreational interests. Three of NUWF's members satisfied this requirement because they testified that Bowman's activities harmed their use of the Muddy River and its banks. NUWF has organizational standing to represent its members.

NUWF has subject matter jurisdiction under *Gwaltney* because the continued presence of dredged and fill material in Bowman's wetland constitutes a continuing violation of the CWA. The weight of authority supports a finding that dredged and fill material remaining in a wetland constitutes a continuing violation. Such a finding is consistent with *Gwaltney*, which emphasized that citizen suits are appropriate to abate an ongoing violation of the CWA. Because the presence of dredged and fill material itself violates section 404, Bowman was in violation at the time the complaint was filed. The district court's holding would create a 60-day safe harbor for landowners to complete their illegal land-clearing activities because the notice requirement precludes citizens from filing suit within that timeframe. This Court should allow NUWF's citizen suit to continue because a contrary holding is therefore inconsistent with the weight of authority, the Supreme Court precedent in *Gwaltney*, and the CWA's goal to protect wetlands.

NUWF's citizen suit is also not barred by NUDEP's prior administrative action. The totality of the circumstances surrounding NUDEP's compliance order demonstrates that the state agency's action amounts to little more than a superficial effort to preclude NUWF's citizen suit. The administrative order failed to bring Bowman into compliance with the CWA because it does not seek civil penalties or require him to restore the wetland. Because NUDEP entered into a settlement with Bowman so quickly, NUWF could not participate in the compliance order process. And NUDEP's suit does not stem from a need to seek judicial enforcement of the compliance order. The court therefore erred in concluding that NUDEP's prior action excluded NUWF's citizen suit.

Bowman's activities violated the CWA because he added pollutants to wetlands when he redeposited dredged and fill material without a permit. The plain language of the CWA

indicates that "addition" includes redepositing dredged and fill material. Furthermore, the EPA has prescribed a reasonable regulatory interpretation that a redeposit can be an "addition" under section 404. The EPA can define the term differently in sections 402 and 404 because the statutory context supports divergent implementation strategies. In particular, the EPA's decisions not to apply the water transfers rule or the outside world definition of "addition" from section 402 in the 404 context deserves deference. Applying the EPA's reasonable interpretation of the term "addition" in section 404, Bowman violated the CWA by redepositing dredged and fill material into waters of the United States without a permit. Therefore, the district court erred in holding that Bowman did not violate the CWA.

ARGUMENT

I. NUWF HAS ORGANIZATIONAL STANDING TO REPRESENT ITS MEMBERS WHO WERE INJURED BY BOWMAN'S LAND-CLEARING ACTIVITIES.

The United States Constitution requires that there be a case or controversy before a court can hear and decide a case. U.S. Const. art. III, § 2. This requirement, known as standing, limits judicial involvement to cases where individuals have a "direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Under the CWA, any "person or persons having an interest which is or may be adversely affected" may commence a civil action. 33 U.S.C. § 1365(a), (g) (2006). A third party organization can satisfy the standing requirement and represent members who allege an injury when it meets three requirements: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Furthermore, NUWF is entitled to represent its members in court because it has a formal membership structure where its members fund the organization

through dues and elect its leadership. *See Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 829 (5th Cir. 1997) (holding that Friends of the Earth had members it could represent because it had a clearly articulated membership structure and was funded by individuals). Because NUWF alleged facts sufficient to establish that its individual members would have standing, the court below erred in barring NUWF's suit.

A. NUWF's members could sue on their own behalf because they satisfy the requirements to establish constitutional and prudential standing.

Standing involves "constitutional limitations . . . and prudential limitations." *Warth v. Seldin*, 422 U.S. 290, 298 (1975). NUWF's members are entitled to sue on their own behalf because individually, they alleged sufficient facts at this early stage in the trial to meet both constitutional and prudential standing requirements.

1. NUWF members have constitutional standing.

Three minimum requirements are needed to establish constitutional standing. First, an individual must have an "injury in fact" that is both "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the injury must be "fairly traceable" to the defendant's action. *Id.* Finally, it must be likely that the injury would be redressed by a judicial decision in the plaintiff's favor. *Id.* at 561. At the summary judgment stage, the plaintiff's evidence is "taken to be true." *Id.* (citing Fed. R. Civ. P. 56(e)).

First, the injuries alleged by NUWF members Dottie Milford, Zeke Norton, and Effie Lawless are sufficient to satisfy the injury-in-fact prong of the standing test. The injury requirement merely serves to certify that an individual has a direct stake in the litigation, thus a plaintiff must only allege an "identifiable trifle." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 734 n.14 (1973). In environmental cases, aesthetic and recreational concerns are valid interests that give rise to a statutorily protected injury, provided that the organization can show that at least one of its members actually

uses the area affected by the challenged activity and is therefore personally harmed. *Compare Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183–84 (2000) (holding that the plaintiff organization had standing because its members regularly used a river for recreational purposes near a pollution site but discontinued that use because the river looked and smelled polluted); *with Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (holding that Earth Island Institute lacked standing to challenge several timber sales because affidavits did not show that any members of the organization utilized the specific areas affected by the sales). There is no dispute that Milford, Norton, and Lawless all use the Muddy River and its banks on or near Bowman's property for recreational purposes and that they personally feel a loss to the river's ecosystem due to Bowman's activities. (R. 6). Milford stated that the Muddy itself looks more polluted, and Norton stated that the loss of wetlands has curtailed his frogging activity, which is legal on the portion of Bowman's property that has been put into a conservation easement with the right of public entry. *Id.* Thus, at least one of NUWF's members alleges current injuries sufficient to satisfy the first prong of standing.

NUDEP's biologist suggested that NUWF does not allege an injury-in-fact because the 3.6 acres of preserved wetlands will eventually be a richer habitat than the original 1,000-acre wetland tract. (R. 6). However, plaintiffs do not need scientific proof of environmental harm to satisfy standing; a "reasonable fear and concern" about the effects of the challenged activity on their interests is sufficient to establish an injury-in-fact. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000). Degradation of a river due to destruction of an adjacent wetland is a recognized injury, making it reasonable for NUWF's members to conclude that destruction of the wetland will have an adverse impact on the Muddy. *Sierra Club v. U.S. Army Corps of Eng'rs*, 935 F. Supp. 1556, 1569 (D. Ala. 1996); *see also Rapanos v. United States*, 547 U.S. 715, 777 (2006) (Kennedy, J., concurring) (stating that the "discharge of fill material is [not] inconsequential for adjacent waterways"). In *Sierra Club*, the court concluded that the plaintiff organization had standing to challenge the destruction of a wetland because its members alleged injuries stemming from recreational use of a

river adjacent to the wetland even though any impact to the river would "undoubtedly be slight." *Id*. Similarly, Milford, Norton, and Lawless reasonably fear that Bowman's activities will negatively affect their future use of the Muddy River, which is sufficient to show an injury-in-fact.

