C.A. No. 13-01234

In the United States

Court of Appeals for the Twelfth Circuit

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

BRIEF FOR JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee / Defendant-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

This is an appeal of an order granting a motion to dismiss without prejudice. (R. 1). The district court had jurisdiction over the federal issues pursuant to 28 U.S.C. § 1331, as this case arose under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq. (2012). This Court has jurisdiction to review final orders of the district court, pursuant to 28 U.S.C. § 1291 (2012). Bonhomme's action was dismissed without prejudice, which would generally result in a non-final order. However, because Bonhomme is unable to amend the complaint to cure the defect, "the order dismissing the complaint is final in fact and appellate jurisdiction exists." *Domino Sugar Corp. v. Sugar Workers Loc. Union 392 of United Food and Com. Workers Intern. Union*, 10 F.3d 1064, 1066 (4th Cir. 1993).

STATEMENT OF THE ISSUES

1. Whether Bonhomme is the real party in interest to bring suit against Maleau for violating 33 U.S.C. §1311 (a).
2. Whether Bonhomme – a foreign national – is a "citizen" under 33 U.S.C. 1365, who may bring suit against Maleau.
3. Whether Maleau's mining waste piles are "point sources" under 33 U.S.C. § 1362(12), (14).
4. Whether Ditch C-1 is a "navigable water/water of the United States" under 33 U.S.C. § 1362(7), (14).
5. Whether Reedy Creek is a "navigable water/water of the United States" under 33 U.S.C. § 1362(7), (12).
6. Whether Bonhomme violates the CWA when his culvert merely transferred water from a tributary to Reedy Creek.

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of Progress, entered July 23, 2012. Jacques Bonhomme ("Bonhomme") filed suit against Shifty Maleau ("Maleau"), alleging Maleau violated the CWA, 33 U.S.C. §§ 1251 et seq. (2012).

Bonhomme brought this citizen suit pursuant to the citizen suit provision, 33 U.S.C. § 1365. (R. 5). The State of Progress ("Progress") filed a separate suit against Bonhomme for violating the CWA, in which Maleau intervened. Both suits were consolidated by the district court.

Bonhomme alleges Maleau violated the CWA by configuring arsenic-laden mining waste piles in such as way as to cause stormwater runoff to leach into Ditch C-1. (R. 4). Ditch C-1 carries that arsenic-laden water into Reedy Creek, via a culvert on Bonhomme's property. (R. 5). The water then flows into Wildman Marsh. *Id.* Bonhomme contends all three of those bodies of water are "waters of the United States" and subject to the jurisdiction of the CWA. *Id.*

The State of Progress ("Progress") later filed a citizen suit against Bonhomme, alleging Bonhomme has violated the CWA. *Id.* The State of Progress alleges the culvert on Bonhomme's property is a "point source" that discharges pollutants into Reedy Creek. *Id.* Maleau intervened in this suit, pursuant to 33 U.S.C. § 1365. *Id.*

In the consolidated action, Maleau alleges that Bonhomme is not a proper plaintiff, because he is not a real party in interest and thus cannot maintain his suit under Rule 17(a) of the Federal Rules of Civil Procedure. (R. 7). Maleau alleges that Precious Metals International, Inc. ("PMI"), Bonhomme's employer, is the real party in interest. *Id.* Maleau also alleges that Bonhomme, a French national, is not a citizen of the United States and therefore cannot file a citizen suit under 33 U.S.C. § 1365. (R. 8). Bonhomme alleges that Maleau's waste piles are point sources and the Ditch C-1 into which the arsenic flows is a navigable water within the meaning of the CWA. (R. 7). Progress filed briefs in support of Maleau concerning Bonhomme's alleged lack of standing and in support of Maleau's contention that waste piles are not point sources. Progress also filed a brief in support of Bonhomme, however, on the issue of whether Ditch C-1 and Reedy Creek are navigable.

On July 23, 2012, the District Court made the following findings: (1) Bonhomme is not a real party in interest; (2) Bonhomme is not eligible to file a citizen suit; (3) Maleau's waste piles are not point sources; (4) Ditch C-1 is not navigable; (5) Reedy Creek is navigable; (6) Bonhomme has violated the CWA. Bonhomme is appealing issues 1, 2, 3, 4, and 6. Maleau is appealing issue 5. Progress is appealing issues 4 and 5. On September 14, 2013, this Court granted review.

STATEMENT OF THE FACTS

Maleau owns and operates a gold mining pit adjacent to the Buena Vista River in the State of Progress. (R. 3). Maleau is one of the region's largest employers. (R. 6). That operation has the required permits, but Maleau trucks the overburden and slag to his property in Lincoln County, Progress. (R. 3). Maleau places this overburden in piles adjacent to Ditch C-1. *Id.* When it rains, rainwater flows down through the piles and into Ditch C-1, where the water eventually reaches the Reedy Creek through a culvert on Bonhomme's property and then into Wildman Marsh. *Id.*

Bonhomme, a French national employed by PMI as its President, owns a hunting lodge in the State of Progress. (R. 6). Bonhomme tested the water in Ditch C-1 both upstream and downstream of Maleau's property, revealing Ditch C-1 has arsenic in high concentrations just below Maleau's property, but no arsenic is detected above his property. *Id.* The arsenic concentration decreases in proportion to the increased water flow in Ditch C-1. *Id.* Tests of Reedy Creek above and below where Ditch C-1 empties into it revealed arsenic in Reedy Creek below, but not above, Ditch C-1's entry point. Arsenic was also detected, in trace amounts, in Wildman Marsh, which is downstream of Reedy Creek. *Id.* Arsenic is a common byproduct of gold mining and extraction and is undisputedly a poison. *Id.*

Ditch C-1 is a drainage ditch, approximately three feet across and one foot deep. (R. 5). The ditch was created in 1913 by an association of landowners, and restrictive covenants require the current landowners to permanently maintain it. *Id.* Ditch C-1 begins upland of Maleau's property, runs across Maleau's property and continues for three miles across several agricultural properties before reaching Bonhomme's property. *Id.* The source of the water in Ditch C-1 is primarily rainwater and groundwater runoff. *Id.* The ditch contains water continuously, except during periods of drought lasting as little as several weeks but no longer than three months. *Id.* Ditch C-1 exists wholly within Progress. *Id.*

Reedy Creek is approximately fifty miles long and carries a permanent flow of water. *Id.* The Creek starts in the State of New Union and then flows into the State of Progress. *Id.* It serves as the water supply for Bounty Plaza in New Union, a rest stop adjacent to interstate highway I-250; the Plaza sells gasoline and food to interstate travelers. *Id.* In both states, farmers use the water from Reedy Creek for agricultural irrigation, and their agricultural products are sold in interstate commerce. *Id.*

