Team No. 10

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 13-01234

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee,

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU

Intervenor-Plaintiff-Appellant, Cross-Appellee

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

On Appeal from the United States District Court for the District of Progress

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BRIEF OF JACQUES BONHOMME
Plaintiff-Appellant, Defendant-Appellant, Cross-Appellee

Oral Argument Requested

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JURISDICTIONAL STATEMENT

Appellant Jacques Bonhomme filed a complaint against Shifty Maleau in the District Court for the District of Progress. The District Court for the District of progress had jurisdiction under 28 U.S.C. § 1331 because Bonhomme sought relief under the Clean Water Act, 33 U.S.C. §§ 1251-1387. On July 23, 2012, the district court granted Maleau's motion to dismiss Bonhomme's complaint and denied Bonhomme's motion to dismiss the State of Progress' complaint against Bonhomme. The district court's order is final and jurisdiction in the United States Court of Appeals for the Twelfth Circuit is therefore proper pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Every action in federal court must be prosecuted in the name of the real party in interest, which is measured by whether that party has suffered the injury for which they seek to recover. Bonhomme owns a home on Wildman Marsh and has decreased his use of the marsh because of increased arsenic levels in the water. Is Bonhomme a real party in interest?

II. Citizenship under the CWA is defined by examining whether the "citizen" suffered injury in their individual capacity. Bonhomme reduced his personal and business usage of Wildman Marsh and is now fearful of using it because of increased arsenic levels. Is Bonhomme a citizen as defined by the CWA?

III. The CWA prohibits a person from discharging pollutants into navigable waters from point sources, broadly defined as discernible, confined, and discrete conveyances. Maleau used a truck to dump overburden material, then constructed piles next to Ditch C-1. His pile configuration caused channels to form between the piles. When it rained, water ran off or percolated through the piles containing arsenic. The polluted water collected in and was conveyed through these channels to Ditch C-1. Are the overburden-pile channels and machinery point sources of pollution?

IV. A person is prohibited from discharging pollutants into navigable waters of the United State. Navigable waters were expanded to encompass tributaries. Ditch C-1 is not navigable-in-fact but is physically characterized as a channel with relatively permanent, flowing water that directly connects with Reedy Creek, a navigable interstate water. Is Ditch C-1 a navigable water of the United States?

V. The CWA prohibits a person from discharging pollutants into navigable waters of the United States. Navigable waters are defined to include interstate and traditional navigable waters. Reedy Creek flows from the State of New Union into the State of Progress. Used

as crop irrigation and sanitation and drinking water supply, Reedy Creek's waters substantially affect interstate commerce. Is Reedy Creek a navigable water of the United States?

VI. A person must obtain a NPDES permit to discharge pollutants from a point source to a navigable water unless the water is transferred from one navigable water to another. Water from Ditch C-1 flowed through Bonhomme's culvert into Reedy Creek and ultimately Wildman Marsh, constituting a water transfer. Did the district court err by finding Bonhomme liable for transferring water instead of finding Maleau liable for failing to obtain a permit before discharging arsenic into navigable waters?

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the District of Progress granting Shifty Maleau's ("Maleau") motion to dismiss and denying Jacques Bonhomme's ("Bonhomme") motion to dismiss. (R. at 10). Bonhomme brought a civil suit under the Clean Water Act's ("CWA") citizen suit provision, 33 U.S.C. § 1365, for Maleau's violations of the CWA, 33 U.S.C. §§ 1251-1387. (R. at 4). The State of Progress ("Progress"), after Bonhomme's complaint was filed, initiated a citizen suit against Bonhomme under § 505 of the CWA. Maleau intervened in Progress' suit as a matter of right under § 505(b)(1)(B). (R. at 5). Progress and Maleau moved to consolidate their case with this action based on the similar factual and legal basis. (*Id.*).

Maleau and Bonhomme both filed motions to dismiss for various defects in the complaints. (*Id.*). The district court held that: (1) Bonhomme was not the real party in interest under Federal Rule of Civil Procedure 17(a); (2) Bonhomme was not a citizen as defined by § 1365(g) of the CWA; (3) Maleau's waste piles are not "point sources" under 33 U.S.C. § 1362(12), (14); (4) Ditch C-1 is not a "navigable water" or "water of the United States" under 33 U.S.C. § 1362(7), (12); (5) Reedy Creek is a "water of the United States"; and (6) Bonhomme violated the CWA for adding arsenic to Reedy Creek through a culvert on his property even though Maleau was the but-for cause of the arsenic's presence in Ditch C-1. (R. at 10).

Bonhomme filed a Notice of Appeal challenging all of the district court's holdings, except that Reedy Creek is a navigable water. (R. at 1-2). Maleau filed a Notice of Appeal challenging the district court's holding that Reedy Creek is a water of the United States. (R. at 2). Progress filed a Notice of Appeal challenging the district court's holding that Ditch C-1 is not a water of the United States. (*Id.*).

STATEMENT OF FACTS

Maleau is the owner and operator of a gold mining and extraction operation situated adjacent to the Buena Vista River in Progress. (R. at 5). Rather than dumping the overburden and slag from this operation at the mining site, Maleau hauls the materials and dumps them into piles adjacent to Ditch C-1. (R. at 5). When it rains, the water flows over and through the piles of overburden and slag before eventually discharging into Ditch C-1 from channels cut and eroded into the piles by gravity. (R. at 5).

Ditch C-1, contained completely in Progress, is a drainage ditch dug to drain the surrounding soil for agricultural purposes. (R. at 5). Ditch C-1 contains running water continuously, except during some annual week-to-month-long droughts. (R. at 5). Rainwater and drainage from the surrounding soil is the source of flow in Ditch C-1. (R. at 5). Starting at Maleau's property line, Ditch C-1 extends for three miles through numerous agricultural properties before discharging from a culvert on Bonhomme's property into Reedy Creek. (R. at 5).

Reedy Creek is a waterway approximately 50 miles long. (R. at 5). Beginning in the State of New Union, Reedy Creek is used as the water supply for Bounty Plaza, a service area on Interstate 250, which sells gasoline and food. Interstate 250 is a federally-funded, east-west interstate motorway. (R. at 5). After its inception in New Union, Reedy Creek flows into

Progress. As Reedy Creek flows through both states, farmers divert water for agricultural purposes, particularly irrigation. (R. at 5). Eventually, just before it reaches Bonhomme's property, Reedy Creek flows into Wildman Marsh. (R. at 5).

Wildman Marsh is a vast wetlands area which the stopover home essential to millions of ducks and other waterfowl during their annual migration periods. (R. at 5-6). A majority of the wetlands that create Wildman Marsh is similarly contained within the Wildman National Wildlife Refuge. (R. at 6). The Wildman National Wildlife Refuge is federally owned and maintained by the United States Fish and Wildlife Service. (R. at 6). Because of the large number of waterfowl that passes through Wildman Marsh, it is a key destination for hunters not only from Progress, but also from the surrounding states, the nation, and even other countries. (R. at 6). Hunting, and the economic spinoffs it creates, adds approximately $25 million to the local economy annually. (R. at 6).