Second, the injuries alleged by NUWF are "fairly traceable" to Bowman's activities. *Lujan*, 504 U.S. at 560. This causation requirement is not equivalent to tort causation—plaintiffs do not have to show to a scientific certainty that the defendant's actions caused the alleged injury. *Pub. Interest Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990). It is undisputed that degradation of the Muddy River in the vicinity of Bowman's property is caused by Bowman's clearing activities.

Finally, it is likely that the injury alleged by NUWF would be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. To satisfy the redressability requirement, a plaintiff must show a likelihood that each separate form of relief would be likely to remedy the alleged injury. *Friends of the Earth*, 528 U.S. at 185. NUWF seeks injunctive relief and civil penalties, both of which are necessary to "abate[] [illegal] conduct and prevent[] its recurrence." *Id*. at 186. Restoration of the wetlands on Bowman's property would halt the current losses to the ecosystem in the area. Civil penalties both "promote immediate compliance" and also "deter future violations" of the CWA when the illegal conduct is ongoing. *Id*. at 184, 188. Because Bowman's wetlands remain filled and NUDEP failed to hold him accountable for that illegal activity, NUWF has standing for both injunctive relief and civil penalties to redress its current and ongoing injuries. NUWF's members satisfy the constitutional standing requirement because they allege an injury-in-fact that is fairly traceable to Bowman's land-clearing activities, and this Court can redress that injury.

2. NUWF has prudential standing because its injuries are protected by sections 301 and 404 of the CWA.

Prudential standing requires NUWF to show that its injuries "fall within the zone of interests protected or regulated" by the CWA. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). To fall within this zone, the injury must "share a plausible relationship" with the interests promoted by the statute. *Ocean Advocates v. Corps*

of Eng'rs, 361 F.3d 1108, 1121 (9th Cir. 2004). The CWA's section 404 permitting program limits the availability of permits to fill wetlands when that activity would "have an unacceptable adverse effect on . . . recreational areas." 33 U.S.C. §1344(c) (2006). Sedimentation and fear of continued degradation of the Muddy River due to destruction of wetlands adjacent to the river is directly related to the interests promoted by the CWA's section 404 permitting program, thus satisfying prudential standing.

B. In bringing this suit, NUWF seeks to protect interests that are germane to the organization's purpose of protecting the fish and wildlife of New Union.

To establish standing, an organization must show that the lawsuit "bears a reasonable connection to the association's knowledge and experience." *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.2d 138, 149 (2d Cir. 2006). The interests of NUWF's members to continue using the Muddy for recreational purposes, which include fishing and frogging, are germane to the organization's purpose of protecting wildlife and its habitat. (R. 6).

C. This suit does not require participation by individual members because NUWF seeks relief that is not dependent on individualized proof.

An organization can represent its members in court if it seeks relief that will "inure to the benefit of those members." *Warth*, 422 U.S. at 514. An organization lacks standing under this prong only if it seeks monetary damages paid to its members, which would require proof of the precise injury to that individual to assess damages. *Telecomm. Research & Action Ctr. v. Allnet Commc'n Servs.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986). Here, NUWF seeks injunctive relief and civil penalties paid to the U.S. Treasury, neither of which requires the individuals to participate in the suit. Therefore, NUWF has organizational standing to represent its members in this suit because its members would have standing in their own right, NUWF seeks to protect interests germane to the organization's purpose, and the suit does not require participation by individual members.

II. *GWALTNEY* DOES NOT BAR NUWF'S CITIZEN SUIT BECAUSE THE CONTINUED PRESENCE OF DREDGED AND FILL MATERIAL IN BOWMAN'S WETLANDS WAS AN ONGOING VIOLATION OF THE CWA AT THE TIME OF THE COMPLAINT.

In order to bring a citizen suit under section 505 of the CWA, NUWF must allege that Bowman is "in violation of" the Act. 33 U.S.C. § 1365(a) (2006). A citizen must "allege a state of either continuous or intermittent violation" to meet this requirement. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). *Gwaltney* made clear that this requirement is meant to prevent citizens from seeking civil penalties for "wholly past violations." *Id.* at 58. The majority of courts addressing the issue have held that dredged or fill material that remains in a wetland without a permit is a continuing violation until the material is removed. *City of Mountain Park, Ga., v. Lakeside at Ansley, L.L.C.*, 560 F. Supp. 2d 1288, 1296 (N.D. Ga. 2008) (collecting cases). NUWF alleges that dredged and fill material remains in Bowman's wetlands without a permit and therefore Bowman is in violation of the CWA. Thus, the district court erred in finding that it lacked subject matter jurisdiction over NUWF's claim.

A. Bowman is in violation of the CWA because dredged and fill material remains in the wetland.

In order to establish subject matter jurisdiction, NUWF need only to have alleged in good faith that Bowman was in violation of the CWA. *Gwaltney*, 484 U.S. at 64–65. The time at which the complaint is filed is the relevant time for determining whether a violation is ongoing. *Bldg. & Const. Trades Council of Buffalo, N.Y. & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 151 (2d Cir. 2006). Where the plaintiff has alleged a good faith violation of the CWA, the *Gwaltney* test is met and jurisdiction vests. *Gwaltney*, 484 U.S. at 64–65. If the defendant contests that he is not in violation of the CWA, he must seek dismissal not for lack of jurisdiction but for mootness. *Id.* at 66. "In seeking to have a case dismissed as moot, however, the defendant's burden 'is a

heavy one.'" *Id.* (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). In contrast to this heavy burden, NUWF's jurisdictional bar is a low one. *City of Mountain Park*, 560 F. Supp. at 1297. The district courts' interpretation of *Gwaltney* provides a good faith legal basis for NUWF's claim because the majority rule is that dredged and fill material that remains in a wetland constitutes a continuing violation of the CWA.

1. The weight of authority supports finding that dredged and fill material that remains in a wetland constitutes a continuing violation.

