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Best Brief, Cross-Appellant

Kenneth Cox
Wayne State University Law School

Robert Johns
Wayne State University Law School

Jessica Wayne
Wayne State University Law School

TWENTY-FIFTH ANNUAL PACE UNIVERSITY LAW SCHOOL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Best Brief, Cross-Appellant*

WAYNE STATE UNIVERSITY LAW SCHOOL
KENNETH COX, ROBERT JOHNS, & JESSICA WAYNE

C.A. 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 – Cross-Appellant,
v.
JIM BOB BOWMAN,
Defendant-Appellee

On Appeal from the United States District Court for the District of New Union

BRIEF OF THE NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor – Cross-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.

STATEMENT OF JURISDICTION

Cross-Appellant New Union Department of Environmental Protection (NUDEP) seeks review of the final decision of the United States District Court for the District of New Union issued on June 1, 2012. (R. at 1). This Court retains proper jurisdiction to hear appeals from final decisions of the district court pursuant to 28 U.S.C. § 1291 (2006). The district court had subject matter jurisdiction to hear the case, as the underlying issues arose under the Clean Water Act (CWA or the Act), 33 U.S.C. §§ 1251-1387 (2006). Federal district courts have original jurisdiction over questions of federal law. 28 U.S.C. § 1331 (2006).

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether the New Union Wildlife Federation (NUWF) has organizational standing under a traditional standing analysis where it can demonstrate that its individual members have suffered a concrete and particular injury through impaired enjoyment of the Muddy River fairly traceable to the Jim Bob Bowman's (Bowman) conduct, and the injury is redressable by this Court.

II. Whether Bowman's violation of Section 404 of the CWA was wholly in the past such that subject matter jurisdiction does not attach where Bowman ceased dredging the wetland before NUWF filed its lawsuit, there is no indication that he will restart any dredging activity, and he has already agreed to penalties for the prior actions.

III. Whether NUDEP's calculated strategy to seek a consent decree and settlement agreement from Bowman constitutes diligent prosecution as to bar NUWF's lawsuit where NUDEP exacted non-monetary penalties, courts accord deference to Agency enforcement, and NUWF had ample opportunity to intervene in the initial enforcement action.

IV. Whether Bowman's movement of dirt and vegetation from one part of his wetland to another without a permit violates Section 404 of the CWA where the EPA's definition and subsequent judicial interpretation of discharge of dredged and fill material incorporates clearing of wetlands for agricultural use.

STATEMENT OF THE CASE

This is an appeal from a final order granting summary judgment in the United States District Court for the District of New Union on June 1, 2012. (R. at 2). NUWF challenged Bowman's improper clearing and filling of his wetland without a permit under Sections 301(a) and 404 of the CWA on August 30, 2011. (R. at 4). Prior to NUWF's federal lawsuit, NUDEP used its discretion as the state agency charged with implementing the CWA to diligently prosecute Bowman for violations of the statute. (R. at 4). NUDEP intervened in NUWF's federal suit to ensure that its prior prosecution was accorded appropriate status by the court. (R. at 4). Pursuant to a finding that Bowman's activities did not create an addition of fill material to his wetland, the district court granted Bowman's summary judgment motion on all grounds. (R. at 2).

NUDEP appeals the lower court's finding that NUWF lacked standing, arguing that the facts in the record demonstrate that NUWF's individual members show an actual, concrete injury. (R. at 1). The lower court appropriately relied on the standard in *Gwaltney* to find that Bowman's actions were wholly in the past prior to NUWF's federal lawsuit; NUDEP respectfully requests that this Court affirm the lower court's decision as to subject matter jurisdiction. (R. at 2). NUDEP further asks this Court to affirm the lower court's decision that NUDEP's prior prosecution was procedurally and substantively diligent as to bar NUWF's lawsuit. (R. at 2). Last, because the lower court did not accord proper deference to the EPA's interpretation of dredge and fill material, NUDEP respectfully requests that this Court overturn the district court's grant of summary judgment for lack of a CWA Section 404 permit.

STATEMENT OF FACTS

On June 15, 2011, Bowman began clearing his wetland by pushing existing vegetation into artificial trenches without a permit. (R. at 4). He moved this uprooted vegetation and soil from one part of his land to another with a bulldozer when clearing it to plant wheat. (R. at 4). He excavated a wide ditch to

drain his newly-formed field into the Muddy River, to which his land is hydrologically connected. (R. at 3-4). Bowman completed all clearing and filling activities on approximately July 15, 2011. (R. at 4). After learning of Bowman's activities in July 2011, NUDEP, carrying out its authority to implement the CWA, sent Bowman a notice of violation of state and federal law. (R. at 4). Bowman entered into a settlement agreement with NUDEP, consenting not to clear more wetland and granting a permanent conservation easement of land adjacent to the Muddy River. (R. at 4). NUDEP did not seek monetary penalties from Bowman, exercising its judgment as the agency charged with implementing the CWA. (R. at 4).

In addition to its settlement agreement, NUDEP brought suit against Bowman in federal court on August 10, 2011. (R. at 5). NUWF, a non-profit organization whose mission is to protect the habitats of the State of New Union's fish and wildlife, filed suit against Bowman in federal court on August 30, 2011, more than twenty days after NUDEP's suit. (R. at 4-5). NUDEP waited approximately one month to file a motion to enter a consent decree, identical to the state settlement agreement previously agreed to by both NUDEP and Bowman. (R. at 4-5). NUDEP intervened in NUWF's suit against Bowman to ensure that its previous administrative order and consent decree were accorded controlling status by the Court. (R. at 5).

In its suit against Bowman, three members of NUWF testified that they each use the Muddy River for recreational fishing and boating, and they picnic on its banks near Bowman's land. (R. at 6). NUWF members stated that they feel a loss from the destruction of the wetlands, and are aware of differences in the River. (R. at 6). One member, Mr. Norton, can no longer find frogs in the cleared wetland. (R. at 6). Another testified that the River looks more polluted after Bowman's decimation of the wetland. (R. at 6). In its suit against Bowman, NUWF is seeking monetary penalties and a court order requiring Bowman to restore the wetlands. (R. at 5).

STANDARD OF REVIEW

This case comes before this Court on appeal from the district court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact

and. . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Questions of law are reviewed *de novo* by this Court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). This Court should therefore review Appellants' claims *de novo* and afford no deference to the opinions and conclusions of the district court. *Id.*

SUMMARY OF THE ARGUMENT

The district court improperly granted summary judgment for Bowman on the issues of NUWF's standing and Bowman's violation of CWA Section 404 and properly granted summary judgment on the issues of subject matter jurisdiction and diligent prosecution.