Bonhomme owns a hunting lodge and property that sits adjacent to Wildman Marsh. (R. at 6). The extensive hunting opportunities drew Bonhomme to Wildman Marsh where he held up to eight hunting trips annually with business acquaintances and friends. (R. at 6). Recently, however, Bonhomme was forced to reduce his hunting trips from as many as eight, down to two trips per year. (R. at 6). This reduction is a direct result of his fear of rising arsenic levels in Wildman Marsh. (R. at 6). Arsenic is a deadly toxin that is commonly associated with gold-mining operations. (R. at 6).

Because of the drastic rise in arsenic in Wildman Marsh, Bonhomme tested the waters in an around the marsh. (R. at 6). Initially, Bonhomme tested the water in Ditch C-1 both upstream and downstream from Maleau's property and the water upstream and downstream of where Ditch C-1 enters Reedy Creek. (R. at 6). Bonhomme's testing showed high levels of arsenic in

Ditch C-1's waters after Maleau's property. (R. at 6). The arsenic levels dropped proportionately as Ditch C-1 flowed into Reedy Creek; however before Ditch C-1 discharges into Reedy Creek, Bonhomme detected no arsenic. (R. at 6). Significant levels of arsenic are present in Reedy Creek directly downstream of Ditch C-1's discharge point. (R. at 6). Finally, Bonhomme tested the waters of Wildman Marsh and similarly discovered that arsenic was present throughout the marsh. (R. at 6).

STANDARD OF REVIEW

The district court granted Maleau's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. This Court reviews a dismissal based on Rule 12(b)(6) *de novo*. *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 357 (5th Cir. 2012).

SUMMARY OF THE ARGUMENT

The district court erred when it held that Bonhomme was not a real party in interest under Rule 17(a). Every action must be prosecuted in the name of the real party in interest. However, the federal rules do not contemplate that there is only one real party in interest to every action, rather, if a party can demonstrate that they hold the substantive right to they seek to enforce through the litigation. Bonhomme holds the right as defined under the citizen-suit provision of the CWA, so long as he is a citizen as contemplated by the CWA. Furthermore, even if Bonhomme is not a real party in interest, the district court erred because it dismissed Bonhomme's complaint without proper notice.

The district court erred when it held that Bonhomme was not a citizen as contemplated by the CWA. Under the CWA, citizenship is not confined to the traditional notions of national boundaries, but rather it is defined based on whether a party was actually directly injured. This definition is meant to ensure that Congress' goal of broad CWA application is met. When Bonhomme became fearful of using Wildman Marsh for continued personal and business

activities, he suffered an actual, direct injury. Therefore, Bonhomme is a citizen as contemplated by the CWA. Furthermore, the district court went beyond the scope of Rule 12(b)(6) when ruling on Maleau's motion to dismiss because they relied upon the non-moving parties factual assertions and improperly exercised judicial notice.

The CWA prohibits a person from discharging pollutants into navigable waters from a point source without a permit. Point source is defined broadly as any discernible, confined, and discrete conveyance and broadly interpreted by the courts. Appellate courts have identified spoil piles and machinery as point sources. When Maleau trucked, then dumped, gold-mining overburden piles from his Lincoln County mining operation to his property in Jefferson County, the trucks he used were point sources of pollution. He likely used machinery to configure the material into piles, which were also point sources. Over time, gravity eroded the piles and channels formed between them because of Maleau's configuration. When it rained, water ran off and percolated through the piles, becoming contaminated with arsenic. Instead of naturally discharging, the polluted water was directed into the formed channels. These channels ran to Ditch C-1, conveying pollutants from the overburden-pile point sources to Ditch C-1. Although Maleau did not directly create the point sources, he artificially intervened to direct the flow of the water. Therefore, the district court erred in holding that the channels and machinery were not point sources.

The CWA no longer defines navigable as navigable-in-fact. Instead, since the 1972 amendments, the term now broadly encompasses tributaries—ecological systems of water. Tributaries that are navigable waters of the United States have been physically characterized by the United States Supreme Court as having relatively permanent flowing water, continuous except for drought periods. When a relatively permanent tributary flows into a navigable water

of the United States, it is subject to CWA jurisdiction. Ditch C-1 is a permanent, man-made channel that flows for three miles into Reedy Creek. The water in Ditch C-1 is physically characterized as relatively permanent and continuously flowing other than during drought periods. And Ditch C-1 flows into Reedy Creek, a navigable water of the United States. The district court erred when it held that Ditch C-1 is not a navigable water of the United States.

Navigable waters of the United States encompasses interstate waters and traditional navigable waters. Interstate waters are those that cross state boundaries. Traditional navigable waters include those waters used in interstate commerce. Reedy Creek flows for 30 miles across the states of Progress and New Union. Its waters are used in interstate commerce to irrigate crops and supply sanitation and drinking water to interstate travelers. The district court correctly identified Reedy Creek as a navigable water of the United States.

Ditch C-1 and Reedy Creek flow together at Bonhomme's culvert. EPA regulations define this as a transfer of water, exempted from NPDES permit requirements. Because pollutants cannot be added when water is transferred, Bonhomme's culvert cannot be a point source. Although the district court held Bonhomme liable for violating the CWA, he cannot comply because one cannot obtain a permit if one is taking no action. This court should find that Maleau, not Bonhomme, is liable under the CWA.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY DISMISSING BONHOMME UNDER RULE 17(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Under Federal Rule of Civil Procedure 17(a), "[a]n action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a). Rule 17(a) was enacted to serve dual purposes. First, the requirement of Rule 17(a), that all actions be prosecuted by the "real party interest," is driven by the principle that pleadings in a particular case "should be made to reveal and assert the actual interest of the plaintiff, and to indicate the interests of any others in the claim." *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 382 (1949). This rule, therefore, protects "a defendant from facing a subsequent similar action brought by one not a party to the present proceeding and to ensure that any action taken to judgment will have its proper effect as res judicata." *Prevor–Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc.*, 620 F.2d 1, 4 (1st Cir.1980); *see also Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir.2001). Second, Rule 17(a) serves to avoid the unjust forfeiture of claims. *See Sun Refining & Mktg. Co. v. Goldstein Oil Co.*, 801 F.2d 343, 345 (8th Cir.1986). "Although the district court retains some discretion to dismiss an action where there was no semblance of any reasonable basis for the naming of an incorrect party, there plainly should be no dismissal where substitution of the real party in interest is necessary to avoid injustice." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir.1997) (quotation and citations omitted).

