TEAM #1

No. 13-01234

IN THE
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

FALL TERM 2013

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JACQUES BONHOMME,
Plaintiff-Appellant, Defendant-Appellant, and Cross Appellee,

v.

SHIFTY MALEAU
Defendant-Appellant, Intervenor-Plaintiff-Appellant, and Cross-Appellee,

v.

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee.

ON WRIT OF CERTIORARI
TO THE UNITED STATES DISTRICT COURT, DISTRICT OF PROGRESS

BRIEF FOR SHIFTY MALEAU
Defendant-Appellant, Intervenor-Plaintiff-Appellant, and Cross-Appellee.

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OPINION BELOW

The opinion of the United States District Court for the District of Progress is reported at *Bonhomme v. Maleau*, 155-CV-2013 at 10 (D.P. July 23, 2012) (hereinafter "R.").

JURISDICTIONAL STATEMENT

This case considers questions of law under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 (2013), *et seq*, which is a law of the United States. The District Court for the District of Progress had jurisdiction to consider the opinion below pursuant to 28 U.S.C. § 1331 (2013), which gives District Courts of the United States the power to rule upon civil cases brought under laws of the United States. This Court has jurisdiction to review final decisions in District Courts of the United States. 28 U.S.C. § 1291 (2013).

STANDARD OF REVIEW

Federal Circuit Courts review a District Court's decisions of law under a *de novo* standard, and findings of fact are reviewed for clear error. *See, e.g.*, *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002) (internal citations omitted).

ISSUES PRESENTED

I. Whether Bonhomme is the real party in interest under Fed. R. Civ. P. 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1331(a) (2013).

II. Whether Bonhomme is a "citizen" under CWA § 505, 33 U.S.C. 1365 (2013), who may bring suit against Maleau.

III. Whether Maleau's mining waste piles are "point sources" under CWA § 502(12), (14), 33 U.S.C. §§ 1362(12), (14) (2013).

IV. Whether Ditch C-1 is a "navigable water" or "water of the United States" under CWA § 502(7), (12), 33 U.S.C. §§ 1362(7), (14) (2013).

V. Whether Reedy Creek is a "navigable water" or "water of the United States" under CWA § 502(7), (12), 33 U.S.C. §§ 1362(7), (12).

VI. Whether Bonhomme violated the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

Statement of Facts

Shifty Maleau ("Maleau") owns a gold mining operation adjacent to the navigable Buena Vista River in the State of Progress. R. at 5. He trucks the overburden and slag from his operations to his property in Lincoln County and places it in waste piles adjacent to Ditch C-1. R. at 5. When it rains, runoff flows down the waste piles and percolates through them, eventually discharging through channels eroded by gravity into Ditch C-1. R. at 5. The runoff leaches arsenic from the piles and carries it into the Ditch. R. at 5.

Ditch C-1 is a drainage ditch dug into saturated soils to drain them for agricultural use. R. at 5. The Ditch was constructed in 1913, and restrictive covenants in both Jacques Bonhomme's ("Bonhomme") and Maleau's deeds require them to maintain the Ditch on their properties. R. at 5. The Ditch is, on average, three feet across and one foot deep. R. at 5. Annual drought causes the Ditch to run dry for up to three months every year. R. at 5. Ditch C-1 runs three miles through several agricultural properties, including Maleau's, before it discharges through a culvert underneath a farm road on Bonhomme's property directly into Reedy Creek. R. at 5. Ditch C-1 has never been navigated in the past and is too small to be navigated in the future. R. at 9.

Reedy Creek is about fifty miles long, beginning in the State of New Union, where it is used as a water supply for Bounty Plaza. R. at 5. No party alleges that Reedy Creek is or ever has been navigable, or that it could be navigated with reasonable improvement. R. at 9. Farmers along Reedy Creek in both Progress and New Union divert water from the Creek for agricultural purposes. R. at 5. Agricultural products from the farms are then sold in interstate commerce. R.

at 5. Reedy Creek flows into Progress just before reaching Bonhomme's property, and travels several miles before ending in Wildman Marsh. R. at 5. Neither Reedy Creek nor Wildman Marsh is connected or adjacent to other bodies of water. R. at 5.

Wildman Marsh is an extensive wetland that is home to many waterfowl. R. at 5-6. The area is a destination for duck hunters from Progress and other neighboring states. R. at 6. Bonhomme's property fronts part of the Marsh and has been used in the past to host hunting parties consisting primarily of Precious Minerals International ("PMI") business associates and clients. R. at 6.

Bonhomme tested the water both upstream and downstream of the Ditch C-1 outflow on Maleau's property prior to filing his lawsuit. R. at 6. Results of this test indicate that arsenic is undetectable in Ditch C-1 upstream of Maleau's property, while arsenic is found in high concentrations downstream of Maleau's property. R. at 6. Arsenic is also detectable at low levels throughout Wildman Marsh. R. at 6. There have been no notable changes in the flora and fauna surrounding the hunting lodge. R. at 6. Nonetheless, Bonhomme alleges that he hosts fewer hunting parties every year because arsenic pollutes the waters of Wildman Marsh. R. at 6. Coincidentally, PMI's profits have declined during this same period of time. R. at 6.

The existing relationship between these litigants is also important. PMI and Maleau are global competitors in the mining industry. R. at 5. Bonhomme is also the President of PMI. R. at 6. According to the Attorney General, Bonhomme filed this suit against Maleau to injure his ability to compete with PMI. R. at 6. Bonhomme, in response, alleges that the Attorney General is politically aligned with Maleau and that Maleau is an unfair business competitor. R. at 6.

Procedural History

Bonhomme sued Maleau for violating the CWA under the jurisdiction of the citizen suit provision of the statute, 33 U.S.C. § 1365. R. at 4. Later, after proper notice, Progress filed a citizen suit against Bonhomme, alleging that he violated the CWA by discharging arsenic from his culvert into Reedy Creek. R. at 5. Maleau intervened as a matter of right in Progress' lawsuit against Bonhomme under 33 U.S.C. § 1365. R. at 5. Progress and Maleau moved to consolidate their case with Bonhomme's suit against Maleau because the issues of fact and law were the same. R. at 5. Bonhomme did not object to this motion and it was granted. R. at 5. The defendant in each suit filed motions to dismiss. R. at 5.

On July 23, 2012, the District Court for the District of Progress held that Bonhomme was not a real party in interest because he was a proxy litigant for the real party in interest, PMI. R. at 8. The court concluded that Bonhomme was not eligible to bring suit under the CWA because he is a foreign national. R. at 8. The court also held that Maleau's mining waste piles were not "point sources" under 33 U.S.C. § 1362(12) because piles are not conveyances. R. at 9. Relying on *Rapanos v. United States*, the District Court ruled that Ditch C-1 is not a navigable water because ditches are classified as point sources. R. at 9; 547 U.S. 715, 735 (2006). The District Court also found that Wildman Marsh is a water of the United States, and the District Court held that Reedy Creek is also a navigable water under 40 C.F.R. §122.2 (2013) because it is a tributary of Wildman Marsh. R. at 10. All parties have decided to appeal the District Court's ruling. R. at 1-2. This Court granted certiorari on September 14, 2013. R. at 3.

