Team 49

C.A. No. 13-1246

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION WILDLIFE FEDERATION,

Appellant,

vs.

NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Intervenor-Appellant,

vs.

JIM BOB BOWMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION
THE HONORABLE ROMULUS N. REMUS, DISTRICT JUDGE

BRIEF OF INTERVENOR-APPELLANT NEW UNION DEPARTMENT OF ENVIRONMENTAL PROTECTION.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

RULES

REGULATIONS

UNITED STATES SUPREME COURT CASES

CIRCUIT COURSE CASES

DISTRICT COURT CASES

JURISDICTIONAL STATEMENT

This is an appeal from a final Order entered on June 1, 2012 by the Honorable Romulus Remus of the District Court for the District of New Union. The District Court had jurisdiction to hear the case pursuant to 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702. The United States Court of Appeals has jurisdiction to review appeals from any final decisions of the District Court for the District of New Union. 28 U.S.C. § 1291 (2006). On September 14, 2012, this Court granted the petitions for review filed by the New Union Wildlife Federation (hereinafter "NUWF") and the New Union Department of Environmental Protection (hereinafter "NUDEP").

STATEMENT OF THE ISSUES

I. An organization has standing to bring suit on behalf of its members if it alleges that its members would have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Organizational members have standing to sue when they suffer an injury in fact, the defendant's actions are fairly traceable to the injury, and the court can redress that injury. Does the injury caused by the Jim Bob Bowman's (hereinafter "Bowman") destruction of the wetland give NUWF standing to sue?

II. § 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365 (2006), requires that alleged violations be continuing or ongoing in order to confer subject matter jurisdiction to the district court. Bowman's land clearing activities ceased on July 15, 2012, and he entered into an agreement with the NUDEP to not resume them. Does the continued presence of the dredged and fill material in the former wetland constitute a continuing or ongoing violation under § 505, id., of the CWA?

III. § 505(b)(1)(B), id., bars a citizen suit if the state is diligently prosecuting a civil suit to require compliance with the statute. NUDEP commenced a civil action in a district court, and filed with the court a consent decree requiring Bowman to cease further violations of § 404, 33 U.S.C. § 1344, and take steps to preserve other areas of wetlands on and around his property. Does the NUDEP's diligent prosecution of Bowman bar NUWF's citizen suit?

IV. In creating a drainage ditch, Bowman moved dredge and fill material from one part of a wetland adjacent to navigable water to another part of the same wetland. Do Bowman's actions amount to a violation of §§ 301(a) and 404 of the CWA, 33 U.S.C. §§ 1311(a), 1344?

STATEMENT OF THE CASE

On July 1, 2011, NUWF sent a notice of intent to sue Bowman under § 505 of the CWA, 33 U.S.C. § 1365, to Bowman, the Environmental Protection Agency ("EPA"), and the State of New Union, via NUDEP. Record ("R.") at 4. NUDEP contacted Bowman soon after and sent him a notice that he had violated state and federal law by clearing his land. Id. Bowman entered into a settlement agreement with NUDEP under which he agreed not to clear more wetlands on his property. Id. He agreed to convey a conservation easement on his property adjacent to the Muddy River, plus a 75 foot buffer zone between the cleared area and the uncleared portion of his property, to NUDEP. Id. The easement requires Bowman to keep the area in its natural state, construct an artificial wetland as a buffer zone, and allow the public to access the strip of land. Id. This agreement between NUDEP and Bowman was incorporated into an order, which Bowman consented to on August 1, 2011. Id. NUDEP has the authority to issue these administrative orders under a state statute identical to §§ 309 (a) and (g) of the CWA, 33 U.S.C. § 1319(a),(g). R. at 4.

On August 10, 2011, NUWF filed an action under the CWA § 505, 33 U.S.C. § 1365, against Bowman for clearing and filling wetlands without a permit, in violation of §§ 301(a) and 404 of the CWA. 33 U.S.C. §§ 1311(a), 1344. NUDEP intervened. R. at 5. NUWF and Bowman filed cross motions for summary judgments. Id. Bowman's motion for summary judgment was granted. NUWEF and NUDEP appeal. Id.

STATEMENT OF THE FACTS

The Bowman Property

Jim Bob Bowman owns one thousand acres of land adjacent to the Muddy River, near Mudflats, New Union. R. at 3. Bowman's property includes 650 feet of shoreline on the Muddy River, and the entire property is located within the 100-year flood plain of the river. Id. Parts of his property flood each year, and the property is covered with trees and vegetation characteristic of wetlands. Id. The parties have agreed that Bowman's property constitutes a wetland, per the U.S. Army Corps of Engineers' ("Corps") Wetlands Determination Manual. R. at 3-4.

The Disputed Land Clearing Operation

On June 15, 2011, Bowman began clearing a portion of his land, using bulldozers to knock down trees, level vegetation, and push the fallen trees and vegetation into windrows to dry. R. 4. Bowman proceeded to burn the windrows and push the ashes into a trench he had created using the bulldozer. Id. The cleared field was then leveled by pushing soil from high portions into the trenches and low lying areas. Id. Bowman then created a wide ditch to drain the field into the Muddy River. Id. The work was completed on July 15, 2011. Bowman left a 150 foot strip of land adjacent to the Muddy River to be cleared after it had drained, because it was too saturated to allow for work to be completed by the bulldozer. Id.

STANDARD OF REVIEW

In evaluating questions of law, this court should review the lower court's determinations *de novo.* Summary judgment is proper only when there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Supreme Court explained in Anderson v. Liberty Lobby, that the existence of a mere "scintilla of evidence" will be insufficient to survive a motion for summary judgment. Instead, there must be "evidence on which the jury could reasonably find for the plaintiff." 477 U.S. 242, 252 (1986). Applying this standard requires the court to examine both the "caliber" and "quantity" of the Plaintiff's evidence. Id. at 254.

SUMMARY OF THE ARGUMENT

Plaintiffs suffered injury in fact when Bowman's CWA Violation injured their enjoyment of activities on the Muddy River. The District Court erroneously excluded the Muddy River from its characterization of the area affected by Bowman's violation; waterways connected to wetlands are part of the affected area when impacted by CWA violation. Therefore, the District Court's decision to deny standing for NUWF should be reversed.

The District Court correctly determined that there is no subject matter jurisdiction over this case because Bowman's violation is wholly past. In Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 57 (1987), the Supreme Court held that CWA citizen suits cannot be based solely on 'wholly past' violations. In the present case, Bowman ceased his dredge and fill activities on June 15, 2011, and entered into a consent decree with NUDEP. Because Bowman has wholly ceased his violative activities, there is no subject matter jurisdiction.

NUDEP commenced an enforcement procedure against Bowman for his violation of the CWA under a state statutory scheme that is comparable to the CWA. The consent order that NUDEP entered into with Bowman constitutes "diligent prosecution" because it requires him to construct wetlands on a portion of his property and convey an easement for another portion. These remedies are sufficient in light of the deference that is due to NUDEP's determinations. Because the consent decree meets the three requirements of Section 501, NUDEP has "diligently prosecuted" Bowman's violations and NUWF is barred from bringing a citizen suit.