The lower court misinterpreted the requirements of individual standing in Article III of the Constitution and *Laidlaw*. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.(TOC), Inc.*, 956 F. Supp. 588 (D.S.C. 1997), *aff'd*, 528 U.S. 167 (2000). Instead, NUWF has standing to challenge Bowman's filling of his wetlands without a permit under Section 404 because it demonstrated a concrete and particularized injury for all of its testifying members. The broad standing test, as elucidated by the Supreme Court in *Laidlaw*, is consistent with Congress's intent in passing the CWA.

The district court properly decided that Bowman's filling of his wetlands was wholly in the past for the purposes of subject matter jurisdiction. Per the holding of *Gwaltney*, because Bowman came into compliance with NUDEP's settlement agreement, and because NUDEP did not require the removal of dredged and fill materials, Bowman's actions had ended before NUWF filed its federal lawsuit. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). The continuing presence of dredged materials does not constitute a continuing violation under EPA regulations. Because Bowman filled all of the wetland at issue, the single incident, wholly in the past, renders the lower court without subject matter jurisdiction.

The lower court also correctly granted summary judgment for Bowman on diligent prosecution, as NUDEP's settlement agreement and subsequent consent decrees were both substantively and procedurally diligent. Because NUDEP is the state agency charged with implementing the CWA, it has broad

discretion to enforce the Act in the interests of public policy. The lower court properly determined that NUDEP diligently prosecuted Bowman for his violation of the CWA.

Finally, the district court improperly determined that Bowman's activities did not require a Section 404 permit because it failed to consider, let alone give proper deference to, the EPA's interpretation of the CWA. The lower court incorrectly held that Bowman's clearing and filling of the wetland did not constitute dredged material. Courts consistently find landclearing activities like Bowman's to be addition of a pollutant as either dredged or fill material. *Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983). Public policy also dictates that agencies, not the courts, are the proper entities to determine the character of the CWA violation.

ARGUMENT

I. THE NEW UNION WILDLIFE FEDERATION HAS ORGANIZATIONAL STANDING BECAUSE ITS MEMBERS MEET THE BROAD REQUIREMENTS OF TRADITIONAL INDIVIDUAL STANDING.

Section II of Article III of the United States Constitution limits federal judicial power to cases and controversies. U.S. Const. art. III, § 2. Every suit brought in federal court must meet the case or controversy minimum requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). An organization may bring suit on behalf of its members if it can establish that at least one member would have individual standing, the organization's interest in the suit is germane to its purpose, and individual member participation is unnecessary. *Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). The Supreme Court has determined that an individual plaintiff must establish that he or she suffered an injury in fact which is (1) "(a) concrete and particularized and (b) actual or imminent," (2) fairly traceable to the defendant's actions, and (3) likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. The Supreme Court's decision in *Lujan* was broadened in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588 (D.S.C. 1997), *aff'd*, 528 U.S. 167 (2000), such that a plaintiff need not demonstrate actual or particular harm.

NUWF has organizational standing as it can establish that three of its individual members suffered an injury in fact fairly traceable to Bowman's conduct that would be redressed by a favorable decision of this Court. This Court should reverse the district court's holding and find that NUWF meets the requirements of standing set forth by the Supreme Court in *Laidlaw*.

A. NUWF Has Organizational Standing.

NUWF can establish that it has organizational standing to bring suit against Bowman for violations of Sections 301(a) and 404 of the CWA. 33 U.S.C. §§ 1311(a), 1344 (2006). There exists a strong presumption to grant standing, as the purpose of citizen suits are to protect and advance the public's interest in pollution-free waterways, not to promote private interests. *Penn. Envtl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa. 1989).

The inquiry in the instant case into organizational standing centers on whether NUWF can offer sufficient evidence that "its members would otherwise have standing to sue in their own right." *Hunt*, 432 U.S. at 343. Under the broad definition of injury in fact established by the Supreme Court in *Laidlaw*, NUWF can demonstrate that its individual members have individual standing. (R. at 6). NUWF's mission statement and purpose is "to protect the fish and wildlife of the state by protecting their habitats." (R. at 4). Its lawsuit against Bowman for violation of the CWA is therefore germane to its purpose. Last, no individual member need participate in the suit as the remedies requested do not require individualized proof and are properly resolved in a group context. *Hunt*, 432 U.S. at 343.

B. NUWF Meets the Requirements of Individual Standing for Affiant Members.

The standing provisions of Section 505 of the CWA authorize suit "against any person who is alleged to be in violation" by "any person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a)(1), (g) (2006). The tripartite standing test articulated in *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472

(1982), noted that Article III requires the party who invokes the court's authority to show that he personally has suffered some actual legal or threatened injury. The Supreme Court's decision in *Laidlaw* established that "the relevant showing for purposes of Article III standing. . . is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. NUWF's individual members have a concrete and imminent "injury in fact" under the *Laidlaw* analysis, as demonstrated by testimony of *conditional* use of the Muddy River. Similarly, NUWF sufficiently pled that the actual injury is fairly traceable to Bowman's conduct and that the relief requested will redress the injuries. (R. at 4). The broad latitude afforded plaintiffs in establishing standing reflects the fact that the federal government and states lack the resources to enforce environmental law in every case, and as a result are able to enforce only the most egregious of violations. *See* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Envtl. L. & Pol'y F. 39, 44, 49 (2001).

1. NUWF's three affiant members have an injury in fact that is concrete and imminent that confers standing upon the organization.

The district court incorrectly determined that the affidavits of the three NUWF members did not demonstrate an injury in fact. An injury can be a harm to aesthetic, recreational or environmental values and it need not be large – "identifiable trifle" will suffice. *United States v. Students Challenging Reg. Agency Procedures,* 412 U.S. 669, 689 n.14 (1973). To meet the *Laidlaw* standard, a plaintiff must demonstrate that he or she uses "the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" and that these submissions of proof are more than mere "general averments" and "conclusory allegations." *Laidlaw*, 528 U.S. at 183 (citing *Lujan*, 497 U.S. at 888). A plaintiff's affected interest becomes an injury when the threat to that interest is actual and imminent; intentions alone absent any kind of concrete plan to visit the area do not support a finding of actual or imminent injury. *See Lujan*, 504 U.S. at 564. There is no "particular formula for establishing a sufficient concrete and particularized aesthetic or recreational injury-in-fact." *Ecological*

Rights Found. v. Pac. Lumber Co., 230 F.3d 1141 (9th Cir. 2000). As a result, in each case before it, the Court must determine whether the plaintiff's interest in the area is factually based on the stated use or enjoyment of the affected waterway and whether that use would be lessened as a result of the defendant's conduct. *Ecological Rights*, 230 F.3d at 1141.