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed Bonhomme's lawsuit against Maleau. First, PMI is the real party in interest, not Bonhomme. Maleau objected to Bonhomme being the real party

in interest in his answer to the complaint, thereby giving Bonhomme ample time to amend his complaint. Since Bonhomme has not joined PMI, the District Court was correct in dismissing Bonhomme's case. Secondly, because Bonhomme is a French national, the District Court was correct in ruling that Bonhomme was precluded from bringing a lawsuit against Maleau under 33 U.S.C. § 1365 of the CWA.

The District Court was also correct in determining that Maleau's waste piles were not point sources because the associated stormwater runoff is not confined and channelized before discharge. Point sources are instrumentalities that systematically convey pollution from an industrial source to a navigable water. Maleau's waste piles lack the design and complexity to be equated to a systematic conveyance of pollution. Absent active collection, control, and direction of the associated stormwater runoff, Maleau's waste piles do not constitute a point source of pollution.

The Supreme Court's decision in *Rapanos* precludes classification of Ditch C-1 as a navigable water for two reasons. First, point sources and navigable waters are distinct legal categories in the CWA and are incapable of significant overlap. "Ditches" are statutorily classified as "point sources" and therefore cannot simultaneously be classified as "navigable waters." Second, Ditch C-1 was not constructed for navigation and has never been navigated. *Rapanos* proscribes interpretations of the term "navigable water" that render the word "navigable" meaningless. Accordingly, the District Court did not err in granting Maleau's motion to dismiss on this issue.

Reedy Creek is also not a navigable water of the United States, nor is it a tributary of a navigable water. Waters are considered "navigable" if they are actually navigable in fact, or if they have a significant effect on interstate commerce. Here, Reedy Creek possesses neither

quality. Furthermore, Reedy Creek is not a tributary to a navigable water because Wildman Marsh does not share a continuous surface connection with any other body of water, nor does it share a significant ecological nexus with other bodies of water. Additionally, Wildman Marsh does not have an effect on interstate commerce. The District Court was therefore incorrect in deciding that Reedy Creek was a navigable water under the CWA.

Finally, Bonhomme violated the CWA by adding arsenic to Reedy Creek because he owns the point source discharging the pollutants. A well-established aspect of CWA jurisprudence is that a point source does not need to be the original source of a pollutant; it only needs to convey the pollutant to navigable waters to violate the CWA. Here, even if Maleau is the party initially responsible for the discharge of arsenic into Reedy Creek, it is Bonhomme that is responsible *legally* for the discharge. The District Court was therefore correct in denying Bonhomme's motion to dismiss on this issue.

ARGUMENT

I. BONHOMME CANNOT BRING SUIT AGAINST MALEAU BECAUSE HE IS NOT A REAL PARTY IN INTEREST AS REQUIRED BY FED. R. CIV. P. 17(a).

Bonhomme cannot bring suit here because PMI is the real party in interest. Fed. R. Civ. P. 17(a)(1) designates that an "action must be prosecuted in the name of the real party in interest" and delineates a few exceptions to this general rule.[1] The "real party in interest," generally, is the party possessing the right to enforce a claim. *See, e.g.*, *Iowa Coal Min. Co., Inc. v. Monroe Cnty.*, 555 N.W.2d 418 (Iowa 1996). However, "niceties of title alone" do not dictate who is the real party in interest. *See Prevor-Mayorsohn Caribbean, Inc. v. P.R. Marine Mgmt., Inc.*, 620 F.2d 1, 3 (1st Cir. 1980); 59 Am. Jur. 2d *Parties* § 38 (1964). A court is allowed to consider

[1] FRCP 17(a)(1) lists administrators, executors, guardians, bailees, and trustees of an express trust as parties exempted from joining the real party in interest. Bonhomme has brought this suit in his own name and therefore does not qualify as an exception to the rule.

equitable factors in determining the real party in interest, such as looking "beyond the nominal party whose name appears of record and consider[ing] the legal questions raised as they may affect the real party in interest." *See, e.g.*, *Wood v. Davis*, 59 U.S. 467, 469 (1855); *Settle By & Through Sullivan v. Beasley*, 308 S.E.2d 288, 289-90 (N.C. 1983); *Defense Against a Prima Facie Case* § 1.11 (2013). The real party in interest is therefore "one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *See, e.g.*, *Anchor Point, Inc. v. Shoals Sewer Co.*, 418 S.E.2d 546, 549 (S.C. 1992); 67A C.J.S. *Parties* § 18 (1955). Not litigating an issue in the name of the real party in interest requires the court to dismiss the suit for failure to state a claim. *See, e.g.*, *Scholick v. Fifth Ave. Coach Co.*, 68 N.Y.S.2d 208, 210 (N.Y.C. Mun. Ct. 1947); *Shambley v. Jobe-Blackley Plumbing & Heating Co.*, 142 S.E.2d 18, 20 (N.C. 1965).

A. Bonhomme Is Not the Real Party in Interest Because the Alleged Harm Affected PMI and Because the Lawsuit Furthers the Interests of PMI.

Bonhomme cannot bring suit here because PMI is the real party in interest. Bonhomme is the President of PMI and sits on the Board of Directors. R. at 7. PMI has paid for all of Bonhomme's litigation costs, including the cost of sampling and analyzing the arsenic in Reedy Creek, as well as his attorney and expert fees. R. at 7. Although Bonhomme owns the lodge adjacent to Wildman Marsh, he exclusively uses the lodge for PMI company purposes. R. at 7-8. Bonhomme does not live at the lodge and only uses it to host hunting parties that consist of PMI business clients and associates. R. at 7-8. The alleged pollution of Wildman Marsh, which Bonhomme claims is the reason he has hosted fewer hunting parties as of late, coincidentally mirrors PMI's declining profits in recent years. R. at 6. The relationship of the litigants is important here too: PMI and Maleau are direct competitors in the mining industry. R. at 7. Even the Attorney General stated that Bonhomme filed this suit in order to damage Maleau's ability to

compete against PMI. R. at 6. Considering these factors, the District Court correctly determined that Bonhomme was not the real party in interest here because the alleged harm only effected PMI's hunting trips, and because the prior relationship of PMI and Maleau suggests that Bonhomme is a proxy litigant for PMI.

While Bonhomme may technically have an interest in this litigation because of his status as a landowner near Wildman Marsh, this technicality is overridden because he has no actual interest in the outcome of this lawsuit. PMI is the real party in interest here because the runoff affects PMI by polluting the ecosystem used for their company hunting trips. The lodge itself is only used for business purposes because Bonhomme does not live there. R. at 6. More fundamentally, PMI is the real party in interest because their extensive involvement in the litigation reveals their interest in the outcome. PMI possesses "the right to enforce [the] claim *and* has [a] *significant interest* in the litigation," whereas Bonhomme only has the right to litigate through his status as a landowner. *Va. Elec. & Power Co. v. Westinghouse Elec. Corp*., 485 F.2d 78, 86 (4th Cir. 1973) (emphasis added). Rule 17 contemplates that the real party in interest has more than just the right to litigate; they also have a real, material, and substantial interest in the lawsuit. *See Prevor-Mayorsohn*, 620 F.2d at 3. Bonhomme has failed to show how, given his entirely passive involvement in the litigation, the pollution in Wildman Marsh injures him personally. Given these equitable factors, the District Court correctly dismissed Bonhomme's suit against Maleau for failing to join PMI as the real party in interest.