Bowman's land clearing activities added a pollutant to his property within the plain meaning of the CWA because the Act's relevant provisions allow for the "addition" of a pollutant without the addition of foreign material. The District Court improperly applied EPA's interpretation of "addition" in the context of Section 402 to Section 404. In doing so, the District Court ignored multiple canons of statutory construction as well as EPA's position on the matter.

ARGUMENT

I. STANDING FOR THE PLAINTIFFS ARISES FROM INJURY TO INTERESTS IN THE MUDDY RIVER CAUSED BY DEFENDANT'S CWA VIOLATION

NUWF has standing to file suit against Bowman and NUDEP. Article III standing is the only disputed element for organizational standing, as the elements of individual member participation and germaneness to organizational purpose are not contested here. In order to satisfy the Constitutional requirements of standing, a plaintiff must show: (1) injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged action by the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). When considering a motion to

dismiss for lack of standing, the evidence of the non-moving party is to be believed and all reasonable inferences drawn in that party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

The District Court erred in finding that pollution of the Muddy River did not create an injury in fact sufficient to confer standing in this case. The Court below impermissibly confined its "injury in fact" analysis to the dredged and cleared portion of Bowman's property. However, Bowman's wetland and the Muddy River are both physically and hydrologically connected, and the impact of Bowman's actions thus extends beyond the field located on his property. As Bowman filled his wetland property, the dredged wetland drained into the Muddy River via a ditch dug by Bowman, and the wetland's pollutant absorbing qualities were compromised. R. at 4, 6. These activities impaired the water quality in the Muddy River, causing injury to the NUWF members' legally cognizable aesthetic and recreational interests. In light of the injuries to Plaintiff's interests, NUDEP requests that the District Court's denial of standing be reversed.

A. Plaintiffs suffered injury in fact to their recreational and aesthetic interests in the Muddy River.

For environmental plaintiffs, injury in fact is met when plaintiffs "use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.'" Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 183 (2000) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)). The Muddy River is part of the area affected by Bowman's activities due to the hydrological connection between the Muddy and Bowman's property and pollution of the River's waters caused by Bowman's activities.

1. The affected area includes the portion of the Muddy River affected by Bowman's dredging activities.

For purposes of CWA cases, the affected area includes not only the waterway directly subject to an unlawful discharge, but also other waters and tributaries that are affected by pollution. See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs., 645 F.3d 978, 980-89 (8th Cir. 2011) (extending the affected area beyond Defendant's wetland to highway, river, and lake nearby); Natural Res. Defense Council, Inc. v. Watkins, 954 F.2d 974, 978 (4th Cir. 1992) (considering the effects to the entire Savannah River basin from activities occurring solely within Defendant's wetland); Gulf Restoration Network v. Hancock Cnty. Dev., LLC, 772 F. Supp. 2d 761, 765 (S.D. Miss. 2011) (including the nearby Bayou Maron and its tributary in the area affected by wetland dredging). Because the Muddy River and Bowman's wetland are contiguous waterways, R. at 3, Bowman's CWA violation polluted the Muddy River's waters. Therefore, both Bowman's wetland and the Muddy River should be considered part of the affected area for injury in fact analysis.

The record demonstrates that the Muddy River and Bowman's property are hydrologically connected in multiple ways. First, Bowman dug a drainage ditch across the length of his property. R. at 4. The ditch drains water from Bowman's cleared field, which had been full of dredged spoil and burned vegetation remains, directly into the Muddy River. Id. Second, portions of Bowman's property are regularly inundated when the river is high, washing biological material into the River as it recedes. See id. at 3. Finally, before Bowman drained his property, it had served as an ecological filter to the Muddy River, absorbing pollutants and sediment from the River's waters. Id. at 6. Due to the hydrological link between Bowman's property and the Muddy, Bowman's illegal land clearing activities affected portions of the Muddy River that NUWF members use for aesthetic and recreational activities.

The District Court's analysis erroneously restricts the affected area to the land on which dredge and fill activities directly took place. Id. at 6 (finding that the "only direct injury" related to illegal frogging on Bowman's property). This limited view of the affected area ignores the hydrological link between river and wetland. It is true that plaintiffs must show that they use the area "affected by the challenged activity," not an area "in the vicinity" of it. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566 (1992). However, the Supreme Court found in Laidlaw that the affected area for CWA actions may extend well beyond the point of discharge. 528 U.S. at 182. When applied to § 404 CWA actions, the affected area may include other areas and bodies of water that are impacted by challenged activity on the wetland property. See, e.g., Watkins, 954 F.2d at 980-81 (holding that destruction of a wetland affected water and wildlife in the nearby Savannah river); Gulf Restoration, 772 F. Supp. 2d at 765 (dredging wetland caused injury in fact to aesthetic interests in an adjacent river and its tributary). Here, as demonstrated by the record, NUWF members have extensive interests in the Muddy River, and those interests are harmed by pollution from Bowman's violation. This Court should follow the extensive case law in this area and find that, because the NUWF's individual members are recreationally and aesthetically invested in the Muddy River, they have suffered an injury in fact.

In Watkins, the 8th Circuit considered a hydrologically connected wetland and river similar to the one at issue here. Although the plaintiffs could not establish harm from a direct discharge into the river, they pointed out that the defendants had compromised the wetland's roles in absorbing organic material and providing feeding grounds for fish. 954 F.2d at 980. The court held that compromise of the wetland's benefits to the connected river injured the plaintiffs' interests. Id. The principal case involves injury to the type of ancillary waterway benefits that were highlighted by the Watkins court. Specifically, NUWF members testified to the wetland's

"valuable functions in maintaining the integrity of rivers," which include "acting to absorb sediment and pollutants." R. at 6. Plaintiffs cite the loss of those functions as a reason for the increase in pollution. Id. In light of facts presented by the Plaintiffs and § 404 jurisprudence, the Court should acknowledge the hydrological connection and effects of wetland disruption by including the Muddy River in the affected area.

2. Increased water pollution in the Muddy River, caused by Bowman's dredging and filling Activities, injures NUWF member interests.

Because the Muddy River is connected to Bowman's wetland, Bowman's landclearing activities impaired the river's water quality. The Plaintiffs observed that water in the Muddy became increasingly polluted after Bowman's CWA violation. R. at 6. When plaintiffs use the affected area, observation of polluted water is sufficient to satisfy injury in fact. See, e.g., Laidlaw, 528 U.S. at 181 (standing for organization member who noted the river "looked and smelled polluted"); Pub. Interest Res. Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 71 (3d Cir. 1990) (recognizing injury in fact when organization member was offended by brown color and bad odor of water body); Gulf Restoration, 772 F.Supp.2d at 766 (finding injury to recreational interests because, *inter alia,* the "lighter color fill material can be seen streaming through the dark clear waters . . . making them uglier and less healthy looking"). Testimony of observed water pollution does not need to be accompanied by scientific proof of water contamination because the "relevant showing for Article III standing . . . is not injury to the environment but injury to the plaintiff." Laidlaw, 528 U.S. at 169. Moreover, the fear of injury is sufficient to confer standing in environmental cases. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 392 (4th Cir. 2011).