Articulated in *Laidlaw*, a concrete and imminent injury need not reflect an injury to the environment. *Laidlaw*, 528 U.S. at 157. In *Laidlaw*, the affidavits and testimony presented by the plaintiffs asserted the existence of the defendant's alleged discharges along with the affiant members' reasonable concerns about the effects of those discharges. *Id.* Further, individual members of Friends of the Earth averred that the defendant's probable discharges directly affected their recreational, aesthetic, and economic interests in the North Tyga River. *Id.* at 169. The injuries to the plaintiffs' ability to recreationally use the river and its banks, as well as an aversion to the river's smell and appearance satisfied the stricter requirements of *Lujan v. Defenders of Wildlife* for concrete and particular pleadings. *Id.* at 183. Taking these affirmations together, the Court found that individual members had established an injury in fact as to confer standing upon the umbrella organization. *Id*. at 169. *The Supreme* Court acknowledged that the defendant's discharges did no cognizable harm to the river even as it found that the plaintiffs' injuries, which were based on a *perceived* harm to the river, merited standing. *Id.* at 181. The language of the Act itself requires only a violation and an interested party to produce a lawsuit. 33 U.S.C. § 1365(a)(1). Based on the Court's analysis in *Laidlaw*, courts will grant standing when an entity allegedly violates the Act, and then the prospective plaintiff alters his or her behavior according to the simple belief that the waterway has suffered harm. The belief itself, along with the alleged violation of the Act, confers upon plaintiffs an injury in fact that satisfies the *Laidlaw* standard.

In the instant case, NUWF submitted three affidavits from its members which detailed a concrete connection to the allegedly polluted waterway and actual recreational use of it. (R. at 6). All individual members continually use "the Muddy for recreational boating and fishing, often picnicking on its banks, or in the vicinity of Bowman**'**s property." (R. at 6). Each member is

further aware of differences in the River after Bowman cleared and filled the wetlands – they fear that it is more polluted and will become even more polluted if other wetlands along the river are cleared and filled for agricultural purposes. (R. at 6). One member specifically testified that the river looks more polluted now, after Bowman's land was filled. (R. at 6). The concerns about the effects of Bowman's actions and their effects on the Muddy River mirror those upon which the Supreme Court granted standing in *Laidlaw*. *Laidlaw*, 528 U.S. at 157. Following the *Laidlaw* analysis, NUWF's members need not include any "hard data" to establish that the Muddy River is polluted, only their belief that it may be. *Laidlaw*, 956 F. Supp. at 588 (holding that the simple, genuine belief that the river was more polluted was sufficiently concrete to establish injury in fact). For standing, the Act itself requires only a violation and an interested plaintiff, not that the defendant's behavior negatively impacts the plaintiff's current or future use of the affected area. David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 Harv. Envtl. L. Rev. 79, 86 (2004). Through their conditional use of the area for recreational purposes and fear that the river is more polluted, NUWF members have established a concrete and actual injury per the requirements of *Laidlaw*.

The lower court determined that Mr. Norton's trespass upon Bowman's land could not constitute an injury in fact. However, case law suggests that inquiry into a plaintiff's illegal behavior is improper in determining whether the standing requirements have been met. *See Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1183 (D. Idaho 2001) (holding that the organization could bring its citizens suit because of the broader purpose of the CWA even if one or more of its members violated the CWA themselves). The injury to Mr. Norton's enjoyment of the affected waters can similarly meet the requirements of *Laidlaw*. He testified that "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." (R. at 6). As a direct result of Bowman's clearing and draining of the wetlands, Mr. Norton can no longer use the area for recreation. While a NUDEP biologist testified that, once fully established, the buffer zone "will provide a higher quality habitat, and more of it, for frogs," Mr. Norton has still

suffered an injury to his current and future enjoyment of the Muddy River. (R. at 6). As *Laidlaw* noted, for standing, the injury demonstrated must be to the plaintiff, not the environment. Certainly, Mr. Norton's ability to enjoy the River and adjacent land has been lessened by Bowman's decimation of the wetland.

2. The injuries sustained by NUWF members are fairly traceable to Bowman's conduct and are redressable by this Court.

To meet the second prong of the standing test under *Laidlaw*, plaintiffs need only show that the defendant's violations *contributed* to their injury. *Pub. Interest Research Grp. of N.J. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990). As expressed in *Powell Duffryn*, plaintiffs need not show "to a scientific certainty" that the pollution perceived in the waterway comes from the defendant. *Id.* at 73 n.10.

The Fifth Circuit similarly found a fairly traceable injury where an organization alleged that the defendant lacked a permit, such that any discharge would violate the CWA, and the discharges occurring were typical of those which harm water quality and marine life. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996). NUWF members affirmed that they were aware that wetlands serve valuable functions in maintaining integrity of rivers. (R. at 6). NUWF's submitted affidavits included statements that the "Muddy looks more polluted. . . than it did prior to Bowman's activities." (R. at 6). This statement detailing the effects of the filling of Bowman's wetlands, typical of harmful discharge, satisfies the requirements of the Fifth Circuit for the second prong of the standing test.

Similarly, that there were significantly fewer frogs in the area demonstrates that Bowman's clearing and filling of his land is directly traceable to the injury alleged. (R. at 6). As to proof of causation, "rather than pinpointing the origins or particular molecules, a plaintiff must merely show that a defendant. . . causes or contributes to the kinds of injuries alleged in the specific geographic area of concern." *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 995 (9th Cir. 2000). Both the Ninth and Third Circuits agree that the causal connection need not be so airtight in establishing standing as to demonstrate that

the plaintiffs would succeed on the merits, only that there exists a substantial likelihood that the defendant's conduct caused the plaintiff's harm. *Id.; see also Powell Duffryn*, 913 F.3d at 72.

To satisfy the last prong of the standing requirement – redressability – courts only require that the kind of damages sought will address the specific harms endured. An injunction to restore the wetlands or civil penalties, as sought by NUWF, would satisfy the redressability requirement for constitutional standing. *Sw. Marine,* 236 F.3d at 995. Civil penalties may further redress the injury suffered by a plaintiff if they will serve as a deterrent to future polluting. *Powell Duffryn*, 913 F.2d at 73. If the penalties sought are imposed upon Bowman, other would-be polluters along the Muddy River may think twice about filling their wetlands.

C. Congress's Intent in Including a Citizen Suit Provision in the Clean Water Act Is Best Honored by Granting Standing to NUWF.