Dismissing Bonhomme's claim against Maleau also advances the policy considerations behind Rule 17. The purpose of Rule 17 is to protect the defendant against a "subsequent action by the party actually entitled to relief, [ensuring] that the judgment will have proper res judicata effect." *Va. Elec. & Power Co.*, 485 F.2d at 84. Additionally, the rule was created as a way of

preventing parties from litigating through proxies, because those parties sought to avoid bad publicity when litigating. *Va. Elec. & Power Co.*, 485 F.2d at 84. Here, dismissal of Bonhomme's suit would not inhibit PMI's opportunity to litigate on the same matter in the future because PMI could bring a new lawsuit in their own name. Failure to dismiss this case would allow PMI to litigate against Maleau anonymously through a proxy: Bonhomme.

Allowing this proxy litigation is unfair to Maleau. Dismissal would ensure that Maleau is not subsequently sued by PMI after this lawsuit in order to further impair Maleau's ability to compete in the marketplace. Disallowing Bonhomme's suit would thus further the purpose of Rule 17 by preventing PMI from hurting a market competitor through a proxy litigant. Especially in light of the parties' adversarial past relationship, and their current status as market competitors, this Court should affirm the District Court and dismiss Bonhomme's suit against Maleau.

B. This Suit Must Be Dismissed Because Bonhomme Did Not Join PMI Despite Having Considerable Time to Do So.

Bonhomme's lawsuit should be dismissed because he has failed to join the real party in interest within a "reasonable time." Fed. R. Civ. P. 17(a)(3**)** states that a court may not dismiss an action for "failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted" into the action. The objection can be raised by motion or in the answer. *See Santivan v. Centinel Bank of Toas*, 634 P.2d 1282, 1284 (N.M. 1981). Various courts have defined "reasonable time" to preclude objections made during or right before trial. *See, e.g.*, *R.K. Co. v. See*, 622 F.3d 846, 850 (7th Cir. 2010) (waiving objection when raised after seven years had lapsed between complaint and trial); *Hefley v. Jones*, 687 F.2d 1383, 1388 (10th Cir. 1982) (waiving objection when raised sixteen days before trial). Here, Maleau objected as early

as possible by first raising the issue in his answer to Bonhomme's complaint. R. at 7. PMI, the real party in interest, presumably had notice of the objection because of their extensive involvement in the case. However, Bonhomme has yet to amend his complaint. Given Maleau's prompt objection to Bonhomme being the real party in interest, this Court should affirm the District Court and dismiss this suit because PMI is the real party in interest, not Bonhomme.

The Fifth Circuit has identified three equitable factors for determining whether a case should be dismissed for failing to join the real party in interest. *In re Signal Int'l, L.L.C.*, 579 F.3d 478, 488 (5th Cir. 2009). First, courts should consider when the defendant knew or should have known that there was a question regarding the plaintiff's status as a real party in interest. *Id.* Here, Maleau knew Bonhomme was not the real party in interest at the beginning of litigation, by asserting his objection in his answer. R. at 5. The Fifth Circuit also held that courts should consider whether the objection was made early enough to give the plaintiff an opportunity to prove their status as the real party in interest. *Signal Int'l*, 579 F.3d at 488. Maleau objected as early as possible, maximizing Bonhomme's opportunity to prove he was the real party in interest. R. at 5. Finally, *Signal International* considers whether joinder of the real party in interest was both practical and convenient after the objection was made. 579 F.3d at 488. Here, Bonhomme's failure to join PMI stems from his interest in keeping PMI's public image out of the lawsuit, despite their extensive involvement already. In other words, Bonhomme's failure to join PMI was an intentional decision and did not arise out of practical difficulties. This Court should dismiss Bonhomme's lawsuit against Maleau because Bonhomme had ample time to amend his complaint, but has chosen not to do so as part of his litigation strategy.

II. BONHOMME CANNOT BRING SUIT AGAINST MALEAU BECAUSE HE IS NOT A UNITED STATES CITIZEN AS REQUIRED BY THE CWA.

The CWA precludes foreign nationals from bringing suit under the Act. 33 U.S.C. § 1365 is titled "Citizen Suits" and authorizes any "citizen" to commence a suit "on his own behalf" against any other "person" who is alleged to be in violation of the CWA. Section 1365(g) defines "citizen" as a "person having an interest which is or may be adversely affected" and § 1362 defines "persons" as "individuals, corporations, partnerships," and government entities. The legislative purpose of the CWA was to "enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act." *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991). This purpose, however, does not confer standing under the CWA to foreign nationals.

In reviewing the term "citizen suits" from § 1365, the word "citizen" is defined as "a person who, by either birth or naturalization, is a member of a political community" and "citizen suits" as "an action under a statute giving *citizens* the right to sue violators of the law." *Black's Law Dictionary* 222 (9th ed. 2010) (emphasis added). The plain meaning of the word "citizen," and the statutory definition in the CWA, suggest that "citizens" are members of a political community that, by implication, excludes non-citizens. To interpret the term "citizen" to include non-citizens is to lose an essential element of citizenship: exclusivity. Such an interpretation also makes it impossible to distinguish "persons" from "citizens," stripping the latter term of its entire meaning. The plain meaning of the word "citizen" therefore suggests that the CWA meant to limit suits under the Act to citizens of the United States.

Additionally, several canons of statutory construction demonstrate that the CWA meant to exclude foreign nationals from bringing citizen suits. First, the rule of *expresso unius* is instructive: the inclusion of the term "citizen" at the heading of § 1365 shows that the legislature

meant to exclude, by use of a non-technical term, foreigners from having standing under the CWA. This is in addition to the fact that there is no provision affirmatively granting foreigners the right to citizen suits. Secondly, the canon of *in pari materia* suggests that "citizen suits" meant to exclude foreign nationals because any other interpretation would render its meaning useless or redundant. In order to effectuate the language of *all* of the statute, including §§ 1362(5) and 1365(g), "citizen" must be accorded its plain meaning, so as to be different from "persons." Any alternative interpretation of the CWA would deprive the term "citizen" of its plain and logical meaning.