A pollutant, including dredged or fill material, that remains in a wetland is a continuing violation until removed. *Sasser v. EPA*, 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."). The Second Circuit has noted that "[m]ost courts that have addressed the question have concluded on the facts before them that the continuing presence of a pollutant constitutes a continuing [violation] under the CWA."[1] *June v. Town of Westfield, N.Y.*, 370 F.3d 255, 258 n.4 (2d Cir. 2004) (citation omitted).

The important differences between sections 402 and 404 have shaped the majority rule governing continuing violations under section 404. According to one court, the "primary factor" that persuaded it to follow the majority rule was the nature of dredged and fill material. *City of Mountain Park*, 560 F. Supp. 2d at 1296. Unlike discharges under section 402, which "dissipate or dissolve," "fill materials, when discharged, . . . stay intact over time and thus continue to have roughly the same net polluting effect years or even decades after the time of their deposit." *Id.* Not only is the net polluting effect the same over time, but so too is the opportunity to remedy the violation. Bowman was in

1. The majority rule is that dredged or fill material that remains in wetlands is a continuing violation of the CWA. *See City of Mountain Park*, 560 F. Supp. 2d at 1296; *Greenfield Mills, Inc. v. Goss*, 1:00 CV 0219, 2005 WL 1563433, at *3 (N.D. Ind. June 28, 2005); *Hamelin*, 182 F. Supp. 2d at 248; *Informed Citizens United, Inc. v. USX Corp.*, 36 F. Supp. 2d 375, 377-78 (S.D. Tex. 1999); *United States v. Reaves*, 923 F. Supp. 1530, 1534 (M.D. Fla. 1996); *N.C. Wildlife Fed'n v. Woodbury*, 87-584-CIV-5, 1989 WL 106517, at *2 (E.D.N.C. Apr. 25, 1989).

violation of the CWA at the time of the complaint because dredged and fill material remained in the wetlands. This is sufficient to meet the *Gwaltney* test for subject matter jurisdiction.

2. Finding that the continued presence of dredged and fill material qualifies as a continuing violation of the CWA is consistent with *Gwaltney*.

Gwaltney's focus on the important role section 505 citizen suits play in abating environmental harms supports finding that dredged and fill materials that remain in a wetland constitute a continuing violation. *Gwaltney*, 484 U.S. at 61. As Justice Scalia noted in his concurring opinion, "The phrase in § 505(a), 'to be in violation,' unlike the phrase 'to be violating' or 'to have committed a violation,' suggests a state rather than an act—the opposite of a state of compliance." *Id*. at 69 (Scalia, J., concurring). Citizen suits play an important role in forcing violators into a state of compliance. The Court considered the legislative history behind the citizen suit provision and specifically noted that "[m]embers of Congress frequently characterized the citizen suit provisions as 'abatement' provisions or as injunctive measures." *Id*. at 61 (majority opinion).

There is an important distinction between what constitutes abatement under sections 402 and 404. Within the context of section 402, *Gwaltney* requires that there either be ongoing discharges in violation of the permit or a reasonable likelihood of future discharges. *Id*. at 57. This makes logical sense if the purpose of section 505 is abatement. If the violator has stopped discharging pollutants then there is nothing to abate and the pollutants will "dissipate or dissolve over time." *City of Mountain Park*, 560 F. Supp. at 1296. Within the context of section 404 violations, however, the unpermitted filling of a wetland is a remediable situation until the fill is removed. *See, e.g., United States v. Bailey*, 571 F.3d 791, 805 (8th Cir. 2009) (upholding injunctive relief requiring a landowner who filled wetlands without a section 404 permit to restore the wetlands). This is the exact remedy that NUWF seeks—an injunction requiring that Bowman remove the fill. Thus the Court's reasoning in *Gwaltney* that the citizen suit provision is meant to encourage "abatement

provisions" or "injunctive measures" supports the finding of a continuing violation under the facts of this case.

The notice requirement of section 505 citizen suits also gives violators an opportunity to come into compliance with the CWA and to avoid having to go to court. 33 U.S.C. § 1365(b) (2006). "It follows logically that the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, 484 U.S. at 60. In the section 404 context, complete compliance means obtaining a permit or removing the illegally deposited dredged and fill material. *See Bailey*, 571 F.3d at 803 (considering an after-the-fact permit or a restoration order as the appropriate remedies for a section 404 violation). As Bowman has done neither, NUWF's citizen suit remains necessary for enforcement of the CWA.

Bowman argues that the majority rule would obviate the continuing violation requirement in the section 404 context. This argument seeks support from the jurisdictions that have held that subsequent harmful effects of a violation of the CWA do not constitute a continuing violation. *See, e.g.*, *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 989 F.2d 1305, 1313 (2d Cir. 1993) (holding that the continuing disintegration of lead shot from a firing range that remained in Long Island Sound was not a continuing violation under *Gwaltney*). However, the court in *City of Mountain Park* explicitly rejected applying this approach to section 404 violations because the presence of dredged and fill material itself constitutes a violation of the CWA. *City of Mountain Park*, 560 F. Supp. 2d at 1296.

Another key difference between *Remington Arms* and the present case is that the plaintiffs in *Remington Arms* did not seek injunctive relief but only civil penalties. 989 F.2d at 1312. This alone is sufficient to distinguish it from the present case. Injunctive relief is by its very nature forward looking. Where an injunction seeks to abate a violation of the CWA, *Gwaltney* indicates that the continuing violation requirement is met. *Gwaltney*, 484 U.S. at 60. Civil penalties, in contrast, must be aimed at past action because one cannot penalize future behavior. Because NUWF seeks an injunction to remedy an ongoing violation, *Remington Arms* is inapplicable.

The ongoing presence of dredged or fill material is not a continuing violation if the U.S. Army Corps of Engineers (Corps) or the EPA fully enforces the Act through off-site remediation or an after-the-fact permit. *Orange Env't, Inc. v. Cnty. of Orange*, 923 F. Supp. 529, 538 (S.D.N.Y. 1996); 33 C.F.R. § 326.3(e) (2012) (instructing the Corps to issue after-the-fact permits). The court in *Orange Environment* dismissed the plaintiffs' citizen suit because the EPA and the defendant had remedied the situation through "off-site remediation creating at least twice the amount of federal wetlands that had been filled." *Id.* at 349–50. The court was clear that the off-site remediation brought the defendant into a state of compliance with the CWA. *Id.* at 538–39. Thus, following the majority rule that the continued presence of dredged or fill material in a wetland constitutes a continuing violation does not obviate the *Gwaltney* requirement.