The disposition of the instant case will implicate not only the standing doctrine itself, but that of general environmental protection as well. Congress passed the CWA with the intent to provide protection for the nation's waterways from pollution. Within the Act itself, Congress intended to eliminate as many barriers to citizen standing as possible as it charged private citizens with acting as private attorneys general when enforcement agencies would or could not. *See* 33 U.S.C. § 1365. Congress often includes citizen suits or similar enforcement mechanisms to ensure that its broad goals are met. *See* Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 Duke L.J. 1170, 1195 (1993). The inherent narrowness of the Supreme Court's current standing doctrine has a significant effect upon who may sue: this fact causes an asymmetry in the cases the courts do hear as the doctrine admits regulated entities easily, while regulatory beneficiaries who bring citizen suits to enforce the Act are more likely to lack standing. *See Lujan*, 504 U.S. at 561-62 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984) ("when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish").

Were this Court to deny standing to NUWF, it would disregard Congress's intent in granting citizens the ability to sue. Because the CWA itself only requires interested parties and a violation, granting standing in the instant case furthers this broad policy goal of private involvement in environmental protection. Ensuring that those non-regulated entities have access to the courts acknowledges Congress's goals as well as protects the future of the standing doctrine: "there are certain kinds of cases in which the doctrine may be impossible to satisfy and yet we believe access to the courts is desirable[,]" such as suits directly involving the interests of future generations. Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 181 (2011). Vigorous enforcement of the CWA will likely deter similar undesirable activities, thereby protecting the system from future threats. For these reasons, this Court should reverse the district court's holding and find that NUWF has organizational standing.

II. THE COURT LACKS SUBJECT MATTER JURISDICTION UNDER CLEAN WATER ACT SECTION 505 BECAUSE BOWMAN'S ACTIONS DO NOT CONSTITUTE A CONTINUING VIOLATION.

Section 505(a) of the CWA provides authority for citizen suits and gives courts subject matter jurisdiction to hear cases involving violations of the Act. 33 U.S.C. § 1365(a). To bring suit under Section 505(a), a defendant must be "alleged to be in violation of an effluent standard or limitation" of the CWA. *Id.* The Supreme Court has ruled that the language of Section 505(a) requires that for a court to have subject matter jurisdiction, violations must be alleged to be continuous or intermittent *at the time the suit is brought*, and cannot have been completed wholly in the past. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). There are no competing interpretations of the plain-language meaning of "continuous" nor does NUWF argue in the instant case that the material constitutes an intermittent violation of the Act. Because of the statute's legislative history and continued judicial deference to Agency orders, courts will have subject matter jurisdiction only for present and future violations of the Act.

The Supreme Court's ruling in *Gwaltney* is the measure for district courts to determine whether subject matter jurisdiction attaches to a violation of CWA Section 404. District courts have clarified that CWA Section 404 violations are not considered continuing after a party comes into compliance with Agency orders, if the removal of dredged and fill materials has not been ordered. *Orange Env't, Inc., v. Cnty. of Orange*, 923 F. Supp. 529 (S.D.N.Y. 1996).

The district court did not have subject matter jurisdiction because Bowman was already in compliance with the prior Agency order, per the requirements of *Gwaltney*, at the time that NUWF filed its lawsuit. NUWF incorrectly argues that continuing CWA Section 404 violations should be held to a different and higher standard than continuing violations of CWA Section 402. (R. at 7). Yet, this proposition is unsupported by case law, statute or legislative intent. This Court should affirm the district court's holding that Bowman's activities did not meet the necessary threshold for subject matter jurisdiction based on 33 U.S.C. § 1365(a)'s requirement that a violation be continuous or intermittent.

A. Bowman's Violation of Clean Water Act Section 404 Was Wholly in the Past Before NUWF Filed Suit.

In *Gwaltney*, appellees claimed that CWA Section 505(a) gives authority to citizens to seek relief even when these violations were "wholly past" and have little chance of recurrence. *Gwaltney*, 484 U.S. at 55. In its decision, the Court held that violations of Section 505(a) must be continuous or intermittent for subject matter jurisdiction to attach. *Id.* Looking first to the language of the statute, the *Gwaltney* Court found that, while somewhat ambiguous, "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation." *Id.* at 57. "Congress," it continued, "could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option." *Id*. The Court also found that as other sections of the Act, such as Section 309(d), purposely use the past tense to cover previous events, the will of Congress was that Section 404 violations must be current for

courts to have subject matter jurisdiction. *Id.* at 57-59. It further ruled that Congressional history demonstrated that the language was specifically chosen for Section 505 to encompass present and future violations. *Id.* at 50. Legislative history provided that citizen suits are "not [intended] to remedy wholly past violations." *Id.*

Bowman's violation of CWA Section 404 was wholly in the past before NUWF filed suit against him on August 30, 2011, as he had ceased dredging the wetland on his property by July 15, 2011. (R. at 4). Bowman's activities are not continuous, as his landclearing activities were interrupted on July 15, 2011, when he ceased clearing his wetland. (R. at 4). Neither are his activities intermittent as there is no reason to believe, and NUWF does not assert, that he plans to restart his dredging activities in the future. Extending the *Gwaltney* reasoning, a single, discrete incident in the past would not grant courts subject matter jurisdiction. Likewise, Bowman's single violation of the CWA does not constitute a continuing or intermittent violation. Bowman, after being provided notice, ceased his violations of Section 404 and agreed with NUDEP's proposal for remedy. (R. at 4-5). Therefore, by August 30, 2011, when NUWF filed its lawsuit, Bowman's actions were wholly in the past. (R. at 5).

NUWF argues that the CWA Section 402 violations and dredged or fill material covered under Section 404 must be treated differently. (R. at 7). The *Gwaltney* Court does not distinguish between the types of effluence in each section, but instead repeatedly looks to the language of the Act for guidance. *Gwaltney*, 484 U.S. at 59-62. While NUWF argues for a delineation between Section 402 effluence and Section 404 dredged or fill materials, the Court in *Gwaltney* rightly did not make such a distinction. *Id.* As the district court states, "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." (R. at 7). Therefore, not only is NUWF's argument contrary to the ruling of the Supreme Court, it offends logic and public policy to suggest that depositing Section 404 materials into a water is a continuing violation until they are removed, while releasing Section 402 effluence should be considered a wholly past offense even when it is removed just as easily. (R. at 7).

B. Granting Subject Matter Jurisdiction Would Usurp the Right of the State Agency to Act in the Best Interests of All Citizens.