NUWF members provided testimony showing that Muddy River water quality was impaired, causing injury to their aesthetic and recreational interests. The members "fear[] the

Muddy is more polluted as a result" of Bowman's activities, and affiant Dottie Milford testified that the "Muddy looks more polluted to her than it did prior to Bowman's activities." Id. Gulf Restoration provides a pertinent example of when illegal dredging causes an injury in fact. 772 F. Supp. 2d at 766-67. The defendant in Gulf Restoration engaged in unpermitted dredge and fill activities, which caused "lighter color fill material" to stream into a river where the plaintiffs enjoyed bird watching and canoeing. Id. at 766. The waters were then "uglier and less healthy looking," thereby injuring the plaintiffs' recreational interests. Id. at 767. The present case is markedly similar, as the NUWF members "often" picnic, boat and fish along or on the Muddy River. R. at 6. Those activities, which are legally recognized aesthetic and recreational interests, were injured by the observation of unsightly, polluted water.

Plaintiffs have presented facts showing that they "use the affected area, and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." See Laidlaw, 528 U.S. at 183. The connection between Bowman's wetland and the Muddy River justifies the Muddy's inclusion in the affected area, and the Plaintiffs present facts showing that they often use the River for recreation. The Supreme Court in Laidlaw recognized that personal observation of polluted water was sufficient to establish injury, and the Plaintiffs have satisfied that standard with the testimony of Dottie Milford. Therefore, Plaintiffs' testimony demonstrates injury in fact.

B. Injuries are fairly traceable to Bowman because he created ash and loose spoil and drained it into the Muddy River.

The injury suffered by the defendants may be fairly traced to Bowman, either from the ditch that drained his wetlands into the Muddy River or through his disruption of wetlands crucial to sediment absorption. When supporting a claim that injury is "fairly traceable" to the

activity complained of, plaintiffs need not show scientific evidence of added pollution from a defendant's property. Powell Duffryn, 913 F.2d at 72. Rather, a showing that there is a "substantial likelihood" that the defendant contributed to the plaintiff's injury will suffice. Id. The record shows that the Defendant created a ditch that ran from the back of his property to the front, draining a wetland full of dredged spoil and the ashes of vegetation remains into the Muddy River, thereby causing water pollution that injured Plaintiff interests. See R. at 4. Bowman also cleared wetlands that had played a role in absorbing sediment, further contributing to water pollution. Id. Bowman's activities introduced pollution into the Muddy and removed a means for absorbing pollutants; each of those activities makes it substantially likely Bowman contributed to NUWF member injury.

Beyond the drainage ditch, the mere filling of Bowman's wetland could itself satisfy traceability. NUWF members attested to the role of wetlands in "absorb[ing] sediment and pollutants." R. at 6. Bowman eliminated those characteristics from his property by converting the vast majority of his wetland into a dry field. R. at 4, 6. Without Bowman's wetland to absorb sediment and pollution, some of those materials will remain in the River, impairing water quality to the detriment of Plaintiff's aesthetic and recreational interests. Injury to NUWF members' interests in the Muddy can therefore be fairly traced back to Bowman's illegal activities, either directly through the dredging and filling of the wetland, or by runoff from the property via the drainage ditch.

C. Return of Bowman's property to its prior condition and assessment of civil penalties would redress NUWF members' injuries.

The standard for redressibility in environmental cases is relatively low, as a mere reduction in future harm is sufficient. Massachusetts v. E.P.A., 549 U.S. 497, 525-26 (2007). For

CWA actions, redressibility does not require that waters be returned to "pristine condition;" rather, any reduction in pollution will suffice. Powell Duffryn, 913 F.2d at 73. Plaintiffs request an injunction requiring Bowman to return his wetland to its prior condition, which would reinstate the absorptive characteristics that reduce sediment and pollution in the Muddy. Moreover, the Supreme Court has commented that the deterrent effect of imposing civil penalties redresses fears of future pollution. Laidlaw, 528 U.S. at 185-86. Each of the forms of relief thus meets the standard for redressibility.

D. Plaintiff's injuries from the Defendant's actions justify reversal of the District Court's denial of standing.

Plaintiffs have presented facts to support each of the three prongs of the test for Article III standing: injury in fact, causation, and redressibility. The "affected area" includes connected waterways impacted by CWA violation, and injury to plaintiff interests therein may satisfy injury in fact. Bowman's illegal activities polluted the Muddy River, causing injury to the NUWF members' aesthetic and recreational interests. These interests may be redressed by injunction or civil penalty. Therefore, NUWF members satisfy Article III standing requirements, and the District Court's denial of standing should be reversed.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT BOWMAN'S VIOLATION IS 'WHOLLY PAST,' AND, THEREFORE, SUBJECT-MATTER JURISDICTION UNDER § 505(A) OF THE CWA IS LACKING.

Section 505(a)(1) of the CWA grants citizens the right to bring civil actions against any person "alleged to be in violation of" the pollution discharge permit requirement. 33 U.S.C. § 1365(a)(1). In order for a plaintiff to satisfy federal subject matter jurisdiction under § 505(a)(1) of the CWA, the citizen must "allege a state of either continuous or intermittent violation- that is, a reasonable likelihood that a past polluter will continue to pollute in the future." Gwaltney of

Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 57 (1987). It is the burden of the plaintiff to prove that a court has jurisdiction to hear the claims at issue. Id. The Supreme Court has specifically ruled on this issue, and has held that there is no subject matter jurisdiction under § 505(a) of the CWA unless at the time of the suit the defendant is "in violation" of the statute. Id. The only exception is where the plaintiff makes a good faith allegation that the defendant will resume the violations. Id. at 67. The District Court correctly determined that Plaintiffs' claim was barred by the Supreme Court's holding in Gwaltney because the violating action is wholly past; Plaintiff has failed to make a good faith allegation that Bowman will resume his illegal activity; and the continuing *effects* of the activity do not grant jurisdiction under the CWA.

A. The District Court correctly held that there is no subject matter jurisdiction under Gwaltney because Bowman's illegal actions are wholly past.

In the present case, Bowman completed work on his land on July 15, 2011. Since that time, Bowman has not violated the CWA. In fact, he entered into an agreement with NUDEP not only to refrain from clearing any more land, but also to convey a portion of his private property to NUDEP to be kept as a public conservation easement. Plaintiff has made no good faith allegation that Bowman has continued to violate the CWA by clearing more land. Defendant did sow the previously cleared land, but this does not qualify as a violation of § 404. R. at 7. Plaintiff has made no good faith allegation that Bowman is reasonably likely to violate the CWA again by clearing more land and depositing the dredged material elsewhere on the wetland. For this reason, the District Court correctly determined that the violation in this case was 'wholly past,' and correctly granted Defendant's motion for summary judgment on this issue.

In Gwaltney, the Supreme Court clearly held that the alleged violation itself must be ongoing. 484 U.S. at 67. The Court specifically found that the language of the statute, "alleged to

be in violation," focuses on looking at violations in the present, not the past. Id. at 62-63. The crucial element that creates a violation under § 404 is the *discharge* of dredged or fill material into waters of the United States. Under Gwaltney, for the court to have subject matter jurisdiction, Bowman would need to be continually *discharging* dredged material into the wetland. Because Bowman has not discharged dredged material into the wetlands on his property since July 15, 2011, the District Court was correct in holding that the Defendant's actions were wholly past, and the federal court does not have subject matter jurisdiction.

B. The District Court correctly granted Defendant's motion for summary judgment because Plaintiffs failed to make a good faith allegation that there was a continuing violation.