A. Bonhomme is a real party in interest to the litigation.

Rule 17(a) is concerned with whether the party litigating the case is a real party to the litigation. Under the rules of civil procedure, real party in interest is "a term of art" which

"permits courts to intelligibly discuss those instances in which an individual with a substantive right must appear as a party to litigate a claim, and those instances in which another may appear in his stead." *U.S. ex rel. Eisenstein v. City of New York*, 540 F.3d 94, 99 (2d. Cir. 2008). The rules of civil procedure contemplate more than one real party in interest, to that end "there may be multiple real parties in interest for a given claim, and if the plaintiffs are real parties in interest, Rule 17(a) does not require the addition of other parties also fitting that description." *HB General Corp. v. Manchester Partners L.P.*, 95 F.3d 1185, 1196 (3d Cir. 1996).

Black's Law Dictionary defines a real party in interest as "a person entitled under the substantive law to enforce the right sued upon and who generally . . . benefits from the action's final outcome." BLACK'S LAW DICTIONARY 1292 (9th ed. 2009). This definition is echoed by numerous circuits, which focus on who holds, according to the governing substantive law, the right to be enforced. *See U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009) (citing Black's Law Dictionary's definition); *see also In re Signal Intern., LLC*, 579 F.3d 478, 487 (5th Cir. 2009) (noting that a real party in interest is a person who holds the substantive right to be enforced, not the person who will ultimately benefit from recovery); *see also Johnson Intern. Co. v. Jackson Nat. Life Ins. Co.*, 19 F.3d 431, 437 (8th Cir. 1994) (noting that the real party in interest is the person holding the right to be enforced, not necessarily the person who will ultimately benefit from recovery).

The Clean Water Act authorizes individual suits to enforce the overarching goal of the Act. The goal of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Citizenship suits brought under the Clean Water Act allow parties to enforce limited sections of the act on their own behalf. Specifically, § 1365(a)(1), the Clean Water Acts citizen-suit provision, provides that

"any citizen may commence a civil action on his own behalf . . . (1) against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." Section 1365(f)(1) allows citizen suits for "an unlawful act under subsection (a) of section 1311 of this title." Section 1311(a), titled "[i]llegality of pollutant discharges except in compliance with law," provides that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

Bonhomme is a real party in interest because he owns property on Wildman Marsh. Under the prevailing interpretation of "real party in interest," Bonhomme is the holder of the substantive right that he seeks to enforce. The district court erred when espousing that PMI is the real party in interest to this case because "PMI conducted or paid for the sampling and analyses" and "PMI pays the attorney and expert witness fees for Bonhomme in this case." (R. at 7). This analysis is faulty because it misinterprets the requirements of Rule 17(a). Rule 17(a) requires that the action be prosecuted by the real party in interest, however the real party in interest is determined by analyzing who holds the substantive right being enforced in the litigation. *See U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009). Bonhomme brings a citizen suit against Maleau for violations of the Clean Water Act. Section 1365(f)(1) allows citizens suits for unlawful acts as defined by the Clean Water Act. Therefore, any citizen may bring an action under the Clean Water Act. Since Bonhomme can demonstrate that he is a citizen under the definition of § 1365(g) of the Act, he is the real party in interest to this litigation.

B. <u>Regardless of Bonhomme's status as a real party in interest, the district court erred by improvidently dismissing the case without proper notice and time for substitution.</u>

Dismissal of an action for failure to prosecute in the name of the real party in interest should not be immediately considered, rather after an objection has been made, a reasonable time should be afforded to the real party in interest to either join, ratify, or substitute in the action. *See* FED. R. CIV. P. 17(a). A proper objection to Bonhomme's status as the proper plaintiff in this matter must have been made prior to the district court's errant decision to dismiss his claim.

A district court should only consider a dismissal under Rule 17 if the issue was raised by motion "in order to notify the disputed party of the error." *Continental Ins. Co. v. N.A.D. Inc.*, 16 F. App'x 659, 661 (9th Cir. 2001); *see Weissman v. Weener*, 12 F.3d 84, 87 (7th Cir.1993) (even where court sua sponte objects to whether a party is appropriate under Rule 17(a), Rule 17(a) requires a reasonable time to cure the defect). A proper objection under Rule 17(A) is meant to provide notice to the parties that a defect in the pleadings must be corrected. *Cf. Levine v. United States*, 362 U.S. 610, 619 (1960) (general objection does not suffice to give proper notice of issue). Further, any defense under Rule 17(a) must be "plainly" made. *See In re Signal Intern.*, 579 F.3d at 490-91.

The district court erred when determining that Maleau's answer to Bonhomme's complaint was sufficient to provide notice to Bonhomme with notice and "opportunity to correct their pleadings by adding PMI as a party, which they have not done." (R. at 7). Initially, rather than requiring Maleau to serve Bonhomme with a motion made under Rule 17(a), the district court dismissed Bonhomme's case based on Maleau's "objection" in his complaint. However, as the Ninth Circuit in *Continental Insurance* noted, a proper objection under Rule 17(a) should be made by motion to guarantee proper notice to he party in error. *See* 16 F. App'x at 661. The district court erred further because Maleau's answer could not have provided Bonhomme with effective notice that his complaint may be in violation of Rule 17(a). Without proper notice that

his pleading was in error, Bonhomme could not have attempted to join another party, whether or not such joiner was necessary. Such injustice is contrary to the goal of Rule 17(a). The advisory comments to Rule 17(a) "make clear that equitable principles should apply to a district court's opinion." *Continental Ins. Co.*, 16 F. App'x at 661 (citing Fed.R.Civ.P. 17 Advis. Com. Notes). The district court, however, acted inequitably when determining that because Bonhommes uses his home on Wildman Marsh for hunting than as a full-time residence, he could not be a real party in interest to this action. (R. at 7). The district court's decision must be reversed.

The district court committed reversible error when it determined that Bonhomme was not a real party in interest. Bonhomme is a real party in interest because he hold the substantive right under the Clean Water Act which he seeks to enforce. Furthermore, regardless of Bonhomme's status as a real party in interest, the district court erred when allowing Maleau's answer to Bonhomme's complaint serve as notice of his objection under Rule 17(a).

II. BONHOMME HAS STANDING TO BRING THIS ACTION UNDER THE CLEAN WATER ACT BECAUSE HE IS A "CITIZEN" WHO SUFFERED AN INJURY BECAUSE OF MALEAU'S ILLEGAL ACTIONS.

Article III of the Constitution limits the power of the federal court to hear cases and controversies. U.S. CONST., Art. III, § 2. Every suit brought in federal court, therefore, must meet the case or controversy minimum requirement. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Congress has the unequivocal power to grant new interests the invasion of which will confer standing to an injured party. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). However, even when Congress has conferred such a right, the injury minima of Article III remains. *Lujan*, 504 U.S. 560 (requiring injury-in-fact, causation, and redressability).