The Supreme Court has held that the purpose of the notice provision in the CWA is to give an alleged violator the opportunity to come into compliance with the Act and to allow the Administrator or the State to follow up with actions. *Gwaltney*, 484 U.S. at 60-61. Construing the notice provision, the *Gwaltney* Court reasoned that the purpose of giving sixty days notice before filing a suit, not only to the State and Administrator, but the alleged violator as well, was to allow the violator the opportunity to come into compliance with the Act. *Id*. It would "render incomprehensible § 505's notice provision" if citizen suits could "target wholly past violations." *Id*. at 59-60. The Court found that "the harm sought to be addressed by the citizen suit lies in the present or the future, not the past," therefore, suits brought after an Administrator had assessed penalties, would curtail agency "discretion to enforce the Act in the public interest." *Id*. at 59-61. Curtailing the notice provision would have the effect of changing "the nature of the citizens' role from interstitial to potentially intrusive." *Id*. at 61.

It is uncontroverted that Bowman ceased his landclearing activities on July 15, 2011, after NUWF issued notice to him on July 1, 2011, and before it filed its federal lawsuit on August 30, 2011. (R. at 4-5). Furthermore, because NUDEP exacted penalties from Bowman in the form of developing and maintaining a new artificial wetland, giving the State a conservation easement for public use, and a restriction from developing these areas in any way, giving the Court subject matter jurisdiction would remove the Agency's ability to enforce the CWA in the public interest, per *Gwaltney*. *Gwaltney*, 484 U.S. at 61.

NUWF erroneously relies on *Sasser v. Administrator*, 990 F.2d 127, 129 (4th Cir. 1993) because the Fourth Circuit held that each day Section 404 dredged and fill material "remains in the wetlands without a permit constitutes an additional day of violation." In ruling against the landowner in *Sasser*, the court noted that not only had the violations been ongoing, but that there had been no effort to work with the EPA or the Army Corp of Engineers despite repeated notices and citations. *Id* at 128.

The court's holding that the violation was continuous was only in the context of the landowner's refusal to work with the EPA, who had demanded that the deposited materials be removed. *Id.* at 129. Unlike NUWF, the EPA in *Sasser* was not bringing a citizen suit, but was instead enforcing the issuance of an order under 33 U.S.C. § 1311, due to the plaintiff's repeated refusal to come into compliance with the CWA. *Id.* at 128.

On August 10, 2011, after receiving notice from NUWF, NUDEP stepped in to resolve Bowman's violations. (R. at 5). An agreement was reached that will effectively recreate a wetland while enhancing public recreation. (R. at 5). According deference to Agency orders ensures that citizen-suits will not usurp the state's authority to work toward the public good. This Court should accord the Agency deference and recognize the finality of its orders by not extending subject matter jurisdiction.

III. THE NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION'S PROCEDURAL AND SUBSTANTIVE DILIGENT PROSECUTION BARS THE NEW UNION WILDLIFE FEDERATION'S CITIZEN SUIT.

Under the CWA, even when a citizen has standing, the citizen's lawsuit will be barred if the state diligently prosecutes the alleged CWA violations. 33 U.S.C. § 1365(b)(1)(B) (2006). Section 505 of the CWA states in pertinent part that no citizen suit may be commenced if the "Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States" provided that citizens have the opportunity to intervene in such suit. *Id.* The Supreme Court concisely restated this requirement in *Gwaltney*, when it stated that "citizen suits are proper only if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Gwaltney*, 484 U.S. at 60. NUDEP's settlement agreement with Bowman, the resulting administrative order, and NUDEP's subsequent federal lawsuit constitute diligent prosecution, barring NUWF's citizen suit.

A. NUDEP's Consent Decree and Settlement Agreement Lack Procedural Defects and Should Be Afforded Considerable Deference by the

Court.

While it is true that an agency's consent decree must demonstrate actual diligence in prosecution, citizens "bear the burden of proving the state agency's prosecution was not diligent. This burden is a heavy one because diligence on the part of the enforcement agency is presumed." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. (Laidlaw I)*, 890 F. Supp. 470 (D.S.C. 1995). This presumption, especially for consent agreements, stems from the agency's unique position to consider the best solution for all interested parties, not just potential plaintiffs. *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994).

Courts recognize settlement agreements and consent decrees as procedurally acceptable methods of diligent prosecution. The Supreme Court recognized that "if citizens could file suit. . . in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Gwaltney,* 484 U.S. at 60-61. The Tenth Circuit explained that while requiring diligence, "Section 1365(b)(1)(B) [of the CWA] does not require government prosecution to be far-reaching or zealous. . . Nor must an agency's prosecutorial strategy coincide with that of the citizen-plaintiff." *Karr v. Hefner*, 475 F.3d 1192, 1197 (10th Cir. 2007). Courts defer to Agency judgment when negotiating consent decrees because if defendants are "exposed to a citizen suit whenever the EPA grants it a concession, defendants will have little incentive to negotiate consent decrees." *Karr*, 475 F.3d at 1197. The Eighth Circuit followed the same reasoning when it stated that "[i]t would be unreasonable and inappropriate to find failure to diligently prosecute simply because [defendants] prevailed in some fashion or because a compromise was reached." *Ark. Wildlife Fed'n.*, 29 F.3d at 380. Furthermore, failing to defer to an agency's judgment in assessing proper remedies undermines Congress's intent in balancing power in the CWA between the States, private citizens and agencies, which permits citizens to act only when the agency has failed to do so. *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004).

NUDEP's settlement was procedurally distinguishable from the rejected settlement in *Laidlaw I* because it offered the

opportunity for citizen intervention within the meaning of CWA Section 505. The court in *Laidlaw I* explained that the main procedural defect was "the absence of a meaningful opportunity for the citizen plaintiffs to intervene in this case" which "trigger[ed] a heightened scrutiny into the settlement." *Laidlaw I*, 890 F. Supp. at 489-90. In *Laidlaw I*, the agency filed its settlement only one day after filing its lawsuit, foreclosing any opportunity for citizens to intervene. *Id.* The *Laidlaw I* court further noted that "the complaint was filed at the [d]efendant's request, solely to accommodate the [d]efendant's desire to bar a citizen suit" and the defendant "drafted the state-court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee. And finally the settlement agreement between [the agency] and [defendant] was entered into with unusual haste, without giving the [p]laintiffs the opportunity to intervene." *Id.* at 489. NUWF cannot claim any type of procedural defect found in the *Laidlaw I* settlement. Rather than attempt to intervene in NUDEP's suit, NUWF brought its own action twenty days later. (R. at 5). Unlike the Agency in *Laidlaw I*, NUDEP waited nearly one month before filing its motion to enter the consent decree. (R. at 5). The proposed consent decree embodied a compromise diligently reached between NUDEP and Bowman. (R. at 4). The fact that the agreement mirrored the state lawsuit agreement simply reflects the fact that the state statute mirrors the CWA. (R. at 4). To overturn the district court's diligence finding based on the sameness of the statutes and their settlement terms would fashion a new rule which would result in the absurd requirement that parties rehash identical negotiations for identical statutes merely because the violations are now brought before a federal court.