The Supreme Court unanimously held in Gwaltney that § 505(a) of the CWA, the citizen suit provision, does not confer federal jurisdiction over citizen suits for wholly past violations. Id. at 57. However, the Court also held that where citizen-plaintiffs make a "good faith allegation of continuous or intermittent violations," federal jurisdiction will attach. Id. at 64.

In interpreting Gwaltney, the Second Circuit has held that "once a defendant has come forward with evidence showing . . . [that] it is unlikely defendant will continue its illegal discharges- plaintiff must demonstrate more than good faith." Connecticut Coastal Fisherman's Ass'n v. Remington Arms Co., 989 F.2d 1305, 1312 (2d Cir. 1993). At that point, a plaintiff "must present instead evidence from which a factfinder could find a likelihood of continuing violation." Id. Here, Bowman has made a showing that he has ceased all activity that is violative of the CWA, and that, if he were to resume the land clearing activities, he would be in violation of a voluntarily signed order with NUDEP. Because Bowman has shown that it is unlikely that he will violate the order, the Plaintiff must assert evidence showing a likelihood of a continuing violation. Plaintiff has failed to provide evidence that there is any likelihood whatsoever that he

will resume his illegal land clearing operations in the future. In Remington, the Department of Environmental Protection issued an order requiring Remington to cease all discharges of lead shot into Long Island Sound, similar to the order issued to Bowman by NUDEP. Id. at 1309. The Second Circuit found that because there was no evidence that Remington had violated its order, "no fair-minded juror could find that there was a likelihood . . . that Remington would discharge lead shot in the future." Id. at 1312. Similarly, Bowman signed a consent decree which required that he cease all illegal land clearing activities, and there is no evidence that he has since violated that order. R. at 7. The Remington court went a step further to state that there is a possibility that the Gun Club *could have* violated its DEP order because the order didn't specify that the Gun Club must cease all activity. Id. Here, the NUDEP went one step further than the DEP did in Remington: they made Bowman sign an order stating that not only would he cease his land clearing activity, but that he would take steps on other parts of his land to ensure public enjoyment of the wetlands. R. at 4. This Court should affirm the District Court's holding because Bowman has not violated his order yet; as stated by the Second Circuit, no "fair-minded juror" could find that there is a likelihood that Bowman would violate the order in the future.

The Ninth Circuit has used a standard similar to that applied by the Second Circuit in Remington. In Sierra Club v. Union Oil Co. of Cal., 853 F.2d 667, 671 (9th Cir. 1988), the Ninth Circuit, in applying Gwaltney, required plaintiffs to "prove ongoing violations either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." The court further stated that sporadic violations continue to be ongoing "until the date when there is no real likelihood of repetition." Id. If the risk of

defendant's continued violation has been "completely eradicated" by the time the suit is filed, the violation is wholly past. Id.

Applying the Ninth Circuit's test to this case, Plaintiff fails to meet its burden. Plaintiff has not shown, nor alleged, any "sporadic" illegal discharges after July 15, 2011. The Plaintiff does not dispute that the last time Bowman discharged dredged material into the wetland was on July 15, 2011. Similarly, Plaintiff does not allege a "reasonable likelihood" that Bowman will discharge dredged material into the wetland again some time in the future. The Plaintiffs have alleged only past illegal discharges without a proper permit. While it is not impossible for Bowman to commit an illegal discharge in the future, the signed consent decree makes it highly unlikely that Bowman will violate that order and submit himself to further penalty in the future. Plaintiff will likely argue that Bowman left a strip of land adjacent to the Muddy to clear after it had drained because he had been unable to clear it with a bulldozer while it was saturated, and that, in the future, he will clear that land contrary to the terms of the NUDEP decree. As a term of the consent decree Bowman entered into with NUDEP, Bowman conveyed to the Agency a conservation easement on the "still wooded part of his property adjacent to the Muddy . . . plus an additional 75 foot buffer zone." R. at 4. Bowman is no longer in full ownership of this strip of land, and therefore it is very unlikely that Bowman will clear it in the future. When it is impossible for the defendant to commit a present violation because of a land transfer, there can be no ongoing violation because "there is no real likelihood of repetition" of the violation. Union Oil, 853 F.2d at 671. Therefore, following Gwaltney, Remington, and Union Oil, the District Court correctly held that there is no subject matter jurisdiction under § 505(a) of the CWA because Plaintiff has failed to make a good faith allegation that the violations will continue in the future.

C. The District Court correctly determined that subject matter jurisdiction under § 505(a) is established by continuous violations, not continuing effects, of a wholly past violation.

Plaintiff asserts that § 404 violations are continuing until the fill material is removed, which is distinguishable from the § 402 violations which are addressed in Gwaltney. Plaintiff's argument, however, is inherently flawed. Section 404 is violated when dredged or fill material is *discharged* into waters of the United States. 33 U.S.C. § 1344. Plaintiff's argument is based not upon a discharge, but rather upon the *effects* of the wholly past discharge. Continuing residual effects of a prior discharge do not amount to a continuing violation so as to provide jurisdiction. Aiello v. Town of Brookhaven, 136 F.Supp.2d 81, 120 (E.D.N.Y. 2001); Wilson v. Amoco Corp., 33 F.Supp.2d 969, 975 (D. Wyo. 1998). The District Court correctly found that this interpretation does not comport with the language of the CWA or the Supreme Court's holding in Gwaltney.

In City of Mountain Park, GA v. Lakeside at Ansley, LLC, 560 F.Supp.2d 1288 (N.D.Ga. 2008), the Plaintiffs made a similar argument to the one Plaintiff makes in the case at hand. The Mountain Park court examined a line of cases that holding that each day that a pollutant remains in a wetland without a permit constitutes an additional day of violation. See e.g., Sasser v. EPA, 990 F.2d 127, 129 (4th Cir. 1993); 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); North Carolina Wildlife Fed'n v. Woodbury, 1989 WL 106517, at *2 (E.D.N.C. 1989). These cases rely mainly on Justice Scalia's concurrence in Gwaltney, rather than the majority opinion, for their precedence. Id. Justice Scalia stated in his Gwaltney concurrence that "[w]hen a company has violated an effluent standard or limitation, it remains, for purposes of § 505(a), in violation of that standard or limitation so long as it has not put in place remedial measures that

clearly eliminate the cause of the violation." 484 U.S. at 69 (internal quotations omitted). The courts rely incorrectly on this concurrence to avoid applying Gwaltney as it was intended, which was to prevent citizen suits from being brought under the CWA for wholly past violations. The majority does not specify that the opinion is only applicable to § 402 violations, but rather it suggests that the Gwaltney standard should be applied in all citizen suits brought under § 505(a). To become precedent, the point of law must be agreed upon by a majority of the court ruling on the matter. See Maryland v. Wilson, 519 U.S. 408, 412-13 (1997) (stating that both dictum and language of a concurrence do not constitute binding precedent). Mere concurrence in the result is insufficient to establish precedent. Id. A concurring opinion, while persuasive, is not binding. See United States v. Reynard, 473 F.3d 1008, 1021 (9th Cir. 2007). Therefore, the District Court was correct in using the Gwaltney majority holding to find that Plaintiff lacks subject matter jurisdiction under § 505(a).

The District Court's holding that Plaintiff has not established subject matter jurisdiction should be upheld because Plaintiff asserted only a wholly past violation; Plaintiff has failed to make a good faith allegation of a continuing violation; and Plaintiff has erroneously based its argument on continuing effects of a wholly past violation.