Bowman also suggests that holding him in state of continuing violation would preclude application of the statute of limitations. This is contrary to established law. Courts have held that the five year statute of limitations on government actions, contained in 28 U.S.C. § 2462, also applies to CWA citizen suits. *E.g., Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 74 (3d Cir. 1990). The statute of limitations begins to run when "reports documenting the violations have been filed with the EPA." *Woodbury*, 1989 WL 106517, at *4. Furthermore, this statute of limitations only applies to "'enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise'" and not to actions for injunctive relief. *E.g.*, *United States v. Telluride Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998) (quoting 28 U.S.C. § 2462 (2006)). Instead, "the doctrine of laches controls the availability of equitable relief." *Woodbury*, 1989 WL 106517, at *4. This doctrine depends on the plaintiff's diligence and not the time at which the defendant violated the CWA. *Id.* Thus, applying the majority rule governing application of the continuing violation requirement would not alter the statute of limitations for section 505 citizen suits.

NUWF's section 505 complaint seeks an injunction requiring Bowman to remove the fill material and restore the wetlands. (R. 5). The continued presence of the dredged and fill material in the

wetlands without a permit provides a good faith basis for NUWF's allegation that he is in violation of the act.

B. Public policy weighs strongly in favor of finding that dredged and fill material is a continuing violation so long as it remains in wetlands.

The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). This includes protecting wetlands from unregulated filling. As the oft quoted district court opinion *Woodbury* explained, excluding activities like Bowman's would run contrary to the stated goals of the CWA:

> If citizen-suits were barred merely because any illegal ditching and drainage of a wetland tract was completed before it might reasonably be discovered, violators would have a powerful incentive to conceal their activities from public and private scrutiny—which would lead to serious problems in public and private enforcement of the Clean Water Act.

Woodbury, 1989 WL 106517 at *3. This is exactly the result that the district court's decision creates if allowed to stand. NUWF sent Bowman a notice of intent to sue under the CWA only fifteen days after he began his land-clearing activities. (R. 4). Rather than stop filling the wetlands, he completed his operation in only fourteen days—before NUWF was legally permitted to file its complaint. *Id.*; 33 U.S.C. § 1365(b)(1)(A). The district court's decision would reward this activity by holding him immune from a CWA citizen suit. This would undermine the clearly stated goal of protecting federal wetlands. As the EPA explains in its regulations, "[T]he degradation or destruction of special aquatic sites, such as *filling operations in wetlands, is considered to be among the most severe environmental impacts* covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources." 40 C.F.R. § 230.1 (2012) (emphasis added). Allowing wetlands to remain filled simply because the land owner was able to fill them under cover of night undermines the purpose of the CWA and thus is not a reasonable interpretation of the requirements established in *Gwaltney*.

NUWF has made a good faith allegation that because of the continued presence of dredged and fill material in Bowman's wetlands he remains in violation of the CWA. This is all that *Gwaltney* requires for subject matter jurisdiction. Furthermore, the weight of authority supports NUWF's argument that Bowman is in violation of the CWA until the fill material is removed. To hold otherwise is contrary to the stated policy of the CWA and to the public interest in protecting our nation's wetlands. For these reasons this Court should reverse the decision of the district court regarding subject matter jurisdiction.

III. NUWF'S CITIZEN SUIT IS NOT BARRED BY NUDEP'S PRIOR ACTION BECAUSE THE SUIT DOES NOT CONSTITUTE DILIGENT PROSECUTION.

The CWA does not bar NUWF's citizen suit because NUDEP's administrative compliance order both substantively and procedurally fails to diligently prosecute Bowman. Section 505 of the CWA authorizes "any citizen" to seek enforcement of CWA violations. 33 U.S.C. §1365(a) (2006). However, the CWA bars citizen suits if the "State has commenced and is diligently prosecuting a civil or criminal action in a court . . . to require compliance with the standard, limitation, or order." *Id.* § 1365(b)(1)(B).

An enforcement action under the CWA is diligent if it "is capable of requiring compliance with the Act and is in good faith calculated to do so." *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 523 F.3d 453, 459 (4th Cir. 2008) (internal quotations omitted). While agency diligence is presumed, the preference for governmental enforcement is counterbalanced by robust opportunities for public participation in enforcing the CWA. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 890 F. Supp. 470, 487 (D.S.C. 1995). When determining whether an agency's administrative action qualifies as diligent prosecution of a CWA violation, courts examine both "the *process* and *effects* of agency prosecution." *SPIRG v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D.N.J. 1984) (emphasis added). The "totality of the circumstances" determines if there has been diligent prosecution. *Friends of the Earth*, 890 F. Supp. at 490.

NUDEP's action does not preclude NUWF's citizen suit because it fails to bring Bowman into compliance with the CWA. Moreover, NUDEP's suit does not stem from a need to seek judicial enforcement of the compliance order but merely serves as a superficial effort to exclude NUWF's suit. The court below therefore erred in concluding that NUDEP's action precluded NUWF's citizen suit.

A. NUDEP's compliance order is substantively deficient because it does not require Bowman to come into compliance with the CWA, and it does not assess a civil penalty.

NUWF's suit is not barred because NUDEP's compliance order does not address Bowman's continuing violation of the CWA. *See Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (explaining that citizen suits are barred only when a state enforcement proceeding "has caused the violations alleged in the citizen suit to cease"). When the administrative order "does not settle all the issues in th[e] case," it does not preclude a citizen suit. *Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 244 (N.D.N.Y. 2001). In *Hamelin*, the court allowed a citizen suit to continue because the administrative compliance order "only preclud[ed] Defendant from engaging in additional filling of wetlands" and did not address the continued existence of fill. *Id.* at 243–44. Similarly, NUDEP's consent order only requires Bowman to immediately cease additional land-clearing and does not address the fill remaining in the wetlands. (R. 4). The settlement also does not require Bowman to seek an after-the-fact permit for filling his wetlands, meaning he remains in violation of the CWA. *Id.*; *See* 33 C.F.R. § 326.3(e) (2012) (instructing the Corps to issue an after-the-fact permit to remedy a section 404 violation). Thus, NUDEP's administrative order and subsequent suit did not "require compliance" with section 404 and therefore is not diligent prosecution of the CWA violation. 33 U.S.C. § 1365(b)(1)(B).