B. NUDEP's Actions Culminating in its Federal Lawsuit and the Proposed Consent Decree Constitute Substantive Diligent Prosecution.

Besides procedural considerations, courts look to the substance of consent decrees to determine if the presumption of diligence has been rebutted. *Laidlaw I*, 890 F. Supp. at 490. The *Laidlaw I* court discussed two non-dispositive factors to consider when deciding whether a consent decree is substantively diligent: "a state's failure to enforce its consent order" and "lack of

substantial relief." *Id.* The court held that these factors must be "viewed in light of all of the circumstances." *Id.* at 491. In considering all the circumstances, the court noted the deficiencies alleged: (1) only requiring the defendant's best effort to comply with its permits, (2) lack of stipulated penalties for future violations, (3) lack of liability for any violations occurring during the order's time while extending that time indefinitely into the future, and (4) an overall lenient penalty. *Id.* at 490-91. In fashioning remedies, agencies should consider the defendant's economic benefits from his non-compliance; however, the failure to consider such benefits alone does not support a finding of non-diligent prosecution. *Sierra Club v. ICG E., LLC*, 833 F. Supp. 2d 571, 579 (N.D. W. Va. 2011) (clarifying the holding in *Laidlaw I*, 890 F. Supp. at 499).

While the severity of a penalty is one non-dispositive factor, the Seventh Circuit explained that courts examine penalties for future deterrent effect but do not require monetary penalties when remedial penalties suffice. *Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 762-63 (7th Cir. 2004). The *Friends of Milwaukee's Rivers* court stated, "[w]e agree with the First Circuit that '[d]uplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [the goals of the Clean Water Act]. They are, in fact, impediments to environmental remedy efforts.'" *Id.* (citing *N. & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 558 (1st Cir. 1991). Thus, if courts were to require monetary penalties, agencies' delegated powers would be usurped in determining the appropriate remedy to fulfill the goals of the CWA.

There are no allegations that NUDEP's proposed consent decree has any of the glaring substantive deficiencies found in *Laidlaw I*, nor are there allegations that the decree attempts to remove this Court's jurisdiction to enforce the order. (R. at 4). NUWF does not suggest that NUDEP will fail to enforce the agreement. (R. at 4). Furthermore, NUDEP effectively obtained an injunction requiring Bowman to cease and desist all clearing activities and there are no allegations that the consent decree granted Bowman any immunity from liability for future violations. (R. at 4). Finally, while NUDEP did not seek monetary penalties, it carefully considered the circumstances and

determined that the most appropriate remedy would be obtained by seeking substantial non-monetary penalties. (R. at 4). Bowman was required to actually cede control of a portion of his land, granting a conservation easement open to the public, and permanently stripping him of all development rights to it. (R. at 3-4). While only a small percentage of his land by acreage, this concession was on prime river front acreage which he planned to clear and use. (R. at 3-4). This concession removes one of the property sticks from Bowman's bundle and is likely to permanently affect his land's resale value. Bowman was also required to improve some of his remaining land by constructing at his cost a year-round wetland. (R. at 3-4). These non-monetary penalties will actually benefit the NUWF members and the public at large, demonstrating that NUDEP considered the interests of all parties per its role as primary enforcer of the CWA. Testimony from NUDEP's biologist established that "the new, year-round, partially-inundated wetland in the buffer zone will provide richer wetland habitat than the former, occasionally-inundated wetland." (R. at 6). The easement will allow NUWF members to legally continue their frogging. (R. at 8). The district court also found that the "easement shields the field from the river, so that the aesthetics of navigational use of the river is unaffected." (R. at 6). In short, NUDEP has chosen to seek remedial penalties and NUWF has not overcome its heavy burden to rebut the presumption of NUDEP's diligence negotiating the administrative order and proposed consent decree.

IV. BOWMAN'S DISCHARGE OF POLLUTANTS IN A WETLAND WITHOUT A PERMIT VIOLATED CLEAN WATER ACT SECTION 404.

The CWA clearly states that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12) (2006). The CWA then defines pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage. . ., chemical wastes, biological materials. . ., rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). The government "may issue permits. . . for the discharge of dredged or fill material into the

navigable waters. . . and is authorized to enforce "[v]iolations of permits." 33 U.S.C. § 1344(a), (s) (2006).

The EPA has defined the terms of 33 U.S.C. § 1344 to differentiate between dredged and fill materials in 33 C.F.R. § 323.2. In the instant case, Bowman does not dispute that he used a bulldozer as a point source to clear a wetland and that he did not first obtain a permit for the activities. (R. at 8, 9). Nor has NUDEP's authority to prosecute violations of the CWA been questioned. (R. at 4). At issue is whether Bowman's activities meet the requirements for the EPA's interpretation of addition of dredged material, which is defined to include the redeposit of said materials. Furthermore, even if this Court decides that the substances constituted fill material, case law repeatedly defines actions such as Bowman's to fall within the definition for the addition of a pollutant as a violation of Section 404.

A. Bowman Violated the CWA by Redepositing Dredged Materials into a Wetland without a Section 404 Permit.

For the purposes of enforcing the CWA, the EPA has stated that "dredged material means material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). The EPA's definition for "discharge of dredged material" is "any addition of dredged material into, including the redeposit of dredged material other than incidental fallback within, the waters of the United States." 33 C.F.R. § 323.2(d)(1). The EPA specifically includes "excavated material. . . which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation." 33 C.F.R. § 323.2(d)(1)(iii).

1. EPA regulations define the materials Bowman redeposited into the wetland as dredged material.

To emphasize that mechanized landclearing constitutes dredging, Section 323.2 further states that "[a]ctivities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing)" and where these activities do not disturb "the root system nor involves mechanized pushing, dragging, or other similar activities that

redeposit excavated soil material" shall not be considered dredging. 33 C.F.R. § 323.2(d)(2)(ii). Therefore, a wetland is dredged by a landclearing machine used to disturb vegetation below the ground surface.