A. Under the CWA requirement for citizen suits, Bonhomme suffered an injury resulting in direct injury to his interests.

Section 505 of the CWA provides that "any citizen may commence a civil action on his own behalf" against a person alleged to have violated the CWA. 33 U.S.C. 1365(a) (West 2012). The CWA defines "citizen" as a person "having an interest which is or may be adversely affected." 33 U.S.C. 1365(g) (West 2012). The district court incorrectly determined that Bonhomme, a French national, was not a "citizen" as defined by the CWA.

Under a proper analysis of § 1365(g), Bonhomme need only demonstrate that he suffered an injury under the Supreme Court's decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972). The Second Circuit in *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984), completed a thorough review of the legislative history of the CWA and determined that when enacting the CWA, Congress intended to confer standing under the CWA in accordance with the *Morton* decision. *See SCM Corp.*, 747 F.2d at 104. Testimony of the drafters of § 1365(g) indicated that the intent of the CWA standing provision was to abandon a restrictive regional-based scheme of determining standing in favor of a provision that conferred standing based on whether a party suffered direct injury. *See id.* at 105-07. The Second Circuit's conclusion is bolstered by the Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, where the Court reasoned that, "[i]t is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton.*" 453 U.S. 1, 16 (1981). Therefore, Congress had completed their goal of extending standing to plaintiffs who could meet the requirement of showing injury in fact and nothing more. *See* Stephen Fotis, *Private Enforcement of The Clean Air Act and The Clean Water Act*, 35 AM. U. L. REV. 127, 141 (1985).

The district court improperly relied on the narrow construction of United States "citizen" to drive their decision that Bonhomme was not entitled to pursue this case. The district court

erred further when reasoning that when expanding the defition of citizen, Congress intended to create standing for non-individual entities rather than foreign nationals. (R. at 8). Such a conclusion is improper in light of Congress' stated legislative intent.

The proper analysis of Bonhomme's status as a citizen, therefore, is whether he meets the standing requirement in *Morton*. The consideration afforded to Bonhomme on this issue is not whether he has standing under the prevailing caselaw; rather Bonhomme need only demonstrate that his injuries are compensable as understood by the Court in *Morton*. The *Morton* Court determined that standing should be conferred when the party seeking review is himself among the injured. *Morton*, 405 U.S. 734-35. Injury that was considered by the Court was not expressly limited to economic injury, rather injury to conservational and recreational interests would suffice. *See id.* at 735.

Bonhomme, as a homeowner, suffers a palpable injury as a direct result of Maleau's dumping of contaminated spoils. (R. at 6). Beyond the injury to his property, Bonhomme is no longer comfortable bringing hunting parties to Wildman Marsh, and has he has decreased his parties from eight to two per year. (R. at 6). These injuries are the type of injury contemplated by *Morton* because Bonhomme has suffered an injury to his own interests. Because Bonhomme's injury was cognizable under *Morton*, he is a "citizen" as contemplated by Congress when enacting the CWA. The district court's decision is therefore in error.

B. Congress's intent in defining citizen in the CWA is best honored by allowing Bonhomme to proceed with this action.

The disposition of this case will affect not only the doctrine of standing, but the entire scheme of environmental protection. The fundamental goal of the CWA is to make "the discharge of any pollutant" unlawful unless in compliance with a number of statutory schemes.

33 U.S.C. § 1311. Further, Congress intended to eliminate or significantly reduce those barriers that hold individual plaintiffs back from suing when enforcement agencies could, or would, not bring action. *See* 33 U.S.C. § 1365 (West 2012). Congress often allows citizen suits, or other enforcement mechanisms, to ensure the broad goal of its legislation is met. *See* Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1195 (1993). Congress' goal when enacting legislation with citizen suit provisions is to allow as many citizen suits as possible. *See* Martin A. McCrory, *Standing in the Ever-Changing Stream: The Clean Water Act, Article III Standing, and Post-Compliance Adjudication*, 20 STAN. ENVTL. L.J. 73, 90 (2001).

Were this Court to affirm the decision of the district court and deny Bonhomme status as a citizen for the purposes of the CWA, it would subvert Congressional intent in passing the CWA. When the CWA was enacted, the citizen-suit provision was intended to convey broad standing based on injury, rather than the traditional definition of "citizenship". *See*, *e.g. Middlesex County Sewerage Authority*, 453 U.S. at 16. While the doctrine of standing has severely limited the ability of certain plaintiffs to prosecute actions under the CWA, the posture of this case does not implicate the narrow construction of the current standing doctrine. Ensuring that all "citizens" as defined by the CWA, not the traditional term "citizenship," are able to prosecute actions acknowledges Congress' goal when enacting he CWA. Vigorous enforcement of the CWA, and all other environmental legislation, relies on the unfettered ability of plaintiff's to bring citizen suits. The district court's decision would be a significant setback for environmental enforcement if left untouched.

C. <u>The procedural significance of Rule 12(b)(6) was subverted when the district court determined that Bonhomme was not a citizen as defined by the CWA.</u>

The standard of review applied by the district court when reviewing Maleau's motion to dismiss was wholly inappropriate. A Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted tests the legal sufficiency of a complaint by evaluating the assertions therein in a light most favorable to Plaintiff to determine wither such states a valid claim for relief. *See In re NM Holdings Co., LLC*, 622 F.3d 613, 618 (6th Cir. 2010).

The Supreme Court, in its landmark decision in *Bell Atlantic Corporation v. Twombley*, reasoned that a motion to dismiss will be denied where the factual allegations are enough to raise a right for relief above the speculative level on the assumption that all of the complaint's allegations are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As the Supreme Court more recently held, to survive a motion to dismiss, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). This plausibility standard "is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

The district court initially exceeded the scope of Rule 12(b)(6) review when it accepts Maleau's interpretation of the facts in this matter. Maleau alleges that the decrease in Bonhomme's hunting parties is not related to the arsenic now present in Wildman Marsh, but is rather related to the economic decline. (R. at 6). Instead of treating Maleau's allegations as mere puffery, the district court was inclined to accept his allegations, in juxtaposition to the treatment of a complaining parties allegations under Rule 12(b)(6). *See In re NM Holdings*, 622 F.3d at 618 (requiring that the district court evaluate the assertions in a light most favorable to the non-moving party).

The district court's exercise of judicial notice with respect to comments made by Bonhomme at a public press conference was inappropriate. A court may exercise judicial notice in the context of a motion to dismiss under Rule 12(b)(6). *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). However, for a fact to be subject to judicial notice it must be either generally known within the territorial jurisdiction of the court or is capable of ready determination from sources whose accuracy cannot reasonably be questioned. FED. R. EVID. 201(b); *see also Facebook, Inc. v. Teachbook.com LLC*, 819 F.Supp.2d 764, 771 (N.D. Ill. 2011). Courts must strictly adhere to the criteria of Rule 201(b) because "the effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and, in effect, directing a verdict against him as to the fact noticed." *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1083 (7th Cir.1997).