Bonhomme's interpretation of §§ 1362 and 1365 is also unsupported by the congressional record; on the contrary, only citizens have enforcement power under the CWA. Congress created § 1365 as a way of providing "*citizen* enforcement of control requirements and regulations" under the CWA. *S. Report No.* 92-414, at 32 (1972), *reprinted* 1972 U.S.C.C.A.N. 3668, 3677 (emphasis added). The Senate further elaborated that enforcement of the CWA was limited to "*citizens* themselves [who] may go to United States District Courts" for enforcement of the Act. *Id.* (emphasis added). While it is true that § 1362 defines "persons" broadly, Bonhomme is incorrect in reasoning that Congress wanted to extend enforcement power under the CWA to foreign nationals. Instead, Congress intended to ease the "personalized injury" requirement of standing for environmental groups by defining "persons" broadly. *See* Ward L. Wagstaff, *Citizen Suits and the Clean Water Act: The Supreme Court Decision in Gwaltney of Smithfield v. Chesapeake Bay Foundation*, Utah L. Rev. 891, 906-07 (1988). This Senate Report indicates that Congress only sought to extend enforcement power to United States citizens and citizen organizations, not foreign nationals with a minimal interest. Conferring enforcement power to foreign nationals is therefore incorrect because it is unsupported by congressional

records, and because it is expressly contradicted by the plain language of both the CWA and the Senate Reports.

Bonhomme tries to reason that "citizen" can be defined more broadly as a "person" within the statute without depriving the former term of its meaning.[2] However, this reasoning is flawed. First, the definition of "citizen" requires an individual to be a member of a political community, whereas Bonhomme's proposed definition eliminates this requirement altogether. If Bonhomme's interpretation is accepted, then it becomes impossible to distinguish a "citizen" from a "person." Secondly, Bonhomme's proposed interpretation does not make sense because citizenship requires inclusion in a political community and, by implication, the exclusion of non-citizens. However, Bonhomme's interpretation of "citizen" under the CWA would obviate the exclusion of non-citizens by including foreign nationals. Doing this would not only change the meaning of the word "citizen" as used in the CWA, but it would strip the word of its entire meaning. As the Supreme Court noted in *SWANCC*, it is "one thing to give a word limited effect and quite another to give it no effect whatever." 531 U.S. at 172. Because Bonhomme is a French national, he should be precluded from bringing suit here because Congress intended to exclude foreign nationals from bringing citizen suits under the CWA. R. at 8.

[2] Bonhomme erroneously relies on *United States v. Riverside Bayview Homes, Inc.*, where the Supreme Court reasoned that by defining the narrow phrase "navigable waters" in 33 U.S.C. § 1362(7) as the larger concept of "waters of the United States," Congress did not deprive the term "navigable" of its meaning. 474 U.S. 121 (1985). However, the Court's decision in *Solid Waste Energy of Northern Cook County. v. United States Army Corps of Engineers* ("*SWANCC*") explained that this decision was largely based on the fact that Congress had acquiesced and approved of the Army Corps' subsequent regulations defining the scope of the CWA. 531 U.S. 159, 172 (2001). These cases are readily distinguishable from the present case because here there is no question of administrative deference; rather, this case is solely about effectuating Congress' intent in excluding foreign nationals from litigating under the CWA.

III. MALEAU'S MINING WASTE PILES ARE NOT POINT SOURCES BECAUSE THE ASSOCIATED STORMWATER RUNOFF IS NOT SYSTEMATICALLY COLLECTED, CHANNELED, AND CONVEYED INTO A NAVIGABLE WATER.

The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* at § 1362(12). Any source that is not a "point source" of pollution is a "nonpoint source" and is not subject to a permitting scheme. *League of Wilderness Defenders/Blue Mountain Diversity Project v. Forsgren*, 309 F.3d 1181, 1183-84 (9th Cir. 2002).

Discharged pollution must be specifically channelized in order to fall within the definition of a "point source" of pollution. *Cordiano v. Metacon Gun Club, Inc.,* 575 F.3d 199, 221-22 (2d Cir. 2009). Furthermore, point sources are physical systems or instrumentalities assembled for the express purpose of storing and transporting pollutants. *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 509-10 (9th Cir. 2013).

A. The Stormwater Runoff From the Waste Piles Is Not Discrete and Confined Because Maleau Does Not Systematically Collect, Channel, and Discharge the Runoff from His Property.

Generally, the CWA contemplates that discharges be "channelized" in order to fall within the Environmental Protection Agency's ("EPA") regulatory jurisdiction. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 510 (2d Cir. 2005); *see also Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 841 n.8 (9th Cir. 2003); *Shanty Town Assocs. Ltd. P'ship v. EPA*, 843 F.2d 782, 785 n.2 (4th Cir. 1988). Stormwater runoff "is a nonpoint or a point source . . . depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus

a point source discharge)." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011).

In *Appalachian Power Company v. Train*, the Fourth Circuit held that rainfall runoff from areas used to store construction materials is not a point source if that runoff is not normally routed into a collection system. 545 F.2d 1351, 1373-74 (4th Cir. 1976). Despite the generally broad interpretations of "point source," the Fourth Circuit excluded "unchanneled and uncollected surface waters" from its definition. *Id.* at 1373. The Second Circuit expressed a similar understanding in *Cordiano*. 575 F.3d at 221 ("Surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and consequently is not subject to the CWA permit requirement."). The Fifth Circuit in *Sierra Club v. Abston Construction Company, Inc.*, also excluded unchanneled and uncollected surface waters from its interpretation of "point source" when such water is neither collected nor channeled in connection with an industrial activity. 620 F.2d 41, 47 (5th Cir. 1980). In *Ecological Rights*, the Ninth Circuit reiterated the specific conditions under which stormwater runoff constitutes a point source. 713 F.3d at 508. The court held that stormwater runoff is a point source only if it is "collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances." *Id.* (quoting *Brown*, 640 F.3d at 1070-71).

These four Circuits include stormwater runoff within the meaning of "point source" only when the runoff is specifically confined and channeled before discharge into a navigable waterway. *Cordiano*, 575 F.3d at 221 (2d Cir.); *Appalachian Power*, 545 F.2d at 1373-74 (4th Cir.); *Abston Constr. Co.*, 620 F.2d at 47 (5th Cir.); *Ecological Rights*, 713 F.3d at 508 (9th Cir.). Here, the polluted stormwater that runs off Maleau's waste piles is not collected, channeled, and discharged through a system of ditches, channels, and other conveyances. R. at 5. Therefore, the

resulting discharge is not "discernible, confined and discrete" as required by the CWA. 33 U.S.C. § 1362(14). Small drainage ditches are not point sources because they lack mechanisms to actually collect and channel stormwater prior to discharge.

The Second Circuit in *Cordiano* noted that "Congress had classified nonpoint source pollution as runoff caused primarily by rainfall around activities that employ or create pollutants . . . ." 575 F.3d at 220. Here, Maleau does not collect or channel any runoff from his property. Rather, the unchanneled rainfall runs off the piles and into Ditch C-1. R. at 5. Systematic collection and discharge of runoff is an anthropogenic activity; unlike rainfall, it is not forced by nature. Any runoff associated with Maleau's property is a nonpoint source of pollution, because it is not actively collected or discharged; rather, rainfall causes pollution to flow into Ditch C-1.

B. Maleau's Mining Waste Piles Do Not Constitute a Point Source Because They Are Not Instrumentalities Built to Systematically Convey Pollution from an Industrial Source into Navigable Waters.