III. BECAUSE NUDEP HAS DILIGENTLY PROSECUTED BOWMAN'S VIOLATION OF THE CWA, NUWF'S CITIZEN SUIT IS BARRED.

Section 501(b)(1)(B) of the CWA bars citizen suits if the "State has commenced and is diligently prosecuting a civil . . . action in a court of the United States" to redress the CWA violation(s) in question. 33 U.S.C. § 1365(b)(1)(B). Courts have held that citizen suits will be precluded under the "diligent prosecution bar" if three requirements are met: (1) the state must have "commenced" an enforcement procedure against the polluter; (2) the state must be

"diligently prosecuting" the enforcement proceedings; and (3) the state's statutory enforcement scheme must be "comparable" to the federal scheme. McAbee v. City of Fort Payne, 318 F.3d 1248, 1251 (11th Cir. 2003). The District Court correctly ruled that NUDEP diligently prosecuted Bowman's illegal land clearing activities, as its actions meet each of the three requirements. NUDEP's consent decree with Bowman constitutes an enforcement procedure and New Union's state environmental statute is virtually identical to the federal CWA scheme, thus meeting the comparability requirement. With respect to the only contested issue – the "diligent prosecution" prong – NUDEP also acted appropriately. While the Department did not levy a penalty on Bowman, it forced Bowman to transfer a conservation easement to NUDEP, which will substantially benefit the local community. Relevant case law unanimously holds that an Agency's settlement decisions are due substantial deference and that non-monetary settlement terms, such as a conservation easement, are appropriate in lieu of penalties. For these reasons, NUDEP asks that this court affirm the District Court's ruling with respect to Section 501's citizen suit bar.

A. NUDEP's consent decree constitutes "diligent prosecution" of Bowman's violations.

While it was within NUDEP's statutory authority to issue a harsher penalty for Bowman's CWA violation, the terms of its consent decree were nonetheless reasonable. Agencies are granted very significant discretion in promulgating the terms of their settlements, and only gross deviations from reasonability will justify a finding that the Agency was not "diligently prosecuting" a violation. Friends of Milwaukee's Rivers v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 761 (7th Cir. 2004). Moreover, courts have repeatedly held that monetary penalties are not required for an agency's prosecution to be "diligent." Id. at 762. For

these reasons, the Court should find that NUDEP "diligently prosecuted" Bowman's illegal land clearing activities.

1. States are given broad discretion to craft remedies they believe will be effective.

Agency enforcement decisions are given significant deference under the CWA § 501. Friends of Milwaukee's Rivers, 382 F.3d at 761; N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 558 (1st Cir. 1991); Williams Pipe Line Co. v. Bayer Corp., 964 F. Supp. 1300, 1334 (S.D. Iowa 1997). The plaintiffs have the burden of proving that New Union's prosecution is not diligent. Community of Cambridge Environmental Health and Cmty. Dev. Grp. v. City of Cambridge, 115 F. Supp. 2d 550, 553 (D. Md. 2000). "This burden is a heavy one because diligence on the part of the enforcement agency is presumed." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 890 F. Supp. 470, 487 (D.S.C. 1995). Illustrating the extent of this deference, one court explained "the court must presume the diligence of the state's prosecution of a defendant absent persuasive testimony that the state has engaged in a pattern of conduct in its prosecution that could be considered dilatory, collusive, or otherwise in bad faith." Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 777 F. Supp. 173, 183 (D. Conn. 1991).

Courts have held that a high level of discretion is especially important when EPA enforces the Act through consent orders. Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007). The Supreme Court has explained that consent orders are vital to EPA's enforcement strategy and judicial second-guessing of an order's validity can undermine EPA's ability to use them:

> Suppose . . . . that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. 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 of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 60-61 (1987). Consent orders are only attractive to regulated parties when EPA is able to make concessions. For these reasons, the CWA does not require the government prosecution to be "far-reaching or zealous" – "it requires only diligence." Karr, 475 F.3d at 1197. As the Sixth Circuit stated, the CWA permits citizens to intervene "where EPA has 'failed' to [act], not where the EPA has acted but has not acted aggressively enough in the citizens' view." Ellis v. Gallatin Steel Co., 390 F.3d 461, 477 (6th Cir. 2004).

2. NUDEP's prosecution may be "diligent" without imposition of a penalty.

NUDEP is not required to include administrative penalties in its consent order in order to "diligently prosecute" Bowman's CWA violation. While the penalty amount is one of many factors that courts consider when judging the sufficiency of an agency's enforcement proceeding under CWA § 501, an agency's decision to forego a penalty is far from controlling. In Friends of Milwaukee's Rivers, the Seventh Circuit "easily disposed of" the plaintiffs' argument that "diligence" requires penalties, and held that "the government may choose to forego civil penalties in favor of securing expensive capital improvements." 382 F.3d at 762. The government's right to seek civil penalties far below the statutory maximum or forego penalties altogether without necessarily failing to "diligently prosecute" CWA violations is well-established in every circuit. See, e.g., Karr v. Hefner, 475 F.3d 1192, 1197 (10th Cir. 2007); Atlantic States Legal Found. v. Tyson Foods, 682 F. Supp. 1186, 1188 (N.D. Ala. 1988), rev'd on other grounds, 897 F.2d 1128 (11th Cir. 1990); Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., 777 F. Supp. 173,185 (D. Conn. 1991), aff'd in relevant part, rev'd in part, 989 F.2d 1305 (2d Cir. 1993); Cmty. of Cambridge Envtl. Health and Cmty. Development Group

v. City of Cambridge, 115 F.Supp.2d 550, 556 (D. Md. 2000). The Court in Remington explained that judicial second-guessing of penalty amounts might "ultimately discourage out-of-court settlements between agencies and polluters, since a polluter's incentive to settle would be greatly diminished if subsequent suits were allowed." 777 F. Supp. at 186.

In the present case, NUDEP's settlement terms with Bowman are within the parameters of "diligence" set by relevant case law. As part of the consent decree, Bowman agreed to permanently convey a conservation easement for 150 feet of his property which overlooks the Muddy River. The general public will have access to this strip of land, and in order to preserve it in its natural state, Bowman also agreed to construct a 75-foot wetland buffer zone between that area and the field. As the District Court noted, constructing the wetland will be a significant initial expense and maintaining it in the future will also require an investment. R. at 8. Although the record does not contain an estimate for the expenses Bowman agreed to undertake in the consent decree, even a relatively low estimate, such as five or ten thousand dollars, would place the consent decree in line with similar settlements that have been upheld in the past. See, e.g., Cmty. of Cambridge, 115 F. Supp. 2d at 556 (upholding a settlement that required just $1,500 in penalties when the state of Maryland could have pursued $10,000 *per day* for the violation); Remington, 777 F. Supp. at 183 (upholding a settlement in which Connecticut neither imposed fines on a violator nor required compliance with an NPDES permit). In light of these cases and the significant deference accorded to NUDEP's prosecutorial decisions, the consent decree's terms constitute "diligent prosecution" even in the absence of monetary penalties.