Moreover, NUDEP's compliance order does not constitute diligent prosecution because it did not impose any administrative penalties on Bowman. *Friends of the Earth*, 890 F. Supp. at 491. The CWA's civil penalty provisions aim to protect the nation's

waters by deterring future violations. *Id.* Recognizing the importance of deterrence in the CWA's statutory scheme, the Ninth Circuit has held that for a compliance order to constitute diligent prosecution, "a penalty must actually have been assessed." *Knee Deep Cattle Co., Inc. v. Bindana Investors Co. Ltd.*, 94 F.3d 514, 516 (9th Cir. 1996). At the very least, the amount of a penalty imposed in an administrative enforcement action must be calculated to "recover an amount beyond the economic benefit of noncompliance." *Friends of the Earth*, 890 F. Supp. at 492.

Under New Union's law, the NUDEP could have sought an administrative penalty of up to $125,000, yet the compliance order did not include any monetary penalties. (R. 4). Bowman also benefitted from his noncompliance. He gained nearly 1,000 acres of agriculturally productive land that was previously non-productive in exchange for putting a 3.5 acre strip of land under a conservation easement. (R. 4–5). The compliance order not only failed to address Bowman's ongoing CWA violations, but also failed to deter future violations through a civil penalty.

B. NUDEP did not diligently prosecute Bowman because the agency did not follow the CWA's procedural requirements for administrative orders.

NUDEP's section 505 suit does not constitute diligent prosecution because it was an insincere attempt to exclude citizen involvement in the enforcement process. In enacting the CWA, Congress included meaningful opportunities for private citizen involvement in the enforcement process to "insur[e] expeditious implementation of the authority and a high level of performance by all levels of government." S. Rep. No. 92-414, at 72 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3738. Due to the importance placed on citizen involvement in CWA enforcement, lack of opportunity for citizens to participate in that enforcement indicates nondiligent prosecution. *See Love v. N.Y. State Dept. of Envtl. Conservation*, 529 F. Supp. 832, 843–44 (S.D.N.Y. 1981) (holding that a state did not diligently prosecute a violation because there was no opportunity for the citizens to intervene in the administrative action).

Here, NUDEP deviated from the typical approach taken in administrative actions, with the effect of excluding citizen

involvement in the enforcement process. First, it is questionable whether NUDEP's section 505 suit is even proper. The statute requires that a citizen be "adversely affected" in order to bring a suit. 33 U.S.C. § 1365(g) (2006). However, because NUDEP argues that the compliance order addresses Bowman's CWA violation, the state can no longer claim to have an interest that is adversely affected. Second, there was no reason for NUDEP to bring a suit against Bowman because he was in full compliance with the compliance order. (R. 4). Regulations guiding the CWA's implementation state that when a violator takes initial corrective measures following guidance from the agency, then "further enforcement action should normally be unnecessary." 33 C.F.R. § 326.3(d) (2012). Because NUDEP had no dispute with Bowman, the agency's section 505 suit can only be motivated by a desire to trigger section 505's preclusion on citizen suits. The substance of NUDEP's action against Bowman does not rise to the level of diligent prosecution contemplated by section 505 and instead amounts to little more than an administrative activity governed by section 309.

If a state chooses to pursue administrative enforcement under section 309 of the CWA, "then § 1365(b)(1)(B) [does] not apply." *Paper, Allied-Indus., Chem. and Energy Workers Int'l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1298 (10th Cir. 2005). Instead, section 309's narrower preclusion on citizen suits governs. *Id.* Section 309 does not preclude citizen suits when a citizen gives notice of intent to sue before the state agency starts an administrative action as long as the suit is filed within 120 days after that notice. 33 U.S.C. § 1365(g)(6)(B)(ii) (2006). NUWF filed its notice of intent to sue Bowman on July 1, 2011, before NUDEP commenced its administrative action. (R. 4). NUWF filed its section 505 complaint on August 30, 2011, well within the 120-day time limit. (R. 5). The plain language of section 309 therefore would not bar NUWF's suit. *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, L.L.C.*, 548 F.3d 986, 992 (11th Cir. 2008) (allowing a citizen suit to continue under section 309(g)(6)(B)(ii) when the notice of intent to sue was filed prior to commencement of an administrative enforcement action and the citizen suit was filed within the 120-day time limit).

The fact that section 309 allows for citizen suits to continue alongside administrative actions further supports allowing NUWF's suit to continue. Section 309 requires public notice and opportunity to comment on any proposed order assessing civil administrative penalties. 33 U.S.C. § 1319(g)(4)(A). Anyone who comments on a proposed administrative penalty "shall have a reasonable opportunity to be heard and to present evidence." *Id.* § 1319(g)(4)(B). Once someone comments on a proposed administrative penalty, that individual may then "obtain judicial review" of that penalty. *Id.* § 1319(g)(8). These provisions ensure that "citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests." *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (internal quotations omitted).

Barring NUWF's suit would be inconsistent with the CWA's emphasis on citizen participation in the statute's enforcement. Under section 309, NUWF should have had the opportunity to participate in the administrative compliance procedures. 33 U.S.C. § 1319(g)(8). Yet, NUDEP quickly entered into settlement talks with Bowman after NUWF sent its notice of intent to sue, and the agency issued its compliance order a mere fifteen days after Bowman finished clearing his wetlands. (R. 4). Despite knowing that NUWF had an interest in the proceeding, NUDEP did not give NUWF notice that the agency was negotiating with Bowman—a requirement of the CWA. 33 U.S.C. § 1319(g)(4)(A). Just ten days after issuing the administrative order, NUDEP brought suit in federal court, closing off any opportunity for NUWF to participate in the enforcement process outside of court. *See Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co., Inc.*, 735 F. Supp. 1404, 1416 (N.D. Ind. 1990) (holding that where an agency was motivated by the specter of a citizen suit and the administrative compliance process advanced much faster than usual, the prosecution was not diligent).

Based on the "totality of the circumstances," NUDEP's disingenuous prosecution, the hurried settlement agreement between Bowman and the agency, and the lack of public involvement in the administrative enforcement process all demonstrate that NUDEP's efforts are not diligent. *Friends of the Earth*, 890 F. Supp. at 490. Allowing NUDEP's insincere

prosecution to bar NUWF's citizen suit "would render citizen suits impossible when they are required most: instances where an agency encourages a polluter to believe its unlawful behavior will go unpunished." *EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1405 (8th Cir. 1990) (internal quotations omitted). Therefore, this Court should not bar NUWF's citizen suit on the basis of NUDEP's prior administrative action.