The Supreme Court emphasized in *South Florida Water Management District v. Miccosukee Tribe of Indians*, that "point source" refers to things that *transport* pollutants. 541 U.S. 95, 105 (2004). The term "point source" is characterized by instrumentalities that systematically transport pollutants from an industrial site to navigable waters. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). The Ninth Circuit mirrored this position in *Ecological Rights* and noted that point sources are physical systems or instrumentalities constructed for the express purpose of storing pollutants and moving them from one place to another. 713 F.3d at 509-10. In *Parker v. Scrap Metal Processors, Inc.*, the court noted that stormwater runoff does not, in all circumstances, constitute a point source; however, it does when the runoff first accumulates in structured collections of industrial waste and then enters navigable waters. 386 F.3d 993, 1009 (11th Cir. 2004).

Circuit courts have elaborated on the Supreme Court's definition of point sources as conveyances that "transport" pollutants. *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 105. The Second Circuit noted that "the words used to define the term ['point source'] and the examples given [by the statute] evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *Plaza Health*, 3 F.3d at 646. The Ninth Circuit relied on this interpretation in *Ecological Rights* to reject the contention that solid wood utility poles are point sources. 713 F.3d at 509-10. In analyzing the legislative history of the 1972 amendments to the CWA, the Second Circuit included the following comment from a senate report: "a non-point source of pollution is one that does not confine its polluting discharge to one fairly specific outlet, such as a sewer pipe, a drainage ditch or a conduit." *Plaza Health*, 3 F.3d at 647.

The Eleventh Circuit echoed similar logic in *Parker*, 386 F.3d at 1009. There, an EPA investigation revealed 600 waste drums on the defendant's scrap metal processing property. *Id.* at 1000-01. The defendant had also contracted to have 1000 drums of liquid waste removed from his industrial site. *Id.* at 1000. According to the EPA, some of the drums appeared to have been crushed or leaking, causing soil contamination from metals, petroleum products, solvents, and paint wastes. *Id.* at 1001. The court concluded that these conditions justified interpreting stormwater runoff as a point source. *Id.* at 1009. "Storm-water runoff does not, in all circumstances, originate from a point source, but several courts have concluded that it does when storm water collects in piles of industrial debris and eventually enters navigable waters." *Id.* Not only did the defendant's property contain roughly 1000 drums of liquid waste, some of which were leaking, defendant also had construction equipment and other debris meant to be disposed of left on the property. *Parker*, 386 F.3d at 1009.

The principles of *Plaza Health* and *Ecological Rights* reaffirm the Supreme Court's definition of point sources: conveyances that transport pollutants. *Plaza Health*, 3 F.3d at 646; *Ecological Rights*, 713 F.3d at 509-10; *see also S. Fla. Water Mgmt. Dist.*, 541 U.S. at 105. Here, Maleau's mining waste piles do not "evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial site to navigable waters." *Plaza Health*, 3 F.3d at 646. A few piles of rock and similar debris are not physical structures built specifically to collect, channel, and transport pollutants. R. at 5. These piles cannot be equated to stormwater collection and drainage structures because they lack the design and complexity to systematically transport wastewater in the same way.

Although the Eleventh Circuit in *Parker* concluded that stormwater runoff from the defendant's industrial site was a point source, the facts in this case are distinguishable because of the nature of the property and waste in question. In *Parker*, the defendant had built various structures in order to store and eventually transfer pollutants. 386 F.3d at 1000-01. Here, Maleau did not build any underground storage structures or have any industrial waste barrels on his property. R. at 5. The record does not indicate that Maleau collected the debris in piles in order to eventually transport the piles somewhere else. Maleau's waste piles are neither structured nor organized. R. at 5. Further, Maleau only has piles of dirt and debris that are not analogous to the systematic consolidation and planned transportation of industrial waste in *Parker*. R. at 9; *Parker*, 386 F.3d at 1009. Therefore, Maleau's debris piles and the associated stormwater runoff do not constitute a point source of pollution.

IV. THE SUPREME COURT'S DECISION IN *RAPANOS* PRECLUDES CLASSIFICATION OF A NONNAVIGABLE DITCH AS A "NAVIGABLE WATER."

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The term "discharge of a pollutant" is defined as "any

addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Supreme Court in *Rapanos v. United States* held that "point sources" and "navigable waters" are separate and distinct categories incapable of significant overlap. 547 U.S. at 735.

The Court further explained that the meaning of "navigable waters" is broader than the traditional understanding of the term, but the "qualifier 'navigable' is not devoid of significance." *Id.* at 731. "Waters of the United States" must be navigable in fact, or at least susceptible of being rendered so." *Id.* "It is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172.

A. Man-Made Drainage Ditches like Ditch C-1 Are Not "Navigable Waters" According to *Rapanos* Because Ditches Are Statutorily Defined as "Point Sources."

The definitions of "point source" and "navigable waters" are conceived as separate and distinct categories. *Rapanos*, 547 U.S. at 735. "Waters of the United States" exclude ephemerally flowing waters such as man-made drainage ditches. *Id*. The term "refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes.'" *Id.* at 733. The Court in *Rapanos* explained the logical inconsistency in classifying ditches as "navigable waters." *Id.* at 735-36. The term "ditch" is included in the definition of "point source" and not in the definition of "navigable water." 33 U.S.C. §§ 1362(7), (12). Therefore, the definition of "discharge" in 33 U.S.C. § 1362(14) "would make little sense if the two categories were significantly overlapping." *Rapanos*, 547 U.S. at 735. The "separate classification of 'ditch[es], channel[s], and conduit[s] . . . show that these are . . . *not* 'waters of the United States.'" *Id.* at 735-36 (emphasis in original).

The holding in *Rapanos* demonstrates that waterways classified as point sources cannot simultaneously qualify as navigable waters. Here, the predecessors in interest of Bonhomme and

Maleau constructed Ditch C-1 to drain oversaturated soil to prepare the soil for agricultural use. R. at 5. Ditch C-1 does not have the relative permanence of the bodies of water described in *Rapanos* to form "geographical features [like that] of oceans, rivers, and lakes" and therefore to constitute a navigable water. 547 U.S. at 733. Also, Ditch C-1 was constructed specifically to transport water from oversaturated soil to the culvert on Bonhomme's property and not for navigation of any kind. R. at 5. The separate classifications of "point source" and "navigable water" would be rendered meaningless if this man-made drainage ditch were classified as a "navigable water." *Rapanos*, 547 U.S. at 735.

B. Ditch C-1 Is Not a "Navigable Water" Because It Has Never Been Navigated and Cannot Conceivably Be Navigated in the Future.

"Waters of the United States" must be navigable in fact, or at least susceptible of being rendered so, even though the definition of the term includes some nonnavigable waters. *Rapanos*, 547 U.S. at 731; *see also SWANCC*, 531 U.S. at 172; *Riverside Bayview*, 474 U.S. at 131. Even if a ditch or other similar watercourse contains more than an intermittent or ephemeral flow, the water must still be navigable within the traditional understanding of the term. *Rapanos*, 547 U.S. at 739. "The phrase does not include . . . channels that periodically provide drainage for rainfall." *Id.* In order to give at least some effect to the term "navigable," the Court concluded that "navigable waters" are only permanent bodies of water "forming geographic features that are described in ordinary parlance as 'oceans, rivers, [and] lakes.'" *Id.* at 734, 739. Defining a nonnavigable drainage ditch as a "water of the United States" would be based on an impermissible construction of the statute. *Id.* at 739.