The district court exercised judicial notice over Bonhomme's comments without any regard to whether their accuracy could reasonably be questioned. Judicial notice was inappropriate because the statements contained assertions that were not generally known within the territorial jurisdiction of the court and the accuracy of those statements were certainly ripe for questioning. As a succinct example, the district court accepted this "fact" as true: "According to the Attorney General, Bonhomme, as President of PMI, filed suit against Maleau to injure his ability to compete with PMI." (R. at 6). By judicially noticing this "fact", Bonhomme is precluded from introducing contrary evidence and a verdict has already been entered against him on that fact. *See General Elec. Capital Corp.*, 128 F.3d at 1083. Judicial notice was inappropriate as exercised over the above statement, along with a myriad other.

The district court committed reversible error when it determined that Bonhomme was not a citizen as defined under § 1365(g). Because Bonhomme is a citizen as contemplated by the

Supreme Court's decision in *Morton*, which was subsequently codified by § 1365(g), he is a citizen for the purposes of the CWA. Furthermore, Congressional intent is best served by permitting Bonhomme to proceed with this citizen suit. Finally, the district court exceeded the procedural scope of a Rule 12(b)(6) motion by not viewing the facts in a light most favorable to Bonhomme and by errantly applying judicial notice.

III. THE OVERBURDEN-PILE CHANNELS THAT WERE CREATED BY MALEAU'S PLACEMENT OF THE PILES ARE POINT SOURCES AS CONTEMPLATED BY THE CLEAN WATER ACT.

Congress uses the CWA to prohibit point-source pollution of navigable waters of the United States. 33 U.S.C. § 1251(a). Courts now broadly interpret the term point source to encompass overburden-pile channels and machinery. *Sierra Club v Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980); *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001). Discharges from a pile can easily be traced to its source—although runoff may be "caused by rainfall or snow melt percolating through a…pile, the discharge is from a point source because the…pile acts to collect and channel contaminated water." *Washington Wilderness Coalition et al. v. Hecla Mining Co.*, 870 F.Supp 983, 988 (E.D. Wash. 1994).

A. The district court erred when it failed to recognize the overburden-pile channels as point sources.

EPA regulations define point source as any discernible, confined, and discrete conveyance, including but not limited to artificial mechanisms like a pipe, ditch, channel, tunnel, or conduit. 40 C.F.R. § 122.2; 33 U.S.C. § 1362(14). Courts now take a broad view of point sources, interpreting the term to mean the "proximate source from which pollutants are directly introduced or carried to navigable waters." *Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) aff'd, 537 U.S. 99 (2002); *U.S. v. Oxford Royal*

Mushroom Products, Inc., 487 F. Supp. 852 (E.D. Pa. 1980) (holding that spray irrigation systems were point sources).

Application of this broad view means that overburden-pile channels are point sources of pollution. In *Sierra Club*, the district court's improperly narrow interpretation of the term point source was reversed when it incorrectly found no point-source pollution from miners' artificial intervention that caused gullies to form, conveying pollutants to navigable water. *Sierra Club v Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980). Interpreting the term broadly to encompass spoil-pile channels, the Fifth Circuit reversed. Although the miners did not affirmatively or directly create a point source, the court said they facilitated runoff by artificially directing water flow. Citing *Consolidation Coal Co. v. Costle* and *United States v. Earth Science*, the court determined that gravity flow or surface water percolation as well as efforts to change the surface, direct the water flow, or impede the progress of water all constitute point-source discharge. 604 F.2d 239 (4th Cir. 1979); 599 F.2d 368, 370 (10th Cir. 1979) (stating "[w]e believe it contravenes the intent of [the Clean Water Act] and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point").

Similarly, here, the district court erred when it applied a narrow definition of point source and failed to recognize that channels are point sources of pollution. Although district court correctly stated that "dirt" and "rock" are not included in the list of point-source examples (they are examples of pollutants), the district court apparently overlooked the term "channel." Nor did it consider that the channels held to be point sources in *Sierra* and the channels formed by Maleau's actions are the very channels used as an example of point-source pollution in EPA regulations. While dirt and rock describe the contents of the pile, channel describes the means by which polluted water is conveyed—the statutory definition of point source. The district court

also ignored the striking similarities between the *Sierra* point-source spoil piles and Maleau's piles. Like *Sierra*, where precipitation flowed through gullies eroded by gravity from the miners' design of point-source spoil piles, Maleau's pile configuration caused channels to form that conveyed polluted rainwater into Ditch C-1.Thus the overburden-pile channels are point sources and should be identified by this Court as the source of the Ditch C-1 pollutants.

B. The courts' broad interpretation of point source encompasses machinery.

Courts have identified machinery like bulldozers, dump trucks, and other earth-moving equipment as point-source pollution.[1] When waste spread with a bulldozer entered navigable waters, the court identified the bulldozer as a point source. *Colvin v. United States*, 181 F. Supp. 2d 1050 (C.D. Cal. 2001). The court noted that bulldozers and other similar vehicles can be point sources of pollution.

Maleau used trucks to dump the polluted material next to Ditch C-1, purposely transporting it from his mining operation to his Jefferson County property. Maleau likely used earth-moving equipment to pile the polluted material next to Ditch C-1. These vehicles are point sources—artificial mechanisms that channeled polluted water into Ditch C-1. This Court should identify the machinery used by Maleau as point sources of Ditch C-1 pollutants.

IV. DITCH C-1 IS A NAVIGABLE WATER BECAUSE UNDER THE APPLICABLE BROADER DEFINITION OF NAVIGABLE WATERS, DITCH C-1 IS A TRIBUTARY SUCH THAT IT IS SUBJECT TO THE JURISDICTION OF THE CLEAN WATER ACT.

For decades, Congress and the courts have made clear that the physical characteristics of navigable water are no longer limited to navigability-in-fact but now more broadly encompass

[1] *See United States v. Weisman*, 489 F Supp 1331 (M.D. Fla. 1980) (holding that dump trucks and bulldozers were point sources of pollution); *People v. Ramsey*, 94 Cal. Rptr. 2d 301 (2d Dist. 2000) (holding that earth-moving equipment was point source); *Borden Ranch P'ship v. U.S. Army Corps of Eng'r.*, 261 F.3d 810 (9th Cir.2001); *National Ass'n of Home Builders v. U.S. Army Corp of Engineers*, 311 F.Supp.2d 91 (D.D.C. 2004); *United States v Lambert*, 915 F.Supp. 797 (S.D. W. Va. 1996); *U.S. v. Marion L. Kincaid Trust*, 463 F. Supp. 2d 680 (E.D. Mich. 2006).

other waters that are not traditionally navigable like tributaries. Waters that are part of a tributary system have specific physical characteristics, including relatively permanent, continuous flow. The intent of Congress is to control pollution at the source. This can only be accomplished by broadly focusing protection efforts at all parts of the aquatic system.