Reedy Creek flows into Wildman Marsh, a wetland mostly contained in Wildman National Wildlife Refuge, which is owned by the federal government. (R. 5–6). The Marsh is an essential stopover for migratory birds. (R. 5). The area attracts duck hunters from seven neighboring states, including Progress and New Union, adding approximately $25 million to the local economy. (R. 6). Bonhomme's property fronts part of Wildman Marsh, and he uses the area for duck hunting parties. *Id.* The arsenic poison was also detected in the ducks, causing Bonhomme to decrease his annual hunting parties from eight down to only two. *Id.*

After Bonhomme commenced his citizen suit, the Attorney General of the State of Progress ("Attorney General") announced at his press conference that the state acted within its

prosecutorial discretion when it filed suit against Bonhomme and did so to protect both Wildman Marsh and Maleau. *Id.* The Attorney General accused Bonhomme of filing suit against Maleau in order to help PMI compete against Maleau's company. *Id.* Bonhomme subsequently accused the Attorney General of bringing this suit against Bonhomme as payback for Maleau's campaign contributions, and accused Maleau of unfair business practices, ignoring environmental protection requirements, and trucking his mining slag to another location to avoid obtaining environmental permits. (R. 6–7). These facts have brought us to the consolidated suit this Court has agreed to review.

STANDARD OF REVIEW

The lower court granted Maleau's Motion to Dismiss without prejudice. (R. 10). Whether a district court has correctly dismissed a suit pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law, and therefore subject to *de novo* review. *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296 (6th Cir.1993).

SUMMARY OF THE ARGUMENT

The district court erred in holding that Bonhomme is not a real party in interest; that he did not have standing to file a citizen suit; that Maleau's waste piles were not point sources under 33 U.S.C § 1362(12), (14); that Ditch C-1 was not navigable under 33 U.S.C. § 1362(7), (12); and that Bonhomme violated the CWA even though Maleau is the but-for cause of the pollution. The district court correctly held that Reedy Creek is navigable under 33 U.S.C. § 1362 (7), (12).

Bonhomme has standing as the real party in interest because he has suffered an "injury in fact" that is fairly traceable to Maleau's actions, and such injury will likely be redressed by a favorable decision from the court. At this stage, Bonhomme is only required to allege general factual obligations that embrace the specific facts necessary to support the claim.

Bonhomme has the right to file a citizen suit because the definition of "citizen" under 33 U.S.C. § 1365 is not so narrow as to depend on a plaintiff's nationality. Bonhomme is a person who has an interest which may be adversely affected, and therefore he meets the statutory definition of "citizen" in 33 U.S.C. § 1365(g).

Maleau's mining waste piles are point sources because Congress intended a broad interpretation of the term "point source" and the EPA's definition requires *Chevron*[1] deference. Mining piles are interpreted as a source of pollution under the CWA. The positioning of Maleau's piles allows rainwater to percolate and flow into the adjacent Ditch C-1, and that addition of pollutants constitutes a point source.

Reedy Creek is navigable because it falls within the EPA's definition of navigability. The EPA plainly included "interstate waters" in 40 C.F.R. § 122.2, and that definition is entitled to *Chevron* deference. Reedy Creek is also the type of water *Rapanos*[2] described as navigable.

Ditch C-1 is navigable because it is a tributary of Reedy Creek, meeting the EPA's definition of tributary. Also, Ditch C-1 satisfies both *Rapanos* tests for navigability. Finally, the terms "point source" and "navigability" are not mutually exclusive.

Bonhomme is not violating the CWA because Maleau, not Bonhomme, has control over the point source, the suit against Bonhomme is vindictive, and Bonhomme's culvert merely transfers water without an intervening use. Therefore, the district court erred in finding that Bonhomme violated the CWA.

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[1] *Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
[2] *Rapanos v. United States*, 547 U.S. 715 (2006).

ARGUMENT

I. BONHOMME IS A REAL PARTY IN INTEREST INDEPENDENTLY OF PMI, AND HAS STANDING TO SUE IN HIS OWN NAME PURSUANT TO ART. III OF THE UNITED STATES CONSTITUTION AND PURSUANT TO RULE 17(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

There is a certain degree of overlap between constitutional standing and prudential real-party-in-interest questions to the extent that both ask "whether the plaintiff has a personal interest in the controversy." *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992). Nevertheless, there is a distinction between the two and both are essential. *Id.* The constitutional standing requirement restricts access to the courts to plaintiffs with a particularized and actual or imminent injury that is traceable to the conduct of the defendant and likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The prudential real-party-in-interest inquiry refers to the requirement that the plaintiff must be the person who possesses the right sought to be enforced. *Farrell Const. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990). Bonhomme satisfies both requirements, as the he is a real party in interest with constitutional standing to file a citizen suit against Maleau for violating the effluent limitations of the Clean Water Act without a permit. 33 U.S.C. §§ 1311, 1365 (2012).

A. Bonhomme has Constitutional standing pursuant to U.S. Const. Art. III.

The constitutional standing requirement demands that a plaintiff shows: (1) the plaintiff suffered an "injury in fact" that is concrete and particularized, and is actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury likely will be redressed by a favorable decision. *Lujan*, 504 U.S. at 560. At the pleading stage, Bonhomme is only required to allege general factual allegations that embrace the specific facts necessary to support the claim. *Id.* at 561.

First, Bonhomme has sufficiently shown that he suffered an actual and particularized injury in fact because of the decreased number of hunting trips to his hunting lodge located on the environmentally affected property that Bonhomme personally owns. (R. 6). Bonhomme has a legitimate fear that the arsenic has fouled the waters of Progress to such an extent that he is afraid to utilize Wildman Marsh for his recreational activities. *Id*. This harm is actual and it is greater in degree than that of the general public and is therefore particularized. *Lujan*, 504 U.S. at 561. Furthermore, this Court has previously recognized that even "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." *Id.* at 562–63. Bonhomme's ownership interest in the affected property is higher than that of observing animal species for aesthetic purposes and he has therefore satisfied the first prong of the constitutional standing requirement.

Second, the harm to Bonhomme is fairly traceable to Maleau's conduct. Maleau's undisputed leaching of arsenic into the local waters is supported by scientific proof that the concentrations of arsenic are non-existent upstream from Maleau's property, but present downstream from Maleau's property, strongly suggesting that the leaching originates on Maleau's property. (R. 6). Furthermore, it is also undisputed that the arsenic is present in the ducks in Wildman Marsh; the ducks that are literally the target of Bonhomme's duck hunting parties. *Id.* Bonhomme sufficiently alleged that he had to reduce the number of duck hunting parties from eight per year to two per year due to his fear that the pollution is harmful. *Id.* Therefore, Bonhomme satisfied the second prong of the requirement as well.