3. NUDEP's consent decree does not exhibit the bad faith typical of prosecutions that courts found not "diligent."

Out of deference to agencies' enforcement discretion, courts have largely found "diligent prosecution" lacking only in extreme cases when the state effectively abandoned its duty to enforce the CWA. See, e.g., Conn. Fund For Env't v. Contract Planting Co., Inc., 631 F. Supp. 1291, 1293 (D. Conn. 1986). As the Contract Planting court put it, a Plaintiff can only override the presumption that the state diligently prosecuted CWA violations if it can provide "persuasive evidence that the state has engaged in a pattern of conduct in its prosecution of the defendant that could be considered dilatory, collusive, or otherwise in bad faith." Id. While NUDEP could have sought harsher penalties for Bowman's violation of the CWA, its consent decree was not so insufficient that it rises to the level of "bad faith." When compared to cases in which courts have found "diligent prosecution" lacking, it is clear that NUDEP's consent decree is a valid settlement under CWA § 501.

Friends of the Earth v. Laidlaw Envtl. Servs. provides an illustrative example of the type of state action that a court will find not to be "diligent prosecution." 890 F. Supp at 497. In Laidlaw, the plaintiffs were able to establish several procedural and substantive defects in the South Carolina Department of Health and Environmental Control's (DHEC) prosecution. DHEC filed its complaint and consent order on the very last day of the statutory sixty-day notice period, thereby limiting citizens' opportunity to comment on or contest the consent decree. Laidlaw, 890 F. Supp. at 489. Moreover, the complaint was filed at the defendant's request – solely to accommodate the defendant's desire to bar a citizen suit – and the complaint itself was written by the defendant. Id. Additionally, DHEC did not consider the economic benefit of noncompliance to the defendant when it requested a penalty of just $100,000 out of a possible $2.2 million. Id. at 491. The court ultimately found that all of these circumstances, considered together, demonstrated a failure to "diligently prosecute" the Defendant's violation. See also Atl. States

Legal Found., v. Universal Tool & Stamping Co., 735 F. Supp. 1404, 1417 (N.D. Ind. 1990) (finding no diligent prosecution where the State repeatedly bended its procedures to accommodate the defendant, including approving the consent decree in a single day when that process typically takes four to six weeks); Ohio Valley Envtl. Coal., Inc. v. Maple Coal Co., 808 F. Supp. 2d 868, 886 (S.D. W. Va. 2011) (holding that diligent prosecution requires "enforc[ing] *something*" and finding the State's prosecution invalid because it enforced neither the existing nor the modified permit, leaving the Defendant "subject to nothing.").

Unlike DHEC in Laidlaw, NUDEP did not engage in a pattern of collusive, bad-faith behavior with respect to Bowman. NUDEP promptly discovered Bowman's illegal land clearing operations after they had ceased on July 15, 2011. R. at 4. Shortly thereafter, NUDEP sent Bowman a notice of violation and began settlement negotiations. Id. NUDEP then filed a complaint against Bowman on August 10, 2011, and filed a motion to finalize the consent decree on September 5, 2011. R. at 5. In sum, NUDEP promptly and diligently responded to Bowman's violation shortly after learning of his actions. Unlike in Ohio Valley, the consent decree here does "enforce something." It requires Bowman to convey the most desirable portion of his property – the portion overlooking the water – for the public's use. It requires him to maintain that portion of the property in part by creating a year round, partially-inundated wetland at considerable initial expense. R. at 4. NUWF has not shown any collusion between NUDEP and Bowman, such as that in Laidlaw and Universal Tool. NUDEP wrote its own complaint against Bowman, and there is no evidence that NUDEP altered its normal procedures to accommodate Bowman. Without any evidence of bad faith, collusion, or dilatory tactics, NUWF's allegations boil down one issue: it believes NUDEP should have pursued harsher penalties against Bowman. However, "the mere fact that a settlement reached by the state is less burdensome to the

defendant than the remedy sought in the . . . citizen suit does not establish that the state failed to prosecute its action diligently." Laidlaw, 890, F. Supp. at 490. As such, NUWF's complaint cannot overcome the strong presumption of diligence accorded to NUDEP.

IV. BOWMAN'S ACTIONS CONSTITUTE "ADDITION" OF A POLLUTANT INTO WATERS OF THE UNITED STATES.

Section 301(a) of the CWA prohibits "the discharge of any pollutant by any person" unless authorized by a permit issued under §§ 402 or 404. 33 U.S.C. § 1311(a). Section 502(12) defines the phrase "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." The parties agree that Bowman's property is a navigable water, that the material he moved on his property is a pollutant, and that the bulldozers he used are point sources. However, the District Court held that Bowman did not "add" any pollutants to his property that were not already on his property, and that therefore the "addition" element of Section 502(12) is not satisfied in this case.

The District Court erred in holding that Bowman's land clearing activities do not constitute "addition" of a pollutant under the CWA. In reaching its conclusion, the Court relied on an interpretation of "addition" that is not supported by the plain language of the CWA, is contrary to the purpose of the CWA, and effectively reads the §404 permitting scheme out of the statute. NUDEP encourages this court to join EPA, the Corps, and the majority of Circuits that have confronted this issue by adopting NUWF's interpretation of "addition" in Section 404.

A. Under the plain meaning of the CWA, the "addition" of "pollutants" does not require the addition of foreign materials.

In finding Bowman's "outside world" and "unitary navigable waters" theories dispositive, the District Court failed to appropriately consider the contrary statutory argument advanced by NUWF and supported by United States v. Deaton, 209 F.3d 331, 335-36 (4th Cir.

2000). The relevant provisions of the CWA prohibit the addition of *pollutants* to navigable waters – they do not speak of "foreign material," or material from the outside world. 33 U.S.C. §§ 1311(a); 1362(12). As the Court in Deaton remarked, "the idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant." 209 F.3d at 335.

In the present case, Bowman may not have added material from outside of his property, but his land clearing activities transformed previously harmless material into "pollutants," as described by the Deaton Court. Bowman knocked down trees and leveled vegetation with a bulldozer. R. at 4. After arranging the vegetation remains into windrows, he burned the windrows and pushed the leftover ashes into large trenches that he had dug through his property with a bulldozer. Id. He leveled the resulting field and dug a wide ditch to drain the field into the Muddy River. Id. In sum, Bowman did not merely move soil a few feet, as the District Court suggested: he fundamentally altered the character of his property. What was once a thousand acres of wooded wetland is now a dry field. In the process of transforming his property, Bowman changed hundreds of tons of previously innocuous material, such as undisturbed vegetation, into "pollutants," which includes "biological material" like tree remains. 33 U.S.C. § 1362. Indeed, the Defendant concedes that the material he moved about his property is a "pollutant." R. at 8.

In Deaton, the Court faced a similar fact pattern and held that digging trenches across a wetland and unearthing vegetation added "dredged spoil" to the wetland, which is a listed pollutant under CWA § 502(6). 209 F.3d at 335-36. In supporting its decision, the Court stated:

> It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland *added* a pollutant where none had been before.