A. Navigable waters of the United States are no longer limited to waters that are navigable-in-fact.

For a century, navigable waters were limited in scope by required navigable-in-fact physical characteristics—whether a person could float a boat on the water. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). But sweeping CWA reform in 1972 signaled Congress's intent to no longer be limited by this traditional concept of navigability. *State of Utah By and Through Div. of Parks and Recreation v. Marsh*, 740 F.2d 799 (10th Cir. 1984). The Senate Report accompanying the CWA articulated this dramatic shift to regulating water quality at the point of pollution, even if the water could not actually be navigated:

> "[T]he conference bill defines the term 'navigable waters' broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws. The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability derived from the Daniel Ball case…to include [other] waterways….Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability…going to govern matters covered by this bill. Indeed, the conference report states…'The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation….'"

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1323-24 (6th Cir. 1974) (citing 118 Cong.Rec. 33756-57 (1972)). For over forty years, countless courts have echoed the intent of Congress that navigable waters be expanded to encompass waters not physically characterized as navigable-in-fact, like wetlands and tributaries. *Rapanos v. United States*, 547 U.S. 715, 732

(2006) (citing *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985)); *Solid Waste Agency of Northern Cook Cty.*, 531 U.S. 159 (2001) (stating that the original, narrow definition can no longer be "applied wholesale" to the Clean Water Act because the meaning of navigable water is "broader than the traditional understanding of that term").

Maleau argues that Ditch C-1 is not navigable water subject to CWA jurisdiction because it has never floated a boat and never will. But the truth of Maleau's argument is irrelevant because navigability-in-fact is no longer the standard. To hold that it is ignores thirty years of progressive environmental legislation and a plethora of federal cases that long ago abandoned the navigable-in-fact definition urged by Maleau. The traditional understanding of navigable waters ceased to exist when the CWA was amended. 33 U.S.C. § 1362(7).

B. Navigable waters of the United States are now defined to include tributaries like Ditch C-1 with relatively permanent, continuously flowing water.

Navigable water is defined by regulation to include tributaries of traditional navigable waters and interstate waters. Tributaries need not by themselves be navigable-in-fact to be one of the waters of the United States. 33 U.S.C. § 1362(7); 40 C.F.R. §§ 230.3(s), 122.2; 33 C.F.R. § 328.3(a). In this context, to determine if a body of water is a tributary, defined physical characteristics are compared to the water's characteristics.

A tributary is physically characterized as a branch of an entire ecological system that flows into navigable waters as well as a relatively permanent, standing, or flowing body of water that has continuous flow at least seasonally except during periods of drought or dry months. *United States v. Deaton*, 332 F.3d 698, 710, 711 (4th Cir. 2003); *Rapanos* 547 U.S. at 739, 742. "Permanent" does not mean the rate or amount of flow but rather if water is flowing in a channel over a period of time. *Rapanos*, 547 U.S. at 733 n.5,6. A tributary does not exist in dry channels

or have intermittent or ephemeral flow in intervals. A tributary can be natural or man-made; it often has a channel with a defined bed and bank—the channel bottom is the stream bed, the lateral constraints the stream banks.

Federal courts have applied these defined physical characteristics to bodies of water to determine if they constitute tributaries. Of significance, the Fourth Circuit held that a roadside ditch had the physical characteristics of a tributary. The ditch carried water through a culvert under a road, then into a creek that fed into a river that flowed into the Chesapeake Bay. The court found evidence of relatively permanent flow in the ditch—one part of a system of water that flowed into several navigable waters. The court concluded that "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *United States v. Deaton*, 332 F.3d 698, 710-11 (4th Cir. 2003). Similarly, the Sixth Circuit found a tributary when a small creek, carrying water from the farms through which it flowed, drained into a larger creek that flowed into a river. The court stated that "[p]ollution control of navigable streams can only be exercised by controlling pollution of their tributaries." *U.S. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1327 (6th Cir. 1974); *see also United States v. Spanish Cove Sanitation, Inc.*, 91 F.3d 145 (6th Cir. 1996) (finding CWA jurisdiction where a "non-navigable tributary of a non-navigable tributary of a non-navigable tributary of a small navigable river").

Similarly, Ditch C-1 is a navigable water of the United States because it has the physical characteristics of a tributary. Carrying water from the farms it flows through, Reedy Creek extends for three miles, flowing through a culvert under a road into Reedy Creek, an navigable interstate highway of water. Ditch C-1 is a man-made ditch with a distinct bed and bank, creating a channel for water flow. It is undisputed that Ditch C-1 contains relatively permanent water that

flows continuously, except during drought periods, directly into Reedy Creek a traditional navigable and interstate water. It is conceivable, when periods of drought are not present in a given year, that Ditch C-1 flows continuously for twelve months. As such, Ditch C-1 cannot be categorized as a dry channel where water flows only intermittently or comes and goes in broken and short-lived intervals. And Maleau has offered no evidence contradicting the fact that Ditch C-1 is a tributary with relatively permanent, continuous-flowing water.

Maleau also argues—and the district court affirmed—that Ditch C-1 is not a navigable water but a point source because a ditch cannot simultaneously be two elements in the water pollution offense. For support, the district court points to the fact that a ditch is listed among the examples provided in the definition of point source. 33 U.S.C. § 1362(14). But the district court decision was erroneous for two reasons. First, the district court made its decision because it identified ditches as an example of a point source. CWA §502(14). But as shown, the district court erred by not applying the physical characteristics of Ditch C-1 to those established through regulation and case law. Had the district court applied the physical characteristics described by the Supreme Court in *Rapanos*, the district court would have correctly concluded that Ditch C-1 is a navigable water because it contains relatively permanent, continuously flowing water. Second, because the district court erroneously found that Ditch C-1 was not a point source, it therefore concluded that it could not be a navigable water because these are distinct and separate categories. As discussed above, the point sources are the channels and machinery used to convey polluted water from overburden piles to Ditch C-1. Moreover, the district court did not fully understand the distinction between these categories drawn by the Supreme Court. In *Rapanos*, the plurality said that physical characteristics of the water distinguish navigable water from a point source. Whereas point sources typically carry intermittent water flow, navigable

waters typically carry relatively permanent water flow. Application of this distinction would have led the district court to correctly conclude that Ditch C-1 is not a point source

Under § 1362(7), Ditch C-1 is a navigable water of the United States because it has the physical characteristics of a tributary—relatively permanent, continuously flowing water that connects to Reedy Creek, a navigable interstate water. Although Ditch C-1cannot float a boat, it does not have to. Classifying Ditch C-1 as a point source under § 1362(14) ignores the physical characteristics of a tributary. As previously argued, the definition of a point source is clearly applicable to Maleau's actions, not to Ditch C-1. Just as clearly, the definition of tributary and its physical characteristics are applicable to Ditch C-1. For these reasons, this Court should reverse the district court's finding that Ditch C-1 is a point source and instead find that Ditch C-1 is a navigable water of the United States.