Third, Bonhomme's injury would be redressed by a favorable decision granting either an injunction or civil money penalties, or both. A "plaintiff must demonstrate standing separately for each form of relief sought," therefore Bonhomme must show that his injury will be redressed

by either remedy. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 185 (2000). Bonhomme has alleged that Maleau's violation of the CWA is ongoing and an injunction will therefore remedy the injury. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000). An injunction preventing Maleau from continuing to pollute the waters would resolve Bonhomme's issue and the wetlands would likely be restored over time. Civil penalties, although not benefitting a plaintiff directly, redress a plaintiff's injury by discouraging current violations and deterring future ones. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. at 185–86.Bonhomme's injury would be redressed by the entry of an order granting civil penalties against Maleau because such an order would deter future violations of the CWA by Maleau.

Bonhomme has alleged sufficient facts to demonstrate that he is a plaintiff with an actual and particularized injury, which is fairly traceable to the acts of the defendant, and that the injury would be redressable by a court of law. Therefore, Bonhomme has satisfied the three prongs of the constitutional standing requirements to maintain his citizen suit against Maleau.

B. Bonhomme is the real party in interest pursuant to R. 17(a) of the Federal Rules of Civil Procedure

Pursuant to rule 17(a) Federal Rules of Civil Procedure, an action in federal court must be pursued by the *real party in interest*. R. 17(1)(a) Fed. R. Civ. P. Therefore, the action must be brought by the person who is entitled to enforce the asserted right under the governing substantive law. *Wieburg v. GTE S.W. Inc.*, 272 F.3d 302, 306 (5th Cir. 2001). The purpose behind this standing-limitation is to ensure that a defendant does not have to litigate the same claim more than once. *Id.* While there can be several real parties in interest, rule 17(a)(1) authorizes several categories of plaintiffs to sue in their own name without joining other persons who also benefit from the suit. *Wieburg*, 272 F.3d at 306 (explaining: "The real party in interest

is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery"). If there is doubt as to the preclusive effect of such litigation it can be addressed by including protective provisions in a final judgment. *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1197 (3d Cir. 1996).

While the rule has a preclusive effect, the original purpose of the rule was permissive, which explains the number of categories of parties authorized to sue without joining other parties. *Id.* One of the categories of plaintiffs who can sue in their own name is "a party authorized by statute." R. 17(1)(a)(G) Fed. R. Civ. P.

In this action, the substantive governing law is the CWA, which specifically authorizes "citizen suits." 33 U.S.C. § 1365. This provision confers standing to sue on "persons having an interest which is or may be adversely affected." *Id.* § 1365(g). Environmental protection laws are typically enforced by state or federal agencies; however Congress specifically included this provision in the CWA to allow for citizens to help enforce the Act, as the administrating agencies are unlikely to unearth every violator through their own investigative means. *Am. Frozen Food Inst. v. Train*, 539 F.2d 107, 126 (D.C. Cir. 1976). A person "having an interest which is or may be adversely affected" has standing to sue pursuant to the CWA, therefore that person is "a party authorized by statute," and is a "real party in interest" pursuant to rule 17(1)(a)(G) of the Federal Rules of Civil Procedure.

Bonhomme personally owns property that fronts part of the wetlands, and the hunting lodge on his property sits on the edge of the marsh near the point where Reedy Creek flows into Wildman Marsh. (R. 6). The pattern of arsenic concentration in the area strongly suggests that the poisoning originates from Maleau's mining waste piles. *Id.* Furthermore, arsenic has already been detected in the ducks in Wildman Marsh and Bonhomme has had to significantly cut back

on his duck hunting parties on the property. *Id.* Bonhomme, through his personal right in property in the affected area, has an interest that is or may be adversely affected by Maleau's actions. Therefore, Bonhomme – independently – has standing to sue under section 1365 of the Clean Water Act. It follows that because Bonhomme has standing to sue pursuant to the Clean Water Act, he is a "party authorized by statute" as defined in rule 17(a)(1)(G) of the Federal Rules of Civil Procedure, which per definition makes him a "real party in interest."

The allegation that PMI may incidentally benefit from Bonhomme's suit does not require Bonhomme to join PMI in the suit, and it does not preclude Bonhomme from being a real party in interest as specifically stated in rule 17(a) of the Federal Rules of Civil Procedure. *See HB Gen. Corp.*, 95 F.3d at 1197. Maleau or Progress cannot attempt to use rule 17(a) to strip Bonhomme of his statutorily granted right to sue, just because Bonhomme's suit may incidentally benefit PMI and thereby possibly affect Maleau's business. Maleau attempts to bolster this argument by the fact that PMI paid for the testing that showed the arsenic content in the water. (R. 7). However, while this seemed persuasive to the lower court, it is simply a red herring in this suit because the CWA confers independent standing on Bonhomme due to his property interest and therefore he is a real party in interest pursuant to R. 17(a)(1)(G), Federal Rules of Civil Procedure.

Bonhomme possesses a sufficient interest in this action to entitle him to be heard on the merits. Therefore, the lower court erred when it dismissed Bonhomme's action for failure to state a claim upon which relief can be granted, because Bonhomme properly alleged enough facts to state a claim for relief that is plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

II. BONHOMME IS A "CITIZEN" WITH STANDING TO SUE WITHIN THE MEANING OF 33 U.S.C. § 1365, BECAUSE CIVIL ENFORCEMENT OF THE CLEAN WATER ACT DOES NOT DEPEND ON THE PLAINTIFF'S NATIONALITY

The citizen suit provision of the CWA was intended to broaden enforcement of the Act by allowing persons, other than government agencies, to enforce the act in civil suits. To interpret the citizen suit provision to restrict the enforcement of the Act goes against the very purpose behind the provision. Furthermore, the lower court should not have imputed such a congressional intent into the unambiguous language of the Act.

A. The Citizen suit provision in the CWA was intended to broaden enforcement of the Act, not to narrow it to United States citizens.

Section 1365(a) of the CWA, the "citizen suit" provision, authorizes "any citizen" to commence a civil action on his own behalf. This provision allows citizens to act as "private attorney generals" to enforce the CWA, as opposed to only allowing federal and state agencies to enforce the CWA. *See Am. Frozen Food Inst.*, 539 F.2d at 126. Congress specifically added this provision to broaden the enforcement activity under the CWA to include private citizens; not to limit the enforcement activity to United States Citizens. *See id.* If Congress intended to preclude foreign nationals from protecting the environment – an intent that would seem obviously contrary to the very purpose of the Act – then Congress could easily have made this restriction clear in the name of the provision and in the definition of "citizen."