Id. Deaton is hardly the only decision to endorse this common-sense reading of the CWA. Nearly every jurisdiction that has confronted the issue has reached a conclusion that is consistent with Deaton's reasoning. See U.S. v. Cundiff, 555 F.3d 200, 214 (6th Cir. 2009); U.S. v. Hubenka, 438 F.3d 1026, 1034 (10th Cir. 2006); Greenfield Mills, Inc. v. Macklin, 361 F.3d 934, 947 (7th Cir. 2004); Rybachek v. U.S. E.P.A., 904 F.2d 1276, 1285 (9th Cir. 1990); Avoyelles Sportsmen's League v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501 (11th Cir. 1985), *vacated and remanded on other grounds,* 481 U.S. 1034 (1987), *readopted in relevant part,* 848 F.2d 1133 (11th Cir. 1988). The text of the CWA does not include a "foreign material" requirement for "addition," as the District Court insinuated. By transforming undisturbed vegetation on his property into "biological material," Bowman "added" "pollutants" within the plain meaning of the CWA.

B. The District Court's interpretation of "addition" is inconsistent with the CWA's purpose and would effectively read the 404 permitting scheme out of the statute.

As discussed above, Deaton and related cases endorsed NUWF's interpretation of "addition" in large part because the plain meaning of Section 502(12) allows for the addition of "pollutants" without the addition of foreign material. However, the aforementioned cases also looked beyond 502(12) to justify their holdings. They also adopted NUWF's interpretation of "addition" because it is consistent with the broader scheme of the CWA, including other provisions of Section 502, and the purpose of the CWA.

1. The District Court's interpretation of "addition" is inconsistent with the CWA's permitting scheme because it would either read § 404 entirely out of the statute or drastically narrow its applicability.

As many courts have recognized, the definition of "pollutant" in Section 502(6) precludes the District Court's reading of "addition." See United States v. Cundiff, 555 F.3d at 213. Section 502(6) defines "pollutant" to include "dredged spoil." 33 U.S.C. § 1362(6). Both the Corps' regulations and multiple courts have noted that "dredged" material is by definition material that comes from the water itself. 33 C.F.R. § 323.2 (2008); see also Avoyelles Sportsmen's League Inc. v. Marsh, 715 F.2d at 924 n. 43 (5th Cir. 1983); National Min. Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1405 (D.C. Cir. 1998). Thus, to require that "pollutants" come from outside the navigable waters at issue is to read the term "dredged spoil" out of the statute since dredged material invariably comes from *within* the navigable waters. This inconsistency not only renders language in Section 502(6) meaningless, but also undermines the entire § 404 permitting scheme, which deals exclusively with dredge and fill activities.

The District Court responded to this argument by asserting that 404 permits would still govern some projects where fill material is imported from outside the waters at issue. This is technically true under the District Court's "outside world" theory of the case, but it is entirely false under the Court's alternative holding based on the "unitary navigable waters" theory. Ultimately, under either rationale, the District Court's holding would cripple the § 404 permitting scheme and the CWA as a whole by either greatly narrowing or entirely eliminating the jurisdiction of Section 404.

a. The District Court's holding under the "outside world" theory would drastically narrow Section 404's jurisdiction and thereby render the CWA's permitting scheme wholly ineffective.

While it is conceivable that a few projects would still be subject to § 404 under the District Court's "outside world" theory, its interpretation of "addition" would *vastly* narrow the scope of the § 404 scheme beyond what Congress intended. As EPA noted in its *amicus* brief in

Greenfield Mills, the discharge of dredged materials "typically involves the excavation and deposition of the materials within the *same* water body." Brief for United States Environmental Protection Agency and Army Corps of Engineers as Amici Curiae supporting Appellees, Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004) (No. 02-1863), 2003 WL 22733948 at *5. Withdrawing and redepositing dredged material within *the same* body of water is standard procedure for dredge and fill operations. The District Court's "outside world" theory would leave this standard procedure entirely unregulated and would thus create a hole in Section 404's coverage far bigger than its remaining jurisdiction. Congress did not mean to create a permitting scheme for dredge and fill operations which would apply to almost none of those projects. EPA and the Corps agree, as they explicitly endorse NUWF's interpretation of "addition" later in their Greenfield Mill brief: "the fact that the Act defines the term "pollutant" to include "dredged spoil" . . . shows that Congress understood such [redeposit] additions to fall within the Act's coverage." Id.

b. The District Court's holding under the "unitary navigable waters" theory would read Section 404 out of the CWA.

The District Court's interpretation of "addition" based on the "unitary navigable waters" theory would have an even more extreme effect on permitting under § 404 – it would entirely eliminate the scheme. The "unitary navigable waters" theory holds that all navigable waters are treated as one water body for the purposes of the CWA. While EPA has endorsed the theory for Section 402 permitting, it has expressly declined to adopt the doctrine in the context of Section 404. See Id. By definition, dredged material *comes from* the "waters of the United States." 33 C.F.R. § 323.2. Thus, as the National Mining Court reasoned, "[s]ince dredged material comes from the waters of the United States, any discharge of such material into those waters could technically be described as a "redeposit," at least on a broad construction of that term." Nat'l

Min. Ass'n., 145 F.3d at 1405. Under the unitary navigable waters theory, even if a project to fill a navigable river used dredged material from a different river over 300 miles away, this action would be considered a "redeposit" since the theory treats all bodies of water as one. To adopt the unitary navigable waters theory in the context of § 404 is to adopt the "broad construction" referenced in National Mining and to read § 404 entirely out of the statute.

2. Under either the "unitary navigable waters" theory or the "outside world" theory, the District Court's holding runs counter to the purpose of the CWA.

Whether § 404 is vastly narrowed or entirely eliminated, the District Court's holding is clearly contrary to the purpose of the CWA. The CWA was designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). "Congress recognized the importance of protecting wetlands as a means of reaching the statutory goals." Avoyelles, 715 F.2d at 923. As the Deaton Court explained, wetlands are extremely important to the ecological health of the nation's waters:

> Wetlands perform a vital role in maintaining water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water . . . Given sufficient time, many (but not all) of these pollutants will decompose, degrade, or be absorbed by wetland vegetation . . . When a wetland is dredged, however, and the dredged spoil is redeposited in the water or wetland, pollutants that had been trapped may be suddenly released.

Deaton, 209 F.3d at 336. Redepositing activities, such as those in Avoyelles and the present case, can dramatically alter the character of a wetland. Avoyelles, 715 F.2d at 923. In fact, one need not look past Bowman's actions in this case to see the potential for redepositing to decimate the ecological functions of a wetland. Over the course of a month, Bowman transformed a wooded wetland into a dry field strictly through sidecasting and redepositing that did not incorporate fill material from outside of his property. Quite simply, the origin of the fill material is irrelevant to its effect on a wetland. As the Deaton court remarked, "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." Deaton, 209 F.3d at 336. The District Court's holding makes even less sense when one considers that using fill material from within the navigable waters at issue (i.e., redepositing) is the standard means of conducting dredge and fill operations.

C. The District Court erred in holding that EPA could not interpret "addition" differently in sections 402 and 404.

The District Court resisted NUWF's interpretation of "addition" in spite of the statutory arguments and case law outlined above by reasoning that (1) EPA endorsed a narrow understanding of "addition" in the context of Section 402 and (2) it must read "addition" to have the same meaning in Section 404 as it does in Section 402. This chain of logic errs in two crucial respects. First, the NPDES Water Transfer Rule simply does not support what the District Court claims it does. The Water Transfer Rule adopts a narrow interpretation of "addition" *in the context of Section 402*; it explicitly rejects extending that interpretation of "addition" to Section 404. The second, more fundamental error in the District Court's reasoning is that it strictly adheres to one canon of statutory construction to justify a tortured reading of the CWA when other canons strongly suggest the opposite interpretation. It is true that courts generally must read the same term used in different parts of the statute to have the same meaning. However, courts must also read statutes to make sense and to effectuate the intent of Congress. These latter canons clearly support NUWF's interpretation, as the District Court's holding would cripple the Section 404 permitting system.