V. REEDY CREEK IS A NAVIGABLE WATER BECAUSE IT CROSSES STATE BOUNDARIES AND IMPACTS INTERSTATE COMMERCE.

The district court correctly identified Reedy Creek as a navigable water of the United States, consistent with the Clean Water Act and federal case law. Contrary to Maleau's assertions, Reedy Creek is a navigable water of the United States because it is both an interstate water and a traditional navigable water that has a substantially effect on interstate commerce.

A. Navigable waters of the United States are defined to include interstate water that crosses state boundaries.

Navigable water is defined by CWA regulation to include interstate water. 33 U.S.C. § 1362(7), 40 C.F.R. §§ 230.3(s), 122.2; 110.1(a); 33 C.F.R. § 328.3(a). Historically, federal water pollution control statutes defined interstate water as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." Water Pollution Control Act of 1948, § 10(e), 62 Stat. 1155, 1161. Today, the definition is remarkably similar: lakes, ponds, and similar water

features that flow across state boundaries or form part of state or international boundaries for the entire length of the water. Simply, interstate means water that crosses a state boundary.

Activities that cross state boundaries or impact more than one state have long been within the federal purview, largely because Congress's commerce power is broad enough to regulate activities that may affect multiple states, like air and water pollution. *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 282, n.21 (1981); *United States v. Byrd*, 609 F.2d 1204, 1209-11 (7th Cir. 1979). Reedy Creek is a navigable interstate water because it continuously flows from the State of New Union, across the New Union-Progress state boundary, into the State of Progress. Thus, by definition Reedy Creek is an interstate water. This Court should affirm the district court's finding that "[t]he interstate nature of water pollution is the reason why Congress enacted water pollution control legislation in the first place." (R. at 10).

B. Reedy Creek is a traditional navigable water of the United States as defined by the Clean Water Act and case law, impacting interstate commerce.

First defined as traditional-in-fact, navigable waters are now more broadly defined but still encompass traditional-in-fact waters under Federal Regulation § 328.3(a)(1),which includes waters that are presently used, were used, or may be susceptible to use in interstate or foreign commerce. 33 U.S.C. § 1362(7); 40 C.F.R. § 230.3(s)(1); 40 C.F.R. § 122.2(b); 40 C.F.R. § 110.1(a). It is long recognized that Congress's interstate commerce power includes navigation regulation. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Congress may regulate the channels of interstate commerce; instrumentalities of interstate commerce or person and things in interstate commerce; and activities that have a substantial relation to interstate commerce including intrastate activities that have a substantial effect on interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995). Thus, Congress can regulate navigable water if rationally related to

protecting the water quality of the channels of interstate commerce and the activities that substantially affect interstate commerce. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1228-29 (2012). Reedy Creek flows for fifty miles from the State of New Union through the State of Progress, forming a channel of interstate commerce. Its waters are used to irrigate crops and supply sanitation and drinking water to interstate travelers.

1. Reedy Creek is a traditional navigable water of the United States that impacts interstate commerce because it irrigates crops sold in interstate commerce.

As Reedy Creek waters flow along interstate channels, farmers use the water to irrigate their crops, which are then sold in interstate commerce.

Like Reedy Creek water, Utah Lake water was used to irrigate crops sold in interstate commerce. *State of Utah By and Through Div. of Parks and Recreation v. Marsh*, 740 F.2d 799 (10th Cir. 1984). When fill and dredge material was discharged without a permit, the Tenth Circuit compared crop irrigation to other forms of interstate commerce to find that the material discharged could harm Utah Lake's water quality and substantially affect its use for irrigating crops sold in interstate commerce. *Id.* at 804 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)). Similarly, Lake Wawasee water was used by out-of-state visitors for swimming, fishing, and other recreational purposes. *See United States v. Byrd*, 609 F.2d 1204, 1209-11 (7th Cir. 1979). When fill material was discharged into surrounding wetlands without a permit, the Seventh Circuit found that this activity could degrade Lake Wawasee's water quality and impair the Lake's attraction to interstate travelers because the value of the lake depended on the purity of the water. *See id.* (citing *Wickard v. Fillburn*, 317 U.S. 111 (1942)). The court concluded that the indirect effect on interstate commerce flow was reasonably related to the CWA. *Byrd*, 609 F.2d at 1211.

Like the Utah River water, Reedy Creek water is used to irrigate crops sold in interstate commerce. And like Lake Wawasee water, pollutants in Reedy Creek water could degrade its water quality and impair its use for irrigating crops sold in interstate commerce. The value of the crops sold depends on the purity of the water used. If crops are contaminated from toxic pollutants in the water, then the interstate food supply and health of the citizens consuming the food could be substantially affected. Farmers in these states could be economically impacted as well if their crops cannot be sold. Reedy Creek water clearly has a substantial effect on interstate commerce.

2. Reedy Creek is a traditional navigable water of the United States that impacts interstate commerce because it supplies sanitation and drinking water to interstate travelers.

As Reedy Creek waters flow along interstate channels, federal employees divert the water for public drinking and sanitation at Bounty Plaza service area on Interstate 250, a federally-funded, east-west interstate highway.

Any regulatory scheme that impacts the safety of drinking water sources "inescapably has an effect on the supply of drinking water, and therefore on interstate commerce." *United States v. King*, 660 F.3d 1071, 1078-81 (9th Cir. 2011). Even though Bounty Plaza is located only in the State of New Union, courts have consistently found that "a waterway can be used as a highway or link in the chain of commerce among the states without crossing state boundaries." *Ashland Oil & Transp. Co.*, 504 F.2d at 1323-24.

Analogous to the CWA, the Safe Drinking Water Act also regulates water quality for comparable reasons. In this realm, water is an economic commodity. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 954 (1982). If the drinking water supply is contaminated, there is an increased risk of water-related disease that require greater healthcare resources. *See United*

States v. King, 660 F.3d 1071, 1079 (9th Cir. 2011). Federal water quality standards for toxic pollutants like arsenic are imperative because the impact of contaminated water on interstate commerce is great. *Nebraska v. EPA*, 331 F.3d 995 (D.C. Cir. 2003) (rejecting the argument that regulation of drinking water is a noneconomic, intrastate activity).

Like the Safe Drinking Water Act, the water regulated under the CWA is an economic commodity because the effect of polluted water on interstate commerce does not change with the name of the Act. If the water supply at Bounty Plaza is polluted, travelers will be deterred from travelling a federal highway of commerce. The effect on interstate travel from water pollution is analogous to the effect on interstate travel from discrimination. Like the hotel owners' discrimination impeded travel in *Heart of Atlanta Motel*, the degradation and pollution of Reedy Creek water quality could impede travel along I-250. 379 U.S. at 258.