Here, the record indicates that Ditch C-1 has never been navigated and is too small to ever be navigable in the future. R. at 9. Not only is Ditch C-1 too small to plausibly fit a boat, it does not even permanently hold water, unlike an ocean, river, or lake. R. at 5. Although the

term "navigable waters" does include some nonnavigable waters, Ditch C-1 could never fit within the definition of the term. A one-foot deep waterway, with an intermittent flow, does not at all resemble an "ocean, river, or lake." R. at 5. Classifying Ditch C-1 as a "navigable water" directly contradicts the plain meaning of the statutory requirement: the watercourse in question must be, at least conceivably, "navigable." *Rapanos*, 547 U.S. at 731.

Where the Court has included nonnavigable waters within its definition of "navigable waters," it has done so where the watercourse in question abuts a wetland or marshland and there is difficulty defining the boundary between the watercourse and the conventionally identified navigable water. *Id.* at 734-35 (referring to *SWANCC*, 531 U.S. at 172 and *Riverside Bayview*, 474 U.S. at 131). However, *SWANCC* and *Riverside Bayview* are not dispositive here because the facts of this issue are significantly distinct from cases dealing with watercourses draining into wetlands.

V. REEDY CREEK IS NOT A NAVIGABLE WATER OF THE UNITED STATES, NOR IS IT A TRIBUTARY OF A NAVIGABLE WATER.

There is no evidence that Reedy Creek is actually navigable by a vessel. R. at 9. Absent such a finding, Reedy Creek should not be considered a navigable water under the jurisdiction of the CWA. *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926); 40 C.F.R. § 122.2. Because Reedy Creek does not have an affect on interstate commerce, it should not qualify as a navigable water. R. at 9-10; 40 C.F.R. § 122.2. Additionally, Reedy Creek does not qualify as a navigable water for being a tributary of a water of the United States, because Wildman Marsh is not a navigable water. R. at 5-6. Wildman Marsh does not share a hydrological connection or significant ecological nexus with any other body of water under the jurisdiction of the CWA, nor does it have any effect on interstate commerce. R. at 5-6. Therefore, Reedy Creek does not qualify as a navigable waterway under the jurisdiction of the CWA.

A. Notwithstanding Its Status as a Tributary of Wildman Marsh, Reedy Creek Is Not a Navigable Water Under the CWA Because It Is Not Actually Navigable and It Does Not Have an Effect on Interstate Commerce.

In order for a body of water to qualify as a "navigable waterway" under the CWA, the waterway must either be actually navigable by a vessel, or it must have some effect upon interstate commerce. *Holt State Bank*, 270 U.S. at 56; *SWANCC*, 531 U.S. at 173; 40 C.F.R. § 122.2; *see also Rapanos*, 547 U.S. at 731. Reedy Creek is not actually navigable by a vessel, and it does not have an effect upon interstate commerce. Therefore, it is not a navigable water.

i. Reedy Creek is not a navigable water because there is no evidence that the Creek has ever been navigated before, and there is no evidence that navigability is possible in the future.

The proper inquiry for navigability is whether a vessel can actually navigate the Creek. *See Holt State Bank*, 270 U.S. at 56; *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), *aff'd in Rapanos*, 547 U.S. at 731 (citing *SWANCC*, 531 U.S. at 173); *see also Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). Recent Circuit Court cases have looked to a historical record of navigation or actual experiments of navigability as determinative factors when conducting a "navigability" analysis. *See, e.g.*, *FPL Energy Marine Hydro, L.L.C. v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (examining experimental canoe trips to determine a river's navigability); *Alaska v. Ahtna, Inc.*, 891 F.2d 1404, 1404-05 (9th Cir. 1989) (holding that the relevant inquiry was whether the river in question was actually being navigated by boats at the time); *Puget Sound Power & Light Co. v. FERC*, 644 F.2d 785, 788 (9th Cir. 1981) (examining past use of river by boats). No experiments of navigability have been conducted in our present case. R. at 5-7, 9. Furthermore, no party alleges that the Creek has been used for waterborne transportation in the past, or that transportation could be possible in the future. R. at 5, 9.

Absent a finding of navigability, this Court should hold that Reedy Creek is not a navigable waterway under the jurisdiction of the CWA.

ii. Water from Reedy Creek does not have an effect on interstate commerce because water consumed by instrumentalities of commerce is not, by itself, an instrumentality of commerce.

The EPA defines "navigable waters" as bodies of water, including "streams," that have an effect upon, or could potentially affect interstate commerce. 40 CFR § 122.2. However, the Supreme Court has held that economic activity alone is not a determinative factor when conducting a navigability analysis. *SWANCC*, 531 U.S. at 173. Even if commercial activity on a body of water has a "substantial effect" on interstate commerce, this does not automatically qualify that waterway as "waters of the United States" under the jurisdiction of the CWA. *Id.*; *see also United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (holding that commerce clause authority does not extend to activities that do not have a substantial affect on interstate commerce). The Supreme Court has instead focused on the plain meaning of the term "navigable waters" defined in the CWA. *SWANCC*, 531 U.S. at 173; *see also Rapanos*, 547 U.S. at 731. Even though activity may occur on that waterway that is "plainly of a commercial nature," this activity is a "far cry" from "waters of the United States to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173 (internal quotation omitted).

Furthermore, water taken from Reedy Creek does not substantially affect interstate commerce. Although water from Reedy Creek is used to irrigate crops and supply a shopping center located along an interstate highway, the water used to support these operations does not actually affect interstate commerce. When water is consumed by "facilities and instrumentalities of commerce," that water is not, by itself, an instrumentality of interstate commerce. *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 321 (1960). The farms and the shopping center produce goods

that may, one day end up in interstate commerce, but the water taken from Reedy Creek is only consumed *intrastate*. *See United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that the commerce clause requires a distinction between what is truly national and what is truly local). Likewise, even though water from the Creek is used by instrumentalities of commerce, Reedy Creek is not a water of the United States under the plain meaning of the CWA. *SWANCC*, 531 U.S. at 173.

If this Court were to hold that water from Reedy Creek has an impact on interstate commerce, this impact is not significant enough for Reedy Creek to be defined as a navigable water under the CWA. Reedy Creek has, at best, an indirect impact on interstate commerce. *See Lopez*, 514 U.S. at 558-59 (holding that commerce clause authority does not extend to insubstantial effects on interstate commerce); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding that indirect burdens on commerce do not implicate the dormant commerce clause). There is no evidence in the record that Reedy Creek is the only source of water used by farmers and Bounty Plaza. R. at 5-6. Rather, the facts suggest that there are other rivers and streams in proximity to Reedy Creek (for example, the Buena Vista River). R. at 5-7. Were water from Reedy Creek to become unavailable, Bounty Plaza and the farmers would likely use these other water sources to support their operations. Even if Reedy Creek dried up, business would continue as usual for Bounty Plaza and the farmers because alternative water sources are available. Therefore, water from Reedy Creek is not essential to their business operations and this Court should hold that Reedy Creek is not a navigable waterway under the CWA.