1. EPA's NPDES Water Transfer Rule explicitly confines its interpretation of "addition" to Section 402; the District Court erred in applying that interpretation outside of the Rule's expressly limited scope.

The District Court correctly stated that EPA's NPDES Water Transfer Rule adopts the "unitary navigable waters" theory and a narrow interpretation of "addition." However, EPA does not endorse this construction statute-wide; on the contrary, the Rule repeatedly emphasizes that it has no impact on Section 404 permitting. In relying on the Water Transfer Rule to support its construction of "addition" in Section 404, the District Court simply decontextualized EPA's argument by unhinging it from its key limiting principle. This Court should reverse the District Court's holding and thereby respect the boundaries which EPA expressly placed on the Water Transfer Rule.

In the "Public Comment" section of the Rule, EPA directly addresses its scope. It explicitly disavows the idea that its interpretation of "addition" with respect to Section 402 may be extended to Section 404:

> Some commenters argued that the proposed rule is inconsistent with section 404 of the CWA (permits for dredged or fill material). They stated that dredged material is listed as a pollutant under section 502 of the CWA and that the proposed rule implies that dredged material never requires a permit unless the dredged material originates from a waterbody that is not a water of the U.S. EPA believes that today's final rule will not have an effect on the 404 program. The statutory definition of ''pollutant'' includes ''dredged spoil,'' which by its very nature comes from a waterbody. 33 U.S.C. 1362(6); 40 CFR 232.2; United States v. Hubenka, 438 F.3d 1026, 1035 (10th Cir. 2006); United States v. Deaton, 209 F.3d 331, 335–336 (4th Cir. 2000) . . . . Because Congress explicitly forbade discharges of dredged material except as in compliance with the provisions cited in CWA section 301, today's rule has no effect on the 404 permit program, under which discharges of dredged or fill material may be authorized by a permit. 33 U.S.C. 1344.

Id. In this passage, EPA makes it abundantly clear that the rule "has no effect on the 404 permit program." Id. The District Court responded to this language by disputing EPA's underlying reasoning: "the inclusion of 'dredged spoil' in the definition of 'pollutant' [] explicitly forbids nothing. . . . it has nothing to do with 'addition.'" R. at 10. As discussed in the previous section,

however, the District Court's construction of "addition" would effectively read "dredged spoil" out of the statute and cripple the entire Section 404 permitting program. Since courts are to interpret each word in a statute to have meaning, the District Court's interpretation of "addition" is in fact directly related to the definition of "pollutant."

Ultimately, however, it is immaterial for the present dispute whether the District Court's criticism of the Water Transfer Rule is well-reasoned. Regardless of whether the District Court agrees or disagrees with the Rule's rationale, the fact remains that EPA expressly limited the Water Transfer Rule's legal effect to Section 402. It does not support a narrow construction of "addition" in the context of Section 404. In fact, it expressly disavows the District Court's interpretation and endorses NUWF's entire theory of the case, even citing Deaton. It is NUDEP's contention that Chevron deference does properly attach to the Rule, in which case this court should defer to EPA's interpretation of the facially ambiguous statute and hold that "addition" should be read narrowly in Section 402 but not in Section 404. See United States v. Mead Corp., 533 U.S. 218, 230 (2001) (noting that Chevron deference is almost always extended to rules enacted through the notice and comment process).

2. Although canons of statutory construction point to conflicting interpretations of "addition" in the context of Section 404, the Court must ultimately strive to effectuate the intent of Congress by reading the statute to be effective.

Almost all of the authority the District Court cited to support its construction of "addition" is specific to Section 402; the Court relied upon Sorenson v. Sec'y of Treasury to extend such authority to Section 404. 475 U.S. 851, 860 (1986). Sorenson stands for the proposition that the same term used in different parts of a statute is to be given the same meaning throughout the statute. Id. While this canon of statutory construction does support the District Court's reading of "addition" in Section 404, other canons support NUWF's interpretation. By

reading the term "dredged spoil" out of the CWA, the District Court's interpretation would violate the "cardinal principle of statutory construction" – that "a statute ought, upon the whole, to be construed so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001). Moreover, the District Court's holding would render the entire 404 permitting scheme ineffective and thereby violate the canon which requires courts to read statutes to accomplish their purpose. See, e.g., Moskal v. U.S., 498 U.S. 103, 117 (1990). The District Court thus erred in adhering strictly to the Sorenson doctrine while ignoring other canons of statutory construction.

The two doctrines that the District Court relied upon in adopting a narrow interpretation of "addition" – the "outside world" and the "unitary navigable waters" theories – were both developed in the context of Section 402. The Court cited Nat'l Wildlife Fed'n v. Gorsuch to support the former theory. 693 F.2d 156 (D.C. Cir. 1993). Gorsuch dealt with a challenge to EPA's position that dam-caused pollution is excluded from the NPDES permitting program under Section 402. The decision mentioned Section 404 once, and only to point out that 404 was entirely irrelevant to the question at hand. Id. at 177. Nonetheless, the District Court found Gorsuch's interpretation of "addition" controlling. R. at 9. Similarly, as discussed in the previous section, the District Court accorded heavy weight to the Water Transfer Rule's treatment of "addition" despite the fact that the Rule was promulgated in the context of Section 402 and expressly disavowed any impact on Section 404. R. at 9.

Given that the District Court relied on theories that are narrowly tailored to Section 402, Sorenson plays an indispensible role in the Court's holding. However, as the Supreme Court has noted, "specific canons are often . . . countered by some maxim pointing in a different direction." Chicksaw Nation v. U.S., 534 U.S. 84, 94 (2001). Moreover, canons are not "mandatory rules,"

but rather "guides that need not be conclusive . . . [which] are designed to help judges determine the Legislature's intent as embodied in particular statutory language." Id. In light of the CWA's purpose – to "eliminate the discharge of pollutants into the navigable waters" – it is exceedingly unlikely that Congress meant to exempt nearly all dredge and fill activities from Section 404. 33 U.S.C. § 1251(a). The District Court relies on Sorenson to adopt an interpretation of Section 404 which EPA, the Corps, and the majority of Circuits have all expressly repudiated. Its reading of "addition" would severely undermine the CWA's permitting scheme and the purpose of the Act. Multiple canons of statutory construction counsel against affirming the District Court's holding, which has been described as an "overly literal and technical" interpretation that is "more tortured . . . [and] less consonant with Congress' zero-discharge goal." Avoyelles, 715 F.2d at 922. Essentially, the District Court's ruling accords more weight to following one non-mandatory canon of statutory construction than to effectuating the intent of Congress. NUDEP asks that the court reverse the District Court's interpretation of "addition."

CONCLUSION

While Plaintiffs have standing to contest NUDEP's consent decree, their claims are not justiciable because the while the violations are wholly past, and § 501 bars their citizen suit. Because of this, the Court should ultimately affirm the District Court's grant of Defendant's motion for summary judgment.