IV. BOWMAN'S ACTIVITIES VIOLATED THE CWA BECAUSE HE ADDED POLLUTANTS TO WETLANDS WHEN HE REDPOSITED DREDGED AND FILL MATERIAL ON HIS PROPERTY WITHOUT A PERMIT.

The CWA prohibits the "addition" of any "pollutant" to "navigable waters" from a "point source" without a permit. 33 U.S.C. §§ 1311(a), 1342(a)(1) (2006). Addition is the only element contested in this appeal. The issue presented is whether the term "addition," as used to define discharge under section 404, can include material that is scooped up and then redeposited in the same wetland without introducing additional pollutants. The EPA has interpreted "addition" as including this type of redeposit under section 404. 40 C.F.R. § 232.2 (2012). This interpretation is consistent with the plain language of the CWA and is a reasonable construction of the term in light of the context in which it is employed.

Under section 402, however, the EPA has interpreted "addition" narrowly, exempting water transfers from permitting when they do not introduce additional pollutants. 40 C.F.R. § 122.3(i) (2012). Section 402 governs the discharge of all pollutants except those covered by section 404; namely, discharges of dredged and fill material. 33 U.S.C. §§ 1342(a)(1), 1344(a). Because sections 402 and 404 govern distinct statutory pollutants, the presumption favoring symmetrical construction of common statutory terms gives way. Thus, the EPA's distinct interpretations of the word "addition" are appropriate and should be upheld as within its customary discretion to resolve questions of statutory interpretation.

A. The "addition" of dredged and fill material includes redepositing such material in wetlands according to

the plain language of the CWA and the EPA's reasonable regulatory interpretation.

When resolving questions of statutory interpretation, courts first examine the underlying statute to see "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If these "traditional tools of statutory construction" indicate that "Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. When the "statute alone does not resolve the case," the court will turn to the agency regulations, "which are entitled to deference if they resolve the ambiguity in a reasonable manner." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 277–78 (2009) (citations omitted).

Turning first to the statute, the CWA prohibits the "discharge of any pollutant" without a permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). "Pollutant" is further defined to include a variety of materials, including "dredged spoil . . .biological waste, rock, [and] sand." *Id.* § 1362(6). Section 404 of the CWA explicitly regulates the discharge of "dredged or fill material" and commits that authority to the Corps. *Id.* § 1342(a)(1). The CWA does not define "addition," the term at issue here.

"Addition" has a plain meaning when considered in the context of section 404. Because "dredged material is by definition material that comes from the water itself," the addition of dredged material reasonably includes redeposits in the water from which it was taken. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). As the Fourth Circuit explained, "Surely Congress would not have used the word 'addition' . . . to prohibit the discharge of dredged spoil in a wetland, while intending to prohibit such pollution only when the dredged material comes from outside the wetland." *United States*

v. Deaton, 209 F.3d 331, 336 (4th Cir. 2000). A reading of "addition" that does not include redeposits is "foreclosed because . . . [it] would read [dredged spoil] out of the Act." *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009). Therefore, "the [CWA's] definition of discharge and its use of the term addition unambiguous[ly]" include redeposits of dredged and fill material.[2] *Deaton*, 209 F.3d at 336.

Even if the statutory language is ambiguous concerning redeposits, the EPA regulations "resolve the ambiguity in a reasonable manner" and are thus "are entitled to deference." *Coeur Alaska*, 557 U.S. at 277 (citations omitted). The EPA prescribed regulations that define the "discharge of dredged material" as "any addition of dredged material into, *including redeposit of dredged material* other than incidental fallback within, the waters of the United States." 40 C.F.R. § 232.2 (2012) (emphasis added). The EPA's regulations explain the CWA's use of "addition" as it relates to discharges of dredged spoil by including redeposits within section 404. As the Sixth Circuit explained, this is a "reasonable agency interpretation and must be accorded deference." *Cundiff*, 555 F.3d at 214.

A contrary interpretation would eviscerate the wetland protections Congress intended to create. The Senate Report accompanying the CWA explicitly referred to the importance of wetlands and section 404's role in protecting them:

> There is no question that the systematic destruction of the nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shell fish which populate the oceans, and

2. The circuit courts have consistently held that "addition" of pollutants can include redeposits under section 404. *See United States v. Cundiff*, 555 F.3d 200, 213–14 (6th Cir. 2009); *United States v. Hubenka*, 438 F.3d 1026, 1035 (10th Cir. 2006); *Green Acres Enter., Inc. v. United States*, 418 F.3d 852, 856–57 (8th Cir. 2005); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948–49 (7th Cir. 2004); *Borden Ranch P'ship v. Army Corps of Eng'rs*, 261 F.3d 810, 814 (9th Cir. 2001); *United States v. Deaton,* 209 F.3d 331, 335–36 (4th Cir. 2000); *Nat'l Min. Ass'n v. Army Corps of Eng'rs*, 145 F.3d 1399, 1405 (D.C. Cir. 1998); *United States v. MCC of Fla., Inc.*, 772 F.2d 1501, 1505–06 (11th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983).

> they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.

S. Rep. No. 95-370 at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4336. "The unregulated destruction of these areas," the Report continued, "is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve." *Id.*

The EPA regulations champion the protections created in section 404 by regulating land-clearing operations like Bowman's that redeposit pollutants into wetlands. To the extent that "addition" is ambiguous under the CWA, the EPA's interpretation of the term in the context of section 404 resolves the ambiguity in a reasonable manner and is entitled to *Chevron* deference.

B. Bowman's interpretation of "addition" improperly applies section 402 regulatory interpretations to the discharge of dredged and fill material under section 404.

The CWA divides permitting authority between the EPA and the Corps under sections 402 and 404 respectively. Under section 402, the EPA has interpreted the "addition of any pollutant to navigable waters" narrowly, in contrast with its broad interpretation under section 404. 40 C.F.R. §§ 122.3(i), 242.2 (2012). The EPA has used two interrelated concepts in defining addition under section 402, the outside world concept and the unitary waters theory. Neither of these apply in the context of section 404.