B. Reedy Creek Does Not Qualify as a Navigable Water Under 33 C.F.R. § 328.3(a)(5) and 40 C.F.R. § 122.2 as a Tributary of Wildman Marsh, Because Wildman Marsh Is Not a Water of the United States Under the CWA.

Even if streams, rivers, and creeks are not navigable waters on their own, they still qualify as "waters of the United States" under the jurisdiction of the CWA if the water is a tributary of another navigable water. 33 C.F.R. § 328.3(a)(5) (2013); 40 C.F.R. § 122.2. Although Reedy Creek is a tributary of Wildman Marsh, the marshland is not a "water of the United States" under the jurisdiction of the CWA. R. at 5-6. Wildman Marsh does not share a hydrological or ecological connection to other waters covered under the Act, and the Marsh has no effect on interstate commerce. R. at 5-6. Additionally, wetlands used by migratory birds do not automatically qualify as "waters of the United States." *SWANCC*, 531 U.S. at 172.

i. Wildman Marsh does not share a continuous surface connection with any other body of water under the jurisdiction of the CWA, nor does it share a significant ecological nexus with other bodies of water covered under the Act.

The jurisdiction of the CWA does not extend to wetlands that are not adjacent to open water. *SWANCC*, 531 U.S. at 168. In *Rapanos*, the plurality opinion held that "waters of the United States" are primarily "rivers, streams, and other *hydromorphic features more conventionally identifiable as 'waters'*" rather than wetlands, and the definition of "waters of the United States" should not be expanded to include other entities. *Rapanos*, 547 U.S. at 734-35 (citing *Riverside Bayview*, 474 U.S. at 131) (internal quotations omitted) (emphasis in original).

Furthermore, "the qualifier 'navigable' is not without significance." *Rapanos*, 547 U.S. at 731 (citing *SWANCC*, 531 U.S. at 172); *see also Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring). In *Rapanos*, a plurality of justices advocated for a narrow construction of the term "waters" under the CWA. 547 U.S. at 732 n.4. Although Justice Kennedy disagreed with the plurality's narrow definition of "waters" under the jurisdiction of the CWA, Justice Kennedy and

four other Justices agreed that isolated marshes and wetlands must have some connection to other navigable waters to qualify as waters under the jurisdiction of the CWA. *Rapanos*, 547 U.S. at 742; 547 U.S. at 767 (Kennedy, J., concurring).

In *Rapanos*, the Court's plurality opinion held that wetlands that are not adjacent to or connected to "waters of the United States" are not waters at all. 547 U.S. at 741 n.10 (citing *Riverside Bayview*, 474 U.S. at 132) (internal quotations omitted). The only time wetlands are defined as "waters of the United States" is when there is a "continuous surface connection" to other bodies of water that are "waters of the United States," and there is no clear demarcation between the waters and the wetlands. *Rapanos*, 547 U.S. at 742. This connection must be a physical connection, with shared hydrological features, rather than an ecological connection. *Id.* at 747.

In his concurring opinion in *Rapanos*, Justice Kennedy disagreed with the plurality's "continuous surface connection" test. 547 U.S. at 772-73 (Kennedy, J., concurring). Instead, Justice Kennedy established a "significant nexus" test, where wetlands are classified as "navigable waters" if they "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable.'" *Id.* at 780. Conversely, when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Justice Stevens' dissenting opinion noted that lower courts interpreting *Rapanos* may use either the plurality's test or Justice Kennedy's test. *Rapanos*, 547 U.S. 810 n.14 (Stevens, J., dissenting). Indeed, Circuit Courts disagree about which test is proper. The Seventh, Ninth, and Eleventh Circuit Courts of Appeals have held that Justice Kennedy's "significant nexus" test is the controlling test. *See United States v. Robinson*, 521 F.3d 1319, 1321-22 (11th Cir. 2008); *N.*

Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). However, the First Circuit and the Eighth Circuit hold that either test is controlling. *See United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

Here, Wildman Marsh does not qualify as a navigable water under either the "continuous surface connection" or the "significant nexus" test. There is no evidence that Wildman Marsh is adjacent to other waters of the United States. R. at 5-6. Unlike the wetlands in *Riverside Bayview*, Wildman Marsh and other "waters of the United States" are readily distinguishable because there is no physical connection to a body of water defined as "navigable" under the CWA. R. at 5-6. Because there are no other bodies of water with which the Marsh could share a surface connection, Wildman Marsh does not meet the standards of the plurality's "continuous surface connection" test in *Rapanos*.

Nor does the Marsh have an affect on the chemical, physical, or biological integrity of other bodies of water. *See Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). There is no evidence that Wildman Marsh is critical to the ecological integrity of other waters. R. at 5-6; *see also Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). Although migratory birds use the marshland to nest, there is no evidence that these birds have any effect on other waters. R. at 5-6. Therefore, Wildman Marsh is not a navigable water under the jurisdiction of the CWA.

As a matter of public policy, this Court should be careful to only find an ecological nexus where there is a strong, well-established ecological connection. *See* Genevieve Casey, *What Went Wrong in San Francisco Baykeeper v. Cargill Salt Division? The Ninth Circuit's Weak Reading of Kennedy's Rapanos Concurrence, and a Prescription for Litigating Clean Water Act Claims Under Rapanos*, 35 Ecology L.Q. 531, 555 (2008) (suggesting that CWA jurisdiction

should only extend to wetlands that are not adjacent to navigable waters when the ecology is significantly altered by other bodies of water). Even the most minor change to Wildman Marsh will affect flora or fauna in some way, which may in turn affect other flora or fauna further down the food chain. However, these connections do not have the kind of practical connection Justice Kennedy envisioned when he created his significant nexus test. Here, there is no evidence in the record that the Marsh has a direct ecological connection to other bodies of water. R. at 5-7. Were this Court to extend CWA jurisdiction to Wildman Marsh, there would be no limit to the kinds of waters that could fall under the CWA's jurisdiction. Therefore, this Court should only find ecological connections when there is a real, practical affect on other waters of the United States.

Additionally, confusion of the extent of the CWA's jurisdiction will likely discourage litigation. P. Ryan Henry, *Muddying the Waters: United States v. Cundiff Adds Confusion and Complexity to the Ongoing Debate Over the Scope of Federal Jurisdiction Under the Clean Water Act*, 22 Vill. Envtl. L.J. 285, 316-17 (2011). The potential for fruitless litigation will discourage enforcement of CWA violations, thereby frustrating the original goal of the CWA: to protect the ecological sustainability of our nation's waters. *Id* at 317; *see also* Bill Currie, *Opening the Floodgates: The Robert's Court's Decision in Rapanos v. United States Spells Trouble for the Future of the Waters of the United States*, 18 Vill. Envtl. L.J. 209, 231-32 (2008) (noting that uncertainty over CWA jurisdiction will impede regulation efforts). Because of the high cost of obtaining permits under the CWA, confusion in this area of law also might lead developers to violate the CWA by avoiding the permitting process altogether. *Id.* at 316. Therefore, this Court should only find an ecological nexus where there is a strong, well-established ecological connection in order to avoid further confusion in this area of law.

ii. Wildman Marsh does not have an affect on interstate commerce because recreational pursuits relating to migratory birds on marshland do not, *ipso facto*, bring the marsh under the jurisdiction of the CWA.