Bowman and the district court contend that the excavated – and subsequently redeposited material – constituted fill material, rather than dredged material, and is therefore not subject to the "redeposit" definition of 33 C.F.R. § 323.2(d)(1). The district court defines the verb "dredge" as "an activity that occurs on open water to excavate a channel or port docking area to make them available for commercial navigation." (R. at 8). However, this is merely one narrow meaning of the word "dredge" and the district court ignored both the EPA's definition and the plain meaning of the term. The definition of "dredge" as a verb is "to dig, gather, or pull out with or as if with a dredge." *Webster's Unabridged Dictionary* 595 (2d ed. 1999). Furthermore, Section 323.2(d)(1)(iii) provides "dredge" with a clearly different meaning than the district court when it includes the term "landclearing" as a method of adding or redepositing dredged material. The district court ignored both the plain meaning and the EPA's own interpretation of the definition for "dredged material" by expanding the word "dredge" beyond its dictionary definition and clear meaning in the EPA's regulations.

2. Bowman violated the CWA when he redeposited the dredged material into the wetland.

The EPA defines the addition of "dredged material" to include redeposit of excavated soil and vegetation. 33 C.F.R. § 323.2(d)(1)(iii). Furthermore, the Fifth Circuit concluded in *Avoyelles* that by using a bulldozer to clear a wetland of vegetation and depositing the resulting debris into sloughs, the landowners had redeposited either fill or dredged materials in violation of 33 U.S.C. § 1344. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 923 (5th Cir. 1983). The *Avoyelles* court also held that "the term 'discharge' covers the redepositing of materials taken from the wetlands." *Avoyelles*, 715 F.2d at 923. The Fourth Circuit agrees with this analysis in *United States v. Deaton*, 209 F.3d 331, 336 (4th Cir. 2000), when it states that once a material is excavated from a wetland, the resulting dirt

and vegetation becomes dredged spoil upon its redeposit into navigable waters due to its harmful effect on the environment. The Court's ruling is bolstered by EPA regulations which state that exemption from CWA permit requirements do not include "mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material." 33 C.F.R. § 323.2(d)(3)(i). The Eleventh Circuit similarly held that dredging by tugboat propellers which "redeposit[ed] the vegetation and sediment on the adjacent sea grass beds" and "cut into the bottom, uprooting and destroying the sea grass" constituted addition of a pollutant in violation of the CWA. *United States v. M.C.C. of Fl., Inc.*, 772 F.2d 1501, 1503, 1506 (11th Cir. 1985), *vacated on other grounds*, 481 U.S. 1034 (1987).

As explained by the EPA and courts, addition of dredged material includes its redeposit. Bowman's activities are precisely the kind of landclearing activities defined by the EPA to constitute addition in 33 C.F.R. § 323.2. The district court supplanted its judgment for the EPA's definition of "dredged material" when it stated, "[l]and clearing is not dredging, so we have no dredged spoil to discharge here" and provided no authority for its revised definition. (R. at 8).

When a court reviews an agency's interpretation of its own statute, the court first looks to see "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. Here, "[n]either the CWA nor the legislative history addresses the precise question of what constitutes a 'discharge of dredged material' in wetlands" or landclearing activities. William S. Pufko, *The Revised Definition of "Discharge of Dredged Material": Its Legality, Practicality, and Impact on Wetlands Protection*, 9 Envtl. Law. 187, 226 (2002). Because Section 404 is ambiguous, *Chevron* analysis proceeds to the second step. The EPA's promulgated rule defining dredged material to include redeposit

from landclearing activities is "is based on sound science and 'the nature of earth-moving equipment.'" *Id*. at 228. The EPA made this conclusion "[i]n light of the broad policy goals of the CWA and the agencies' expertise, their interpretation warrants deference as a reasonable interpretation of their section 404 jurisdiction." *Id*. at 228-29. Yet, the district court failed to give the proper deference to the EPA's regulatory interpretation.

As the district court has found that Bowman performed mechanized landclearing to remove live vegetation from above and below the surface of lands that were properly designated as wetlands, the material that Bowman created is defined as "dredged material" by the EPA, not fill material. (R. at 8, 9); 33 C.F.R. § 323.2. Bowman destroyed the wetland on his property in order to create arable farmland for the production of wheat without first obtaining a permit. (R. at 4). Therefore, NUDEP requests that this Court reverse the decision of the lower court and find that Bowman be found in violation of Section 404 of the Clean Water Act.

B. Bowman's Activities Would Still Violate CWA Section 404's Addition Requirement if Considered Fill Material.

The CWA prohibits the "addition of any pollutant to navigable waters from any point source," but the CWA does not define "addition." 33 U.S.C. § 1362(12). However, the EPA does define "addition" in its regulations, contrary to the district court's opinion. (R. at 9). As explained above, Bowman's material clearly fits the definition of addition of "dredged material" as defined in 33 C.F.R. § 323.2(d). Even if this Court were to consider the Bowman material to be fill material under 33 C.F.R. § 323.2(e), Bowman's actions still constitute "addition."

Fill material is defined as "material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2(e)(1). Addition of fill material is defined to "generally include[], *without limitation*. . . site-development fills for recreational, industrial, commercial, residential, or *other uses*." 33 C.F.R. 323.2(f) (emphasis added). Bowman's fill of the wetland for commercial agricultural use

clearly falls within the meaning of the Agency's definition of addition of fill material.

1. Courts have consistently interpreted activities like Bowman's to fall within the CWA's meaning of addition of "fill material."

The district court incorrectly interpreted the *Nat'l Wildlife Fed'n v. Gorsuch* case, 693 F.2d 156 (D.C. Cir. 1982), to create a hard and fast "from the outside world" rule for the addition of fill material. (R. at 9). However, the *Gorsuch* court did not actually rule on the meaning of the term "addition." *Gorsuch*, 693 F.2d at 175. The *Gorsuch* case merely deferred to the EPA's interpretation of "addition" in relation to the specific facts of that case, stating that the "EPA's interpretation must be accepted unless manifestly unreasonable." *Id.* Incorporating EPA-promulgated definitions of addition of fill material in 33 C.F.R. § 323.2(f), courts have consistently recognized the meaning of "addition" to include activities such as Bowman's.

In *Avoyelles*, the defendant owned a forested tract of land within a seasonably flooded river basin, eighty percent of which was determined to be wetland. *Avoyelles*, 715 F.2d at 901, 903. The defendant decided to clear the land for agricultural use and used "bulldozers. . . [to] cut the timber and vegetation at or just above ground level. The trees were then raked into windrows, burned, and the stumps and ashes were disced into the ground," leveling the tract. *Id.* at 901, 923. The landowner also created a drainage ditch. *Id.* The court held "that the landowners were discharging 'fill material' into the wetlands" without a permit, in violation of CWA Section 404. *Id.* at 925. The court based its determination on 33 C.F.R. § 323.2 to find that the clearing and leveling "chang[ed] the bottom elevation of the waterbody," and "replaced the aquatic area with dry land" and was in effect the addition of fill material. *Id.* at 924-25.