The provision is titled "Citizen suits," not "United States Citizen suits." Furthermore, the word "citizen" is clearly defined for the purpose of the Citizen suit provision. Section 1365(g) defines "citizen" as follows:

> For the purposes of this section the term "citizen" means a *person or persons* having an interest which is or may be adversely affected.

33 U.S.C. § 1365(g)(emphasis added).

This provision is unambiguous. It is clear from the plain meaning of the definition of the word "citizen" that Congress requires a citizen to have a stake in the outcome in order to have statutory standing; there is no requirement of United States Citizenship. If Congress intended to restrict the standing to sue, it could have used limiting language in the definition of the word "person." Instead, Congress defined person very broadly to include an "individual, corporation, partnership, association, State, Municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §1362(5) (2012). It is similarly clear from the definition of "person" that Congress intended to broaden the enforcement of the CWA, not restrict it.

Additionally, the Citizens suit provision specifies that district courts shall have jurisdiction of such suits "without regard to the . . . citizenship of the parties." 33 U.S.C. § 1365(a). The plain reading of this provision also provides that United States citizenship is not a prerequisite to bringing a civil enforcement action under the CWA.

The court below erred when it dismissed Bonhomme's suit, because it would be improper to judicially create a requirement that a plaintiff be a United States Citizen in order to bring an action under the CWA, when such a requirement does not exist under the Act. Bonhomme's complaint therefore sufficiently stated a plausible claim and should not have been dismissed.

B. The lower court erred when it imputed a Congressional intent to preclude non-citizens from bringing a civil enforcement action under the CWA, because the right to petition the courts for redress is protected under the Bill of Rights.

It is even more troublesome that the lower court limited Bonhomme's right to sue based on his nationality. "The right of access to the courts is indeed but one aspect of the right of petition." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 510, 510 (1972). Furthermore, "[t]he First Amendment provides, in relevant part, that 'Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of

grievances.' We have recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524–25 (2002). The right to petition extends to all departments of the Government including the courts. *California Motor Transp. Co.*, 404 U.S. at 510. Such protection applies to Unites States Citizens and resident aliens alike. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98 (1953) ("None of these provisions [First, Fifth, and Fourteenth Amendment] acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority.'").

It is clear from the plain language of the CWA that Congress did not limit citizen suits to United States Citizens. The Supreme Court of the United States, when interpreting federal law, reiterated that: "We based our interpretation in part on the principle that we would not 'lightly impute to Congress an intent to invade . . . freedoms' protected by the Bill of Rights, such as the right to petition." *BE & K Const. Co.* 536 U.S. at 525 (internal citations omitted). Because the right to petition the courts is protected under the Bill of Rights and because courts should not impute an intent to Congress to invade such rights, then the lower court erred when it read a restriction into the Citizen suit provision of the CWA precluding suits by non-citizen residents of the United States who happen to be foreign nationals. There is absolutely no basis for such a restriction in the clear language of the statute.

III. MINING WASTE PILES ARE POINT SOURCES UNDER THE CWA WHEN STORMWATER RUNOFF DISCHARGES POLLUTANTS INTO NAVIGABLE WATERS OF THE UNITED STATES.

The CWA was designed to regulate pollutant discharges through the National Pollutant Discharge Elimination System ("NPDES"), by establishing effluent limitations that would maintain the integrity of the waters of the United States. 33 U.S.C. §§ 1251, 1311, 1342 (2012).

The CWA requires a broad definition of point source in order to fully regulate activities that could discharge pollutants into the Nation's waters. *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (1979); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004).

The Environmental Protection Agency ("EPA") has the expertise required to administer the CWA and is in the best position to define point source within the meaning of the Act, as the Act does not provide an exhaustive list of point sources. The most recent regulation has expanded the definition of "point source" to include discharge of pollutants from surface runoff that is "collected or channeled by man." 40 C.F.R. § 122.2 (2008). The EPA's regulation deserves deference as it is a permissible construction that is not arbitrary, capricious, or contrary to the statute. 5 U.S.C. § 706 (2012); *U.S.A., Inc. v. Chevron Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

Maleau's mining waste piles constitute a point source because the configuration of the piles allows stormwater runoff to percolate and discharge arsenic into a tributary of a navigable body of water. (R. 5). Mine operators who configure piles in such a way that precipitation will cause erosions are liable under the CWA when there is a reasonable likelihood that the pollutant subsequently discharged into the Nation's waters from those waste piles. *Sierra Club v. Abston Construction Co., Inc.*, 620 F. 2d 41, 45 (5th Cir. 1980). Therefore, the lower court erred in dismissing Bonhomme's citizen suit because Maleau's mining waste piles constitute a point source discharging pollutants, and as such is in violation of the CWA, absent a NPDES permit.

A. Congress intended the EPA to broadly interpret the definition of a point source.

The statutory language of 33 U.S.C. § 1362(14) lists examples of point sources, but explicitly states that point sources are "not limited to" the enumerated list, demonstrating congressional intent for the definition of point source to evolve through EPA regulation. The

EPA has the expertise required to administer the CWA, including the measures necessary to ensure compliance with the Act, and the methods of its enforcement. The judiciary has no such expertise in environmental legislation; therefore, when new methods of pollution prevention are discovered, the EPA is far better situated to broaden the definition of a point source than the judiciary. The EPA has studied the dangers of stormwater runoff and determined that industrial activity, such as gold mining and its waste piles, which contaminate stormwater runoff, and then leach the pollutants into navigable waters, are point sources requiring a NPDES permit. EPA, "*Instructions for Storm Water Plan Preparation,*" EPA Publication No. 833-F-06-022 (2006). Maleau's industrial mining waste piles fit within the agency's permissible interpretation of a point source and thus is in violation of the CWA. (R. 5).

The CWA was designed to restore and maintain the integrity of the Nation's waters by regulating to the fullest possible extent sources that introduce pollution into tributaries, creeks, and wetlands, and restricting effluents through the permitting process of 33 U.S.C. § 1342. *See* 33 U.S.C. § 1251. To achieve the goals of this regulatory scheme, the EPA and state agencies must first identify the source of pollution. The Tenth Circuit held in *United States v. Earth Sciences, Inc.*, that the "concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." 599 F.2d 368, 373 (1979). Similar to the case at bar, the Tenth Circuit was presented with an issue of whether gold mining activities, specifically the discharge of pollutants due to precipitation runoff, can be regulated as point sources under the CWA. *Id*. at 370. The court in *Earth Sciences, Inc.* held that the source of such a discharge did constitute a point source, and emphasized that an attempt to exempt from regulation any activity that emits pollution from an identifiable point violated the of the CWA. *Id*. at 373.