More significant, the health of the nation is directly tied to the quality of the water supply. If it were otherwise, clean drinking water would not be the primary goal of the World Health Organization (WHO) that estimates 1.6 million people die every year from water-related diseases. The WHO cites safe drinking water and sanitation facilities as a "precondition for success in the fight" against poverty, gender equality, child mortality. World Health Organization, *Health through safe drinking water and basic sanitation*, last visited November 30, 2013, http://www.who.int/water_sanitation_health/mdg1/en/. Beyond travel, clean drinking water is vital to our nation's health.

The district court correctly identified that Reedy Creek is also an interstate water. The quality of Reedy Creek water substantially affects interstate commerce like crop irrigation, interstate travel, and sanitation and drinking water supply. As an important navigable water of the United States under § 1362(7), protection of Reedy Creek is imperative.

VI. THE CULVERT ON BONHOMME'S PROPERTY IS NOT A POINT SOURCE, IT MERELY TRANSFERS WATER FROM DITCH C-1 TO REEDY CREEK.

The CWA strictly prohibits the discharge of pollutants from a point source into a navigable water of the United States without an NPDES (National Pollutant Discharge Elimination System) permit. 33 U.S.C. §§ 1342, 1362(6), 1362(13). The parties do not dispute that a pollutant—arsenic—was found in Ditch C-1 and Reedy Creek. The district court determined that Maleau added a pollutant to Reedy Creek from a point source (identified as Ditch C-1 by the court) without a permit. Maleau does not dispute this. Assigning no liability to Maleau, the district court found Bonhomme liable for discharging pollutants into Reedy Creek via his culvert, described by the district court as a point source. Explaining its findings, the district court stated that the CWA and EPA prohibit Bonhomme's actions, not Maleau's, because Bonhomme added arsenic to Reedy Creek from a point source—his culvert. (R. at 9). In reaching this conclusion, the district court failed to recognize Supreme Court holdings and EPA regulations that pollutants cannot be added when water is transferred. And while the district court ignored Maleau's admitted polluting activities as well as the entire Ditch C-1 waterway, failing to consider the environmental impact of pollutants in its waters, the district court held Bonhomme liable for taking no action whatsoever.

A. Maleau violated the CWA when he added pollutants to Ditch C-1 without a permit because Bonhomme's culvert was not a point source—it merely transferred water.

Issued by the EPA in 2008, the water transfer rule creates an exemption from the NPDES permit requirement. 40 C.F.R. § 122. A water transfer is defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening

industrial, municipal, or commercial use" (intervening use is not a canal, pipe, or pump station if used to transfer water. The exemption is applied if the water conveyed is a navigable water of the United States *before* it is conveyed to the receiving water. In addition, the water must be conveyed *from* a navigable water of the United States *to* a navigable water of the United States. For example, if water from River A is conveyed to River B through a tunnel, then water is transferred because water is conveyed from one navigable water to another navigable water without an intervening use. Under this rule, a NPDES permit is not required unless a pollutant is introduced to the water by the conveyance itself. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,697, 33,699, 33,700 (June 13, 2008) (codified at 40 C.F.R. pt. 122). The EPA rule clarified the meaning of discharge of a pollutant—a transfer does not add a pollutant to a navigable water and therefore does not constitute discharge of a pollutant. To be discharged, a pollutant must be added to navigable water from a point source. *Nat'l Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988). This rule is consistent with the EPA's longstanding position that a pollutant is only added when it is introduced into a navigable water by a point source *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). It is consistent with Congress's intent that pollutant discharge be controlled at the source. And it is consistent with recent Supreme Court holdings.

Foreshadowing the water transfer rule, the Supreme Court held that pollutants cannot be added when water is merely transferred when the waters are meaningfully the same. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). Similarly, the Supreme Court reversed a Ninth Circuit holding that pollutants were discharged into navigable water in violation of the CWA when water flowed out of concrete channels into downstream waters.

Citing *Miccosukee*, the Court stated that pollutants cannot be added when water is merely transferred in this way. *Id.*

Maleau does not dispute the district court's finding that he added arsenic to water that flowed into Reedy Creek without a permit. The district court erred when it identified the point source as Reedy Creek because the overburden-pile channels and machinery located on Maleau's property were the point sources. Arsenic-laced rainwater was directed into the overburden-pile channels and conveyed into Ditch C-1, a tributary and navigable water of the United States. Ditch C-1 water flowed through Bonhomme's culvert into Reedy Creek, a traditional navigable interstate water. Because the culvert simply transferred water from one navigable water (Ditch C-1) to another (Reedy Creek), it cannot be a point source. Pollutants cannot be added when water is transferred in this manner. The district court erred by not recognizing that the EPA water transfer rule applies such that Maleau, not Bonhomme, is liable for adding pollutants to navigable waters of the United States without a permit.

B. The district court held Bonhomme liable despite the fact that he did not take any action.

Maleau alleges-and the district court agrees-that Bonhomme is liable for simply owning a culvert.

In *Froebel v. Meyer*, the plaintiff alleged that a permit was required when water flowed through a partially-removed dam because the remaining dam structure was a point source, polluting the water. 217 F.3d 928 (7th Cir. 2000). The court disagreed, finding that a permit for pollutant discharge is not required when a person is doing absolutely nothing—it is only required when a person is taking some action that requires a permit. The court stated that the "broad reach of 'navigable waters' pushes the natural reading of 'point source' back to the point at which an artificial mechanism introduces a pollutant."

In this matter, Bonhomme did not pile overburden from a gold-mining operation next to Ditch C-1. He did not configure piles such that channels formed, allowing arsenic to pollute navigable waters. He simply owned a culvert. The district court's finding means Bonhomme must comply with the CWA by obtaining a NPDES permit, yet a permit is only issued when pollutants are added or some kind of action is taken. Because Bonhomme is taking no action prohibited by the CWA, Bonhomme cannot obtain an NPDES permit. For these reasons, this Court should reverse the district court's finding and instead find that Maleau violated the CWA.

CONCLUSION

This Court should hold that Bonhomme is a real party in interest to this litigation. Bonhomme is a "citizen" as contemplated by the CWA. The overburden-pile channels are point sources and Maleau's machinery used to create the piles were point sources. Ditch C-1 is a navigable water because it is a tributary to Reedy Creek. Reedy Creek is a navigable water because it crosses state boundaries and impacts interstate commerce. Because Bonhomme's culvert merely transferred water from Ditch C-1 to Reedy Creek, Bonhomme is not liable under the CWA. Therefore, this Court should reverse the district court's decision to dismiss Bonhomme's complaint.

Respectfully submitted,

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Counsel for Jacques Bonhomme