1. The EPA can interpret "addition" differently under sections 402 and 404.

The statutory context in which "addition" is used supports multiple interpretations of that term. In 2008, the EPA codified its position that a water transfer that "conveys or connects waters of the United States" is exempt from section 402 permitting. 40 C.F.R. § 122.3(i). This rule stems from the unitary waters theory, which "holds that it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d

1210, 1217 (11th Cir. 2009). Under this theory, addition of pollutants only occurs "when pollutants first enter navigable waters, . . . not when they are moved between navigable waters." *Id.* This interpretation of "addition" does not apply under section 404 discharges.

As the Supreme Court has held, "[T]he natural presumption that identical words used in different parts of the same act are intended to have the same meaning is not rigid and readily yields whenever" the context of the statute "reasonably" suggests that the same words "were employed in different parts of the act with different intent." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (internal quotation marks omitted). This flexible approach preserves the "customary agency discretion to resolve questions about statutory definition" with a "reasonable" construction. *Id.* at 576.

Applying these rules of interpretation, *Duke Energy* upheld the EPA's decision to apply two distinct regulatory interpretations to the term "modification," as used in the Clean Air Act, defining it in terms of hourly rate in one context and annual discharge in another. *Id.* at 569. The Court upheld the different interpretations of "modification"—despite its "common statutory definition"—because the term was associated with "distinct statutory objects calling for different implementation strategies." *Id.*

Here, the EPA has also applied two distinct regulatory interpretations to the term "addition." Under section 402, redeposited water is not a discharge of pollutants as long as the source does not add additional pollutants to the water. 40 C.F.R. § 122.3(i). Under section 404, a redeposit can be an addition of pollutants as long as it is not "incidental fallback." *Id.* § 242.2. The presumption favoring symmetrical construction gives way here, as it did in *Duke Energy*, because sections 402 and 404 present distinct contexts that support the reasonableness of the EPA's divergent approaches. Several factors support this conclusion.

First, the CWA bifurcates the regulatory authority between two agencies—the EPA issues permits under section 402, while the Corps issues permits under section 404. 33 U.S.C. §§ 1342(a), 1344(a) (2006). Second, section 404 has a distinct role within the CWA. As the Senate Report accompanying the CWA explained,

the "primary thrust" of section 404 is to protect "wetlands" from "unregulated destruction." S. Rep. No. 95-370 at 10. Third, section 404 has exclusive jurisdiction over the discharge of dredged material—unique among the CWA pollutants because it is material that must be removed from waters of the United States before it can be discharged. 33 U.S.C. §§ 1342(a), 1344(a).

Finally, while the unitary waters theory preserves EPA jurisdiction under section 402, it would largely eliminate the Corps's section 404 jurisdiction over the discharge of dredged material. Under the theory, the EPA can enforce section 402 performance standards when pollutants first enter waters of the United States. *Friends of Everglades*, 570 F.3d at 1217. On the other hand, applying this theory to dredged material would preclude the Corps from enforcing section 404 unless the material was imported from foreign waters. For all practical purposes, excavating, sidecasting, and draining activities would fall outside section 404 jurisdiction, allowing land owners like Bowman to evade the CWA.

Taken together, these factors demonstrate that dredged material under section 404 is a "distinct statutory object[]" that warrants a "different implementation strateg[y]." *Duke Energy*, 549 U.S. at 574. The common statutory definition does not require this Court to "ignore the reasons for regulating" sections 402 and 404 "differently," and the EPA's construction of the statutory definition "falls within the limits of what is reasonable." *Id.* at 576. Thus this Court should uphold the EPA's divergent interpretations of addition.

2. The water transfers rule under section 402 did not amend section 404 dredge-and-fill regulations by implication.

Section 404 was not amended by implication because the EPA explicitly rejected such a construction and the two regulatory schemes are not in irreconcilable conflict. "The rules of statutory construction apply when interpreting an agency regulation." *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (citations omitted). One cannon of construction is that implied amendments "are not favored and will not be presumed" absent "clear and manifest [intent]." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663–64 n.8 (2007).

A new regulation will not be read to amend "a prior one unless there exists a positive repugnancy between the provisions of the new and those of the old that cannot be reconciled." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 134 (1974) (internal quotations omitted). In sum, an implied amendment is only appropriate when consistent with the agency's clear intent or when an irreconcilable conflict exists between the new and old regulations.

The water transfers rule is void of any reference to section 404. 40 C.F.R. § 122.3(i) (2012). Thus any contention that this rule somehow altered the section 404 implementing regulations contradicts the plain language of the rule. Even if the rule were ambiguous, an agency's interpretation of its own regulations "is entitled to a measure of deference" so long as it is not "plainly erroneous or inconsistent with the regulations." *Coeur Alaska*, 557 U.S. at 284–85 (internal quotation marks omitted). Here, the EPA has issued an interpretation of the water transfers rule that expressly rejects the amendment by implication argument.

When issuing the final rule, the EPA highlighted that it "focuses exclusively on water transfers" and "has no effect on the 404 permit program." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule 73 Fed. Reg. 33,697, 33,697, 33,703 (June 13, 2008) (codified at 40 C.F.R. pt. 122). This position is consistent with its response to draft rule comments, which instructed that the unitary waters "interpretation does not effect EPA's longstanding regulation" of "the deposit or redeposit of dredged or fill material" under section 404. National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule 71 Fed. Reg. 32,887, 32,892 (proposed June 7, 2006) (codified at 40 C.F.R. pt. 122). This interpretation merits deference because it provides a "reasonable and coherent" explanation as to why the water transfers rule did not amend the longstanding regulation of redeposited dredge and fill material. *Coeur Alaska*, 557 U.S. at 283–84, 288.

Furthermore, no "positive repugnancy" exists between the two regulatory schemes as the two sections operate apart from one another—section 402 standards do not apply to section 404 permitting decisions. *Id.* at 283–84. Given that amendments by implication are disfavored and the two regulations are not in irreconcilable conflict, the Court should defer to the EPA's

interpretation of the water transfers rule as not amending section 404 permitting.

3. The outside world definition of addition does not apply to section 404 because the EPA has explicitly rejected such a construction.

Throughout the 1970s and 1980s, in cases involving discharges from dams, the EPA took the position that a pollutant is not added under section 402 "unless a source 'physically introduces a pollutant into water from the outside world.'" *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (quoting *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982)). Those courts deferred to the EPA's definition, holding that although dam operations change "water quality," they are not subject to section 402 according to the outside world interpretation. *Id.* 586–87.