Under 40 C.F.R. § 122.2, the EPA defines "navigable waters" as bodies of water, including "wetlands," that have an effect on, or could potentially affect interstate commerce. Although hunters travel across state lines to hunt at Wildman Marsh, the Supreme Court has held that hunting is an activity that does not implicate interstate commerce. *See Baldwin v. Fish and Game Comm'n of Mont.*, 436 U.S. 371 (1978) (holding that charging different fees for hunting permits for in-state and out-of-state residents does not violate the dormant commerce clause). Furthermore, even though individuals hunt game at the Marsh, there is no evidence that the game enters interstate commerce or that it has any affect whatsoever on interstate commerce. R. at 5-6.

In *SWANCC*, the Supreme Court held that recreational pursuits relating to migratory birds on marshland did not bring the marsh under the jurisdiction of the CWA. 531 U.S. at 173-74. Even if this activity, in the aggregate, affected interstate commerce, or was of a "commercial nature," that activity did not satisfy the plain meaning of the CWA. *SWANC*C, 531 U.S. at 173-74. Therefore, Wildman Marsh is not a "water of the United States" under 40 C.F.R. § 122.2 because it has no effect upon interstate commerce.

VI. BONHOMME VIOLATED THE CWA BY ADDING ARSENIC TO REEDY CREEK BECAUSE HE OWNS THE POINT SOURCE DICHARGING THE POLLUTANT.

A well established aspect of the Supreme Court's CWA jurisprudence is that "a point source need not be the original source of a pollutant; it need only convey the pollutant to navigable waters." *SWANCC*, 541 U.S. at 105 (citing 33 U.S.C. § 1362). In fact, the Supreme Court held that a "discharge" under the terms of the CWA does not require the addition of

pollutants to the water being discharged. *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 377 (2006) (noting that "discharge" can also include the flowing out of non-pollutants).

In *S.D. Warren*, the Supreme Court considered CWA claims against the operators of a hydroelectric dam. 547 U.S. at 373. Although the operators of the dam did not introduce any pollutants into the water stream, the discharge alone was held to be a violation of the CWA. *Id.* at 379. Likewise, Circuit Courts have held that focus should be placed upon "ownership of the point source, not the discharge-causing conduct." *Sierra Club v. El Paso Gold Mines Inc.*, 421 F.3d 1133, 1144 (10th Cir. 2005); *accord Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 487 (2d Cir. 2001) ("[E]ach discharge of a pollutant represents a distinct violation of the Act[.]"); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982) ("[T]he point or nonpoint character of pollution is established when the pollutant first enters navigable water[.]").

The CWA does not require that pollutants originate from the individual in control of the point source – the statute only addresses the direct act of introducing pollutants to a navigable water from a point source. *See* 33 U.S.C. § 1311. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court held that under the terms of the CWA, a "discharge of a pollutant" occurs when point sources "bring about an increase" in pollutants. 133 S.Ct. 710, 713 (2013). Here, samples of arsenic were found in much higher concentrations in the portions of Reedy Creek downstream from the portion of Ditch C-1 under Bonhomme's control. Following *Los Angeles County Flood Control District* and *South Florida Water Management District*, Bonhomme is responsible for the discharge of pollutants into Reedy Creek, even though Maleau introduced the arsenic upstream in Ditch C-1. The only relevant fact

is that Bonhomme was in control of the point source when the pollutants were discharged, so this Court should find that Bonhomme is responsible for the discharge under the terms of the CWA.

It is not a violation of the CWA to discharge water from one navigable water, unaltered, into another navigable water. *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 105-06. Further, "even if one water were polluted and the other pristine," it is not a violation to mix navigable waters. *Id.* at 106. Bonhomme and Progress will likely argue that Ditch C-1 is a navigable waterway, or the tributary of a navigable water, and Maleau is in violation of the CWA for controlling the waste piles, which are a point source. This argument will not succeed because Ditch C-1 is not a navigable water. Rather, it is a point source – entities cannot simultaneously be point sources and navigable waters. *See Rapanos*, 547 U.S. at 735.

As a matter of public policy, this Court should place liability on the last individual to be in control of a point source before a discharge occurs into a navigable water. There are too many possible locations upstream in which pollutants can be added. Considering expediency and efficiency, the only reasonable way to regulate water pollution is to hold responsible the individuals that control the point at which discharge enters navigable waters. Therefore, this Court should find that Bonhomme is liable for the discharge under the CWA.

CONCLUSION

Bonhomme cannot bring suit against Maleau because he is not a real party in interest as required by Fed. R. Civ. P. 17(a). Instead, this court should find that PMI is the real party in interest in the present case. This suit should be dismissed because Bonhomme did not join PMI, despite having considerable time to do so. Additionally, Bonhomme cannot bring suit against Maleau because Bonhomme is not a United States citizen as required by the CWA. 33 U.S.C. §§ 1362, 1365.

Maleau's mining waste piles are not point sources because they do not systematically collect, channel, and transport pollution into a navigable waterway. The stormwater runoff from the waste piles is not discrete and confined because Maleau does not collect, channel, and discharge the stormwater runoff from his property. Additionally, Maleau's mining waste piles are not instrumentalities built to systematically convey pollution from an industrial source into navigable waters.

The Supreme Court's decision in *Rapanos* precludes Ditch C-1 from classification as a "navigable water," because man-made ditches like Ditch C-1 are not "waters of the United States." Ditch C-1 is not a "navigable water" because it has never been navigated before and cannot conceivably be navigated in the future. Also, Reedy Creek is not a navigable waterway of the United States, nor is it a tributary of a navigable waterway. Reedy Creek has no effect on interstate commerce, and it is not connected to any other navigable waters under the jurisdiction of the CWA.

Wildman Marsh is not a navigable water, so Reedy Creek does not qualify as a navigable water under 33 C.F.R. § 328.3(a)(5) and 40 C.F.R. § 122.2 as a tributary of Wildman Marsh. The Marsh does not share a continuous surface connection with any other body of water under the jurisdiction of the CWA, nor does it share a significant ecological nexus with other bodies of water covered under the CWA. Wildman Marsh does not have an effect on interstate commerce because recreational pursuits relating to migratory birds on marshland do not, *ipso facto*, bring the Marsh under the jurisdiction of the CWA.

Finally, Bonhomme violated the CWA by adding arsenic to Reedy Creek, even though Maleau's mining operation was the but-for cause of the pollution. The CWA does not require that pollutants originate from the individual in control of the point source. Instead, the CWA

only addresses the direct act of introducing pollutants to a navigable water from a point source. Bonhomme owns and controls the point source from which the pollutant was discharged, and is therefore liable under the terms of the CWA.