It would be contrary to the purpose of the CWA to allow Maleau to continue violating the integrity of the Nation's waters through continuous leaching of arsenic from his mining waste piles. The identifiable point of pollution occurs within the polluted piles of mining waste, and is subject to the CWA as a point source under the EPA's regulatory expansion of a point source to include contaminated stormwater runoff. A judicial determination requiring a narrow construction of the term "point source" would not only allow Maleau to circumvent the permitting requirements of stormwater discharge from industrial mining activities, but would also set a dangerous precedent allowing arbitrators with limited environmental experience the opportunity to dictate the application of the CWA. The lower court erred in dismissing the citizen suit against Maleau, and we respectfully request this Court to reinstate Bonhomme's suit so that the proper party can be held liable under the CWA.

B. EPA regulations defining contaminated stormwater runoff as a point source requiring a permit must be granted *Chevron* deference.

The congressional authority delegated to the EPA encompasses the authorization to promulgate regulations and interpret silence or ambiguity in statutory language, so long as (1) the regulation is a permissible construction, validated by explicit authority, and (2) it is not arbitrary, capricious, or manifestly contrary to the statute. *Chevron*, 467 U.S. at 843–44 (1984).

It is undisputed that the EPA has explicit authority to define point sources,[3] and the expansion of a point source to include contaminated stormwater runoff follows the rationale of the CWA's NPDES provision which specifically excludes stormwater runoff from mining operations that has not been "contaminated by contact with, or do not come into contact with any overburden." 33 U.S.C. § 1342(*l*)(2). Furthermore, it does not exempt from permitting

[3]*United States v. Earth Scis., Inc.*, 599 F.2d 368, 372 (10th Cir. 1979); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 163 (D.C. Cir. 1982).

stormwater discharge associated with industrial activity. *Id*. at § 1342(p)(2)(B). Therefore, the EPA's regulations including that stormwater runoff contaminated by overburden is a point source and requires a permit are permissible constructions of the CWA, and satisfy the first prong of the *Chevron* test.

EPA regulation 40 C.F.R. § 122.2 defines a discharge of a pollutant from a point source as "surface runoff that is collected or channeled by man," and meets the second prong of the *Chevron* test because it is not arbitrary, capricious, or manifestly contrary to the CWA. Congress clearly intended the EPA to consider stormwater runoff as a potential contributor to pollution by specifically exempting non-contaminated runoff from the permitting process. Additionally, the Agency has extensively studied the dangers of runoff and has created the NPDES Stormwater Program to regulate contaminated stormwater discharges from municipal storm sewer systems, construction activities, and industrial activities. 40 C.F.R. § 122.26 (2008). The EPA regulation requires a permit for industrial facilities, including active or inactive mining operations, where there is a discharge of stormwater contaminated by overburden. *Id*. § 122.26(b)(14)(iii).

The EPA has furthered the purpose of the CWA through its regulations by providing federal and state agencies with a broad definition of point source that allows regulation of any activity that emits pollution from an identifiable source. The requirement for a NPDES permit for contaminated stormwater discharges from industrial activities does not run afoul of the CWA as it provides the necessary guidelines to keep industries in compliance with the effluent limitations of 33 U.S.C. § 1311.

C. Maleau's mining waste piles constitute a point source and his failure to obtain a permit is a violation of the CWA.

Maleau trucked overburden and slag fifty miles across county lines from his gold mining and extraction operation to create the waste piles without a permit. (R. 7). The mining waste

piles are a point source under 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2 because they were configured in a way that allows rainwater to percolate the piles and discharge contaminated runoff through channels into a tributary of navigable waters. (R. 5). The placement of the piles allows for such a discharge, and it is of no consequence that the channels were eroded by gravity rather than dug out by man. *Sierra Club v. Abston Const. Co.*, 620 F.2d at 45. The Fifth Circuit was presented with the same issue of determining whether spoil piles are point sources, when piles of discarded overburden percolated during rainfall and discharged contaminated stormwater into a navigable body of water through eroded gullies. *Id*. at 43. The miners in that case were found to be liable for the unpermitted pollutant discharge from the spoil piles even through the gullies were created by gravity, rather than by man, because the miners placed the piles in such a way that the piles were "reasonably likely to be the means by which pollutants [were] ultimately deposited into a navigable body of water." *Id*.

Analogous to the Fifth Circuit's holding in *Abston Construction Company*, Maleau violated the CWA at the moment the mining waste piles were placed in such a configuration that would allow contaminated stormwater runoff to discharge into the Nation's waters from his property. It is not only reasonably likely that the piles are the means by which the arsenic is deposited into a tributary of navigable waters, but it is a scientific fact that arsenic is undetected in Ditch C-1 upstream of Maleau's property and present in high concentrations downstream of the mining waste piles. (R. 6). The piles of overburden and slag from the mining and extraction operation are the ultimate cause in fact of leaching arsenic into Reedy Creek and Wildman Marsh, as testing showed arsenic in both bodies of water downstream of Maleau's property. *Id*.

Maleau circumvented the requirements of the CWA by moving his overburden and slag to a property not adjacent to a traditionally navigable body of water. However, if he had

obtained the proper permit, he would have been required to maintain a stormwater prevention plan that would have required him to ensure that stormwater runoff would not leach dangerous pollutants into waters of the United States. 33 U.S.C. § 1314 (2012); EPA, "*Developing Your Storm Water Pollution Prevention Plan: A Guide for Industrial Operators,*" EPA Publication No. 833-B-09-002 (2009). Therefore, we respectfully ask this Court to reinstate the citizen suit against Maleau, in order to hold him liable for his CWA violations.

IV. REEDY CREEK IS NAVIGABLE BECAUSE THE EPA'S DEFINITION IS A REASONABLE INTERPRETATION ENTITLED TO *CHEVRON* DEFERENCE, AND CASE LAW SUPPORTS REEDY CREEK IS NAVIGABLE.

The plain language of the EPA's regulations governing the CWA specify that "waters of the United States" includes interstate waters. 40 C.F.R. § 122.2. It is undisputed that Reedy Creek spans more than one state. (R. 5). Statutory interpretation principles, whereby unambiguous terms are given their plain meaning and an agency's reasonable interpretation of a statute is entitled to judicial deference.

Furthermore, none of the Supreme Court's decisions in *Rapanos*[4] require a finding that Reedy Creek is not a "water of the United States" simply because it cannot float a boat. In fact, it is consistent with *Rapanos* to find that Reedy Creek, a permanent discrete body of water that indisputably affects interstate commerce and geographically spans multiple states, is navigable for the purposes of the CWA. Case law supports this finding, and is still consistent with *Rapanos*.

A. The EPA's regulation defining "waters of the United States" should be afforded *Chevron* deference.

[4] Rapanos was a plurality decision, wherein no single opinion garnered a majority of votes, but a majority of Justices did favor remanding the case. The plurality opinion written by Justice Scalia favored a relative permanence test, while Justice Kennedy's concurrence favored a significant nexus test.

The purpose of the CWA is to "restore and maintain the physical, biological and chemical integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress defined "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7) (2012). The EPA, to which Congress delegated enforcement of the CWA, defines "waters of the United States," in relevant part, as "all interstate waters." 40 C.F.R. § 122.2. Therefore, to determine if Reedy Creek is covered by the CWA, it must be determined if "navigable waters" includes "interstate waters." The lower court correctly held that Reedy Creek would be considered "navigable" because the EPA's regulation on the matter is a reasonable interpretation that should be afforded *Chevron* deference. Furthermore, this interpretation is consistent with case law which says the term "navigable" means something more than just floating a boat.

In *Chevron*, the Supreme Court devised a test for inspecting the validity of government agency's regulations. *Chevron*, 467 U.S. at 842–43. If Congress spoke directly on the issue, the unambiguous statutory language controls. *Id.* If Congress did not speak, or if the language is ambiguous, then the court will defer to the agency's interpretation if it is reasonable, defined ase as not being "arbitrary, capricious, or manifestly contrary to statute." *Id.* at 844. An agency's interpretation is entitled to deference unless it's "plainly erroneous or inconsistent with the [statute]." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

Congress defined "navigable" as "waters of the United States," but Congress did not define the term "waters of the United States." *See* 33 U.S.C. § 1251(a). Therefore, Congress did not speak directly on the issue; the pertinent definition is the one the EPA was authorized to promulgate in 40 C.F.R. § 122.2, where it defined "waters of the United States" as "all interstate waters." The test, under *Chevron*, is whether the EPA's definition is reasonable and furthers the purpose of the CWA.

Looking at congressional history from when the CWA was enacted, it is apparent that interstate bodies of water are exactly the type of water Congress intended to regulate under the CWA. *See* House debate, *Congressional Record*, vol. 118, part 25, (October 4, 1972), p. 33756 (noting that the conference bill "defines the term 'navigable waters' broadly for water quality purposes" and indicated the CWA was meant to protect "waters of the United States in a *geographical sense*.") (emphasis added). The Supreme Court has also recognized that navigability means something more than just the ability to float a boat. *See Rapanos*, 547 U.S. at 731 ("We have twice stated that the meaning of 'navigable waters' . . . is broader than the traditional understanding of the term.") (citing *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corp of Eng'rs*, 531 U.S. 159, 167 (2001); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)).

The *Rapanos* plurality opinion tacitly supports the notion that the term "interstate" has nothing to do with whether the water can support floating a boat. *Rapanos* 547 U.S. at 812 n. 3 (noting the term "of the United States" excludes intrastate waters even those waters can float a boat). Furthermore, Reedy Creek — a permanent body of water, fifty miles long, stretching across two states, wholly wet throughout the year — is just the type of navigable water that Justice Scalia described in his plurality opinion. *Id.* at 732 ("All of these terms connote *continuously present*, fixed bodies of water [with a] *continuous flow* of water in a *permanent* channel.") (emphasis added).

Turning to whether Reedy Creek is an interstate body of water, "interstate" is defined as "between two or more states." BLACK'S LAW DICTIONARY 1844 (9th ed. 2009). Here, it is undisputed that Reedy Creek begins in the State of New Union and eventually flows into a

different state, the State of Progress. (R. 5). Under the plain meaning of "interstate," it's readily apparent that Reedy Creek is an interstate body of water.

Reedy Creek is an interstate body of water, and because specifying interstate waters as part of the definition of "waters of the United States" is a reasonable interpretation of Congress' intent regarding the CWA, the EPA's definition of navigability is entitled to *Chevron* deference.

B. Alternatively, case law supports that Reedy Creek is navigable.

Notwithstanding the Court's determination as to the reasonableness of the interpretation of "interstate waters," Reedy Creek is still navigable because it is analogous to the creek held navigable in *Earth Sciences, Inc.*. The Court in *Rapanos* did not overturn *Earth Sciences, Inc.*, and neither the plurality or concurring opinion in *Rapanos* conflicts with a finding that Reedy Creek is navigable under *Earth Sciences, Inc*. The issue considered in by the Court in *Rapanos* was limited to consideration of wholly intrastate wetlands, not an interstate creek like Reedy Creek. *Rapanos* at 730. (stating the issue was "whether four Michigan *wetlands* . . . constitute 'waters of the United States.'") (emphasis added).

In *Earth Sciences, Inc.*, a toxic cyanide solution leaked from a gold leaching operation into the Rito Seco Creek. *Earth Scis., Inc.*, 599 F.2d at 370. The relevant issue was whether the Rito Seco Creek was navigable within the auspices of the CWA. *Id.* at 374. Much like Reedy Creek, the Rito Seco Creek was not capable of floating a boat, so the traditional definition of navigability did not apply. *Id.* at 375. Unlike Reedy Creek, the Rico Secco Creek was not an interstate waterway; instead, it was located wholly within Costilla County, Colorado. *Id.* at 374. Yet, the court looked at the impact the creek had on interstate commerce. *Id.* The creek supported trout and beaver, and the water collected in the reservoir downstream was used for agricultural irrigation for products that were sold in interstate commerce. *Id.* The court

determined that waters affecting interstate activities were just the type of waters that Congress intended to protect under the CWA, and that Congress had such power under the Commerce Clause. *Id.* ("Every court to discuss [navigability] has used a commerce power approach and agreed upon the interpretation.").

Comparing Reedy Creek to the Rito Seco Creek, it is readily apparent the similarities are more than sufficient to find Reedy Creek is navigable.[5] (R. 10). Reedy Creek is used as a water supply for interstate travelers. (R. 5). Also, both the water from Reedy Creek and the Rito Seco Creek are used for agricultural irrigation, and those agricultural products are sold in interstate commerce. Finally, the undisputed fact that Reedy Creek spans across state lines further supports a finding that it is "navigable" and should be covered under the CWA. (R. 5). *Earth Sciences, Inc.* is still good law, as *Rapanos* only considered intrastate wetlands in its decision, and the same types of usage and impact on interstate commerce exist in Reedy Creek as existed in the Rito Secco Creek. Therefore, Reedy Creek is navigable under both *Earth Sciences, Inc., Inc.* and the EPA's definition.

V. DITCH C-1 IS NAVIGABLE BECAUSE IT IS A TRIBUTARY OF A NAVIGABLE WATERWAY, IT SATISFIES BOTH *RAPANOS* TESTS, AND THE TERMS "POINT SOURCE" AND "NAVIGABLE WATER" ARE NOT MUTUALLY EXCLUSIVE.

Ditch C-1 has a direct and permanent surface connection to Reedy Creek, an interstate water that is navigable under the EPA's regulatory definition. 40 C.F.R. § 122.2(b). Ditch C-1 is thus a tributary of Reedy Creek and constitutes a navigable waterway under the EPA's regulatory definition. *Id.* § 122.2(e). Ditch C-1 also satisfies both *Rapanos* tests, and that alone is sufficient to find navigability for the purposes of the CWA. Finally, we need not show that

[5] The lower court in this case did indeed conclude it would have found Reedy Creek navigable, but it incorrectly said that *Earth Sciences, Inc.* was no longer good law due to *Rapanos*.

Ditch C-1 is not a point source, because post-*Rapanos* case law shows us that the terms "point source" and "navigable water" are not mutually exclusive. *See United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011); *Nat'l Assn of Home Builders v. United States Army Corps of Eng'rs*, 699 F. Supp. 2d 209, 212 (D.D.C. 2010).

A. Ditch C-1 is navigable because it is a tributary of Reedy Creek and Wildman Marsh, meeting the regulatory definition of a tributary.

A tributary is defined as "a stream which flows into a larger stream or body of water." *Vierstra*, 803 F. Supp. 2d at 1168. In *Vierstra*, the water at issue was a man-made canal which flowed only six to eight months out of the year. *Id.* This canal was not navigable in the traditional maritime sense: it could not float a boat. *Id.* at 1169. Viewing the EPA regulations through a post-*Rapanos* lens, the *Viersta* court found that the canal was a tributary of the Snake River, and under the EPA's regulatory definition of navigability, the canal was a tributary and thus navigable. *Id.* at 1168–69. The *Vierstra* court noted that being man-made, rather than naturally occurring, did not foreclose the possibility of a water still being considered navigable. *Id.* at 1167.

In our case, Ditch C-1 is analogous to the canal the *Viersta* court found to be navigable as a tributary. Ditch C-1 was man-made, but it was permanent, as it was required by the restrictive covenants in the deeds of the property owners that Ditch C-1 be maintained by those owners. (R. 5). Ditch C-1 also flows even more consistently than the canal in *Viersta*, as Ditch C-1 flows continuously except for periods of drought lasting no more than three months, and sometimes even only for a matter of weeks. *Id.* Finally, Ditch C-1 is directly connected, via a culvert, to Reedy Creek, an interstate water that falls within the EPA's definition of navigability. *Id.*

B. Ditch C-1 is navigable because it satisfies both *Rapanos* tests for navigability.

Ditch C-1 is also navigable under either test of *Rapanos*. Because *Rapanos* was a plurality decision, lower courts are generally obligated to follow the narrowest holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale [holds the majority], 'the holding of the Court may be viewed as [that decided] on the narrowest grounds.'").

But courts have not agreed on which *Rapanos* opinion is the narrowest. *Compare Vierstra*, 803 F. Supp. 2d at 1168–71 (finding both tests apply) *and United States v. Johnson*, 467 F. 3d 56, 66 (1st Cir. 2006) (finding either test applies) *with N. Cal. River Watch v. City of Healdsburg*, 457 F. 3d 1023, 1029 (9th Cir. 2006) (finding Justice Kennedy's nexus test applies) *and Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210 (D. Or. 2009) (holding that the nexus test does not apply to tributaries, since the nexus test only considers wetlands). This Court need not decide which *Rapanos* test should apply, because Ditch C-1 is navigable under both Justice Scalia's "relative permanence" test and Justice Kennedy's "significant nexus" test.

Justice Scalia's "relative permanence" test takes a textual approach to the interpretation of the language of the CWA and determines that a water is "navigable" within the meaning of the CWA when it is a "relatively permanent, standing or flowing bod[y] of water." *Rapanos*, 547 U.S. at 732. The court in *Vierstra* considered this test when it decided a man-made canal satisfied the "relative permanence" test. *Vierstra*, 803 F. Supp. 2d at 1170. The *Vierstra* court noted that no precise standards existed for permanence and therefore "common sense" dictated the meaning of permanence. *Id.*

In *Vierstra*, the canal was found to be relatively permanent because it flowed six to eight months out of the year. *Id.* at 1171. In this case, the ditch has an even greater degree of

permanence, as Ditch C-1 flows continuously except for periods of drought lasting as little as a few weeks and no longer than three months. (R. 5). Furthermore, the direct surface connection from the canal in *Vierstra* to the Snake River also supported a finding that it passed the "relative permanence" test. *Vierstra*, 803 F. Supp. 2d at 1171. In the case at bar, Ditch C-1 has a direct surface connection to Reedy Creek. (R. 5). Ditch C-1 is a relatively permanent, continuously flowing body of water analogous to the canal found by the court in *Vierstra* to pass the plurality's "relative permanence" test; therefore, Ditch C-1 also satisfies the "relative permanence" test for navigability.

Justice Kennedy's "significant nexus" test may not even apply to tributaries,[6] but as the *Vierstra* court did, this Court could also apply the "significant nexus" test "out of an abundance of caution." *Vierstra*, 803 F. Supp. 2d at 1172. The "significant nexus" test requires there be a substantial connection between the water in question and the traditionally navigable water. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). Such a nexus exists when the water in question "significantly affect[s] the physical, biological, and chemical integrity of the downstream navigable waterway." *Id.* at 780.

The *Vierstra* court considered whether a man-made, nonnavigable tributary satisfied the "significant nexus" test. *Vierstra*, 803 F. Supp. 2d at 1172. That court found a nexus existed because of the direct physical connection to the navigable and because the undisputed source of the pollutants into the navigable was the man-made canal. *Id.* Here, it is undisputed that arsenic exists in Ditch C-1 and in Reedy Creek below, but not above, where the water from Ditch C-1 enters Reedy Creek. (R. 5). Therefore, the presence of arsenic in Ditch C-1 and Reedy Creek establishes a significant nexus between the bodies of water. Similarly, because those pollutants

[6] *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, at 1210 ("Justice Kennedy's significant nexus test is inapplicable to . . . tributaries.").

flow directly into Wildman Marsh, Ditch C-1 significantly affects the integrity of Wildman Marsh, such that a significant nexus exists between Ditch C-1 and Wildman Marsh. Reedy Creek is an interstate water and provides drinking water to interstate travelers. *Id.* Wildman Marsh is a stopover for migratory birds and provides duck hunting to residents of several states. *But see SWANCC*, 531 U.S. at 174 (holding the Migratory Bird rule is not sufficient grounds for jurisdiction under the CWA). Therefore, given the effect on interstate commerce the arsenic has on the water in both Reedy Creek and Wildman Marsh, there exists a significant nexus to Ditch C-1.

C. The terms "point source" and "navigable water" are not mutually exclusive.

The court in *National Association. of Home Builders v. U.S. Army Corps of Eng'rs* considered whether a water that falls under the definition of "point source" can categorically never be a "water of the United States." 699 F. Supp. 2d 209, 216 (D.D.C. 2010). The water in question was a ditch, and ditches are included in the statutory definition of "point source." 33 U.S.C. § 1362(14). In *National Association of Home Builders*, the court held a facial challenge to whether ditches could ever be "navigable water" in a cause of action fails, because there are instances where ditches can be "navigable water," even though the term "ditch" is included in the definition of a point source. *National Assn. of Home Builders*, 699 F. Supp. 2d at 215–17.

The court in *National Association of Home Builders* analyzed Rapanos and found that, although "point sources" and "navigable waters" are different categories and "most of the time they do not overlap," nothing in the language of *Rapanos* required they *never* overlap. *Id.* at 216 (citing *Rapanos*, 547 U.S. at 735).

Reedy Creek is a navigable water within the meaning of the CWA because it falls within the EPA's definition that is entitled to *Chevron* deference, and *Rapanos* supports this finding as

well. Ditch C-1 is navigable as a tributary of Reedy Creek, and it also passes either *Rapanos* test for navigability. Finally, the terms "point source" and "navigable water" are not mutually exclusive.

VI. BONHOMME DOES NOT VIOLATE THE CWA BECAUSE BONHOMME DOES NOT HAVE CONTROL OVER THE POINT SOURCE, THE CITIZEN SUIT AGAINST BONHOMME IS VINDICTIVE, AND THE TRANSFER OF POLLUTED WATER FROM THE CULVERT INTO REEDY CREEK CONSTITUTES A WATER TRANSFER, EXEMPT FROM CWA REGULATION.

An unpermitted discharge of a pollutant from a point source, owned by an individual or corporation, constitutes a violation of the CWA. 40 C.F.R. § 122.2. Therefore, the liability for a discharge of a pollutant lies with the owner of the point source. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005). Maleau is the sole owner of the property where mining waste piles causing the introduction of arsenic into the navigable waters of Progress are located. As the owner of the point source, Maleau alone is responsible for acquiring the requisite NPDES permits, and only Maleau is liable for the failure to do so, not Bonhomme. *See generally Friends of Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1990). Bonhomme exercised his statutory right to file a citizen suit against Maleau to prevent him from illegally disposing of his pollutants without the required permits. After putting the EPA, Maleau, and the State of Progress on notice of his intent to sue under 33 U.S.C. § 1365, Bonhomme was served with a citizen suit alleging that *he*, rather than Maleau, was the property owner in violation of the CWA. (R. 4–5). The subsequent prosecution of Bonhomme was improperly commenced because it is in retaliation for Bonhomme's exercise of his statutory right to sue, and as such is vindictive and requires judicial review. *United States v. Monsoor*, 77 F.3d 1031, 1034 (7th Cir. 1996). Bonhomme's citizen suit against Maleau is the only action that possesses merit, as Maleau is the party liable for violating the CWA through the addition of arsenic into a tributary

of navigable waters. The State's claim that Bonhomme is in violation of the Act fails because the transfer of water from the culvert on his property is exempt from regulation under 40 C.F.R. 122.3(i), as it is a transfer of water, absent an intervening use, into another body of water.

A. Bonhomme did not violate the CWA because Maleau, not Bonhomme, has control of the point source

Bonhomme did not violate the CWA because he lacks ownership control over the point source — Maleau's mining waste piles — which prevents him from obtaining the requisite NPDES permit to regulate the effluent limitations under 33 U.S.C. § 1311. EPA regulations have reinforced the view that *ownership* of a point source triggers liability under the CWA. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d at 1145. Maleau, as the controlling owner of the point source, is the only proper party that can apply and obtain a NPDES permit under 33 U.S.C. § 1342, and Maleau is the only party responsible for the failure to do so. Bonhomme has no control over the mining waste piles or the ditch, and is required by a restrictive covenant to permanently maintain the ditch on his property. (R. 5). Furthermore, Bonhomme has no access to the culvert that runs underneath a farm road on his property, and therefore has no control over the drainage that is transferred from the culvert into Reedy Creek. *Id.* To maintain the integrity of our Nation's waters, liability for the discharge of pollutants from a point source must lie with the person causing the addition of the pollutant to navigable waters. *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 630 (D.R.I. 1990) (holding that the owners of the septic system that crossed over private and public property was the only party that could be liable for the discharge of raw sewage into the nearby river, because the town and property owners had no control over the discharge and could not obtain the requisite permit).

Bonhomme is not violating the CWA, because he has no ownership control over Maleau's mining waste piles, and the EPA has clearly defined the phrase "addition of any

pollutant" as "surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances *owned by a ... person* which do not lead to a treatment works." 40 C.F.R. § 122.2 (emphasis added). Therefore, the citizen suit brought against Bonhomme in an attempt to hold him liable for the discharge of pollutants from a point source that he retains no ownership control over, could create a dangerous precedent that the "law reaches those who have absolutely no control over the processes that the permit system regulates." *Friends of Sakonnet*, 738 F. Supp. at 631.

B. The citizen suit brought against Bonhomme is vindictive and does not compel compliance with the CWA.

The constitutional structure of government mandates a system of separated powers, thus granting the state broad prosecutorial discretion, while limiting judicial review. *United States v. Scott*, 631 F.3d 401, 406 (7th Cir. 2011). However, prosecutorial discretion is not unlimited. *State v. Karpinki*, 285 N.W.2d 729, 735 (Wis. 1979). It is improper for a state to file a vindictive prosecution in retaliation for the exercise of a protected statutory right. *United States v. Monsoor*, 77 F.3d 1031, 1034 (7th Cir. 1996). Congress specifically intended for interested parties to file citizen suits against alleged polluters for violations of