The Supreme Court and other appeals courts have similarly rejected the "outside world" theory that the district court used. In *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810 (9th Cir. 2001), *aff'd*, 537 U.S. 99 (2002), the Supreme Court upheld the Ninth Circuit's decision when the defendant sought to convert wetlands into orchards and vineyards without a CWA Section 404 permit. *Id.* at 812. The

Ninth Circuit rejected the contention that an activity was not "the 'addition' of a 'pollutant' into wetlands, because it simply churns up soil that is already there, placing it back basically where it came from." *Borden Ranch*, 261 F.3d. at 814. It held that the argument was inconsistent with prior precedent from the Ninth and other circuits "that squarely hold that redeposits of materials can constitute an 'addition of a pollutant' under the Clean Water Act." *Id.* at 814.

The Seventh Circuit recently agreed that the outside world concept would not be "compatible with the purpose of the CWA to 'restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 948-49 (7th Cir. 2004). That court went on to say "it is logical to believe that soil and vegetation removed from one part of a wetland or waterway and deposited in another [contiguous or adjacent] could disturb the ecological balance of the affected areas – both the area from which the material was removed and the area on which the material was deposited." *Greenfield Mills,* 361 F.3d at 948-49.

The Fourth Circuit in *United States v. Deaton*, 209 F.3d 331, 335 (4th Cir. 2000), explained that the CWA "does not prohibit the addition of material; it prohibits the 'addition of any pollutant.'" The court found it quite obvious that "there could be an addition of a pollutant without an addition of material. . . at least when an activity transforms some material from a nonpollutant into a pollutant." *Deaton*, 209 F.3d at 335. The court then pointed out that the earth and vegetable matter that was removed from the wetland became "a statutory pollutant and a type of material that up until then was not present on the [defendants'] property." *Id.* at 335. The court recognized the important difference between soil and vegetation in its natural state and in its disturbed state when it held that "[i]t is of no consequence that what is now [a statutory pollutant] was previously present on the same property in the less threatening form." *Id.* at 335-36. The court then went on to find that the defendant had "added a pollutant where none had been before." *Id*. (emphasis added).

The district court ignores both EPA regulations and prior judicial precedent when it calls the distinction in *Deaton* an "imaginative piece of verbal metaphysics [which] only masks

reality." (R. at 10). The district court cites *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), and the EPA's unitary navigable water theory, to argue that it does not "matter that the defendant's actions changed the nature of some of the material from living to dead." (R. at 10). The Second Circuit distinguished the *Gorsuch* and *Consumers Power* cases by noting that they were based on deference to the EPA's position compiled by the court from "informal policy statements made and consistent litigation positions taken by the EPA over the years, primarily in the 1970s and 1980s." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 490 (2d Cir. 2001). The court went on to point out that "[r]ecent Supreme Court cases emphasize that such agency statements do not deserve broad deference of the sort accorded by the *Gorsuch* and *Consumers Power* courts." *Id.*

The district court found that Bowman used bulldozers to level and push vegetation into windrows, where they were then burned. (R. at 4). He then dug trenches, filling them with vegetation and ash, and drained the leveled field by forming a wide ditch. (R. at 4). Because Bowman's activities were nearly identical to those in the Fifth Circuit *Avoyelles* case and very similar to the above cases in the Second, Fourth, Seventh, and Ninth (affirmed by the U.S. Supreme Court) Circuits, this Court should recognize the overwhelming trend among courts that such activities constitute the addition of a pollutant in violation of the CWA.

C. The District Court Misapplied the EPA's "Unitary Navigable Waters" Theory by Incorrectly Applying it to Dredged or Fill Material that Did Not Already Exist in the Waters of the United States.

Even ignoring the recent Supreme Court rulings cited by the Second Circuit and the reasoning in the above circuits, Bowman's activities – and the similar land clearing activities held to be addition in the above cases – are distinguishable from the activities in *Consumers Power Co.* In *Consumers Power Co.*, live fish entered the defendant's power plant from a reservoir and a mixture of live and dead fish were discharged into Lake Michigan. *Consumers Power Co.*, 862 F.2d at 582. The biological

material was already in the waters of the United States regardless of its status as live or dead. *Id.* The root and soil material that Bowman dug up and moved around were already part of those waters, much like the fish. However, Bowman's land clearing activities also took vegetation that was above the soil, not physically dispersed in the waters of the United States, and added it to those waters. (R. at 4). In other words, the fish in *Consumers* and the roots and soil here were already interspersed with the water of the wetland. Moving those materials around may constitute dredging and redeposit, but such would not displace more water. On the other hand, the vegetation that previously had been entirely above the water would displace more water when added to the wetland, falling squarely within the EPA's definition of addition of fill material by replacing a portion of the water with dry material and changing the bottom elevation of the water. 33 C.F.R. § 323.2(e)(1).

Furthermore, Bowman did not simply change the status of the plant material from living to dead, but chemically and physically changed the material by burning it into ashes. (R. at 4). The charred remains of plant materials contain "[t]race amounts of heavy metals such as lead, cadmium, nickel and chromium" and a considerable amount of calcium carbonate, which, as ash, "increases soil alkalinity" and can be harmful depending on the soil and plant composition. Rosie B. Lerner, *Woodash in the Garden*, Purdue University (Nov. 16, 2011), http://www.hort.purdue.edu/ext/woodash.html. This ash material simply did not exist prior to Bowman's activities and was clearly added to the wetlands, changing the physical and chemical characteristics of the wetland. Consequently, it would run counter to the CWA's purpose of "[r]estoration and maintenance of chemical, physical and biological integrity of Nation's waters" for this Court to exempt Bowman from a Section 404 permit. 33 U.S.C. § 1251(a). Doing so would strip NUDEP of its ability to determine the appropriateness of Bowman's actions given the physical, chemical, and biological complexities of wetlands.

CONCLUSION

For the foregoing reasons, NUDEP respectfully requests that this Court both affirm and reverse its grant of summary judgment. Because NUWF has demonstrated an actual injury,

the lower court improperly decided that NUWF does not have standing to challenge Bowman's violation of CWA Section 404. The district court properly held under *Gwaltney* that all of Bowman's violations were wholly in the past for the purposes of subject matter jurisdiction. Similarly, in its grant of summary judgment, the lower court correctly determined that NUDEP's substantive and procedural prosecution of Bowman met the standards of diligent prosecution as to bar NUWF's suit. Finally, this Court should reverse the lower court's grant of summary judgment to Bowman and find that he violated the CWA by adding pollutants to his wetland without a permit.