In the decades since, the EPA has never argued that this narrow interpretation of addition is relevant in section 404 permitting. When issuing the 1993 amendment to its definition for discharges of dredged material, the EPA stressed that its outside world interpretation from *Gorsuch* and *Consumers Power* is inapplicable under section 404. Clean Water Act Regulatory Programs, 58 Fed. Reg. 45,008, 45,011 (Aug. 25, 1993). "Since dredged material comes from the water itself," limiting jurisdiction to material that comes from "outside" the waters "'would effectively remove the dredge-and-fill provision from the statute.'" *Id.* (quoting *Avoyelles*, 715 F.2d at 924 n.43). The EPA also rejected a test that would turn on "whether dredged material is moved from 'one place to another' or 'from one water to another.'" *Id.* "Such a vague test" would likely lead to "arbitrary distinctions among activities that may be identical in terms of the amount of soil redeposited and their effects on the aquatic system, but differ only in terms of the distance the soil is moved." *Id.* The circuit courts have consistently accepted the EPA's approach under section 404, holding that the outside world theory is not controlling on that section. *E.g.*, *Greenfield Mill, Inc. v. Macklin*, 361 F.3d 934, 948 (7th Cir. 2004).

The clear intent of Congress in regulating dredged material, the EPA regulations that include redeposits as discharges, and the consistent holdings of the courts of appeals demonstrate that

the outside world interpretation does not apply under section 404. Thus Bowman's activities are not exempt from section 404 merely because he did not introduce foreign pollutants when he excavated, leveled, and drained his wetlands.

C. Bowman violated the CWA when he failed to get a permit from the Corps because he redeposited dredged and fill material into waters of the United States.

Under the EPA's regulations, a "redeposit" of dredged material related to "mechanized landclearing, ditching, channelization, or other excavation" triggers section 404 permitting requirements. 40 C.F.R. § 232.2 (2012). These operations typically involve "sidecasting," which "is the deposit of dredged or excavated material from a wetland back into that same wetland," usually by the side of an excavated drainage ditch. *Deaton*, 209 F.3d at 335. As the EPA has explained, these sidecasting "activities have always been regulated under Section 404." Clean Water Act Regulatory Programs, 58 Fed. Reg. at 45,013. The circuit courts have agreed, holding that "the [CWA's] definition of discharge as 'any addition of any pollutant to navigable waters' encompasses sidecasting in a wetland." *E.g.*, *Deaton*, 209 F.3d at 337.

In *United States v. Cundiff*, the Sixth Circuit held that "excavating drainage ditches and clearing trees to make [] wetlands suitable for farming" is subject to section 404. 555 F.3d at 205. Rejecting an argument that sidecasting is not a discharge of dredged material, the court held that once wetlands are "dug up," the material becomes dredged spoil, and its redeposit is subject to CWA regulation. *Id.* at 214–13; *see also Deaton*, 209 F.3d at 333 (holding that a section 404 permit is required when excavating a drainage ditch through a wetland and depositing the material on either side of the ditch).

Bowman's land-clearing operations are nearly identical to those discussed in *Cundiff* and *Deaton*. He used bulldozers to convert his 1,000 acre wetland property into land suitable for agriculture. (R. 3–4). Bowman repeatedly sidecast dredged material on his wetlands. First, he "used a bulldozer to dig trenches" in which he pushed trees and other vegetation. (R. 4). After leveling the property, he dug a drainage ditch that extended

from the back of his parcel to the Muddy River. (R. 4). Consistent with *Deaton* and *Cundiff*, once Bowman "excavated [material] from the wetland, its redeposit in that same wetland added a pollutant where none had been before." *Deaton*, 209 F.3d at 336 (citing 33 U.S.C. § 1362(6), (12) (2006)).

The incidental fallback exception is also inapplicable. 40 C.F.R. § 232.2 ("[T]he term discharge of dredged material . . . include[es] redeposit of dredged material other than incidental fallback . . . ."). As the D.C. Circuit explained, deliberate sidecasting is "analytically" distinct from incidental fallback. *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1406–07 (D.C. Cir. 1998). In *United States v. Fabian*, a property owner "used bulldozers, grading and leveling equipment" to flatten "approximately 7.5 acres of wetlands." 522 F. Supp. 2d 1078, 1082 (N.D. Ind. 2007). In rejecting an incidental fallback argument, the court stressed that "[a]bsent a regulatory definition that is a far cry from the common understanding of the term, there is simply no way to characterize [these] activities as incidental fallback." *Id.* at 1100. Bowman deliberately sidecast excavated wetland material on his property; there was nothing incidental about the discharge and thus the exception is inapplicable.

Bowman also discharged fill material into wetlands. The EPA defines discharge of fill material as the "addition of" "any material [that] has the effect of . . . [c]hanging the bottom elevation" of water. 40 CFR § 232.2. Similar to dredged material, the EPA has a "longstanding" history of regulating redeposits of fill material in wetlands. Water Transfer Proposed Rule, 71 Fed. Reg. at 32,892. In a factually similar case, the Fifth Circuit held that the "discharge" of fill material includes "redepositing" trees and vegetation "taken from . . . wetlands" during land-clearing activities. *Avoyelles*, 715 F.2d at 923–24. *See also Fabian*, 522 F. Supp. 2d at 1093 (holding that a "lateral movement of earthen materials qualifies as an addition" of fill material).

Here, Bowman used bulldozers to push trees, vegetation, and soil from "high" portions of the wetland into "low lying portions." (R. 4). This activity satisfies the regulatory definition because the material discharged changed the elevation of the wetland. 40 CFR § 232.2. It is also the type of activity that the circuit courts and the EPA have long held regulable under section 404. Thus

Bowman violated the CWA when he bulldozed and leveled 1,000 acres of wetland without a section 404 permit from the Corps.

In conclusion, Bowman's land-clearing operation is subject to section 404 because he discharged dredged and fill material on his wetlands and none of the narrow exceptions allow him to evade compliance.

CONCLUSION

This Court should hold that NUWF has standing to represent its members. NUWF has subject matter jurisdiction under *Gwaltney* because the presence of dredged and fill material in a wetland is a continuing violation of the CWA. NUDEP's prior action does not preclude NUWF's citizen suit because it does not diligently enforce the CWA. Because a redeposit of dredged and fill material constitutes an "addition" under section 404, Bowman violated the CWA when he redeposited dredged and fill material into his wetland without a permit. Therefore this court should reverse the district court's decision to grant summary judgment in favor of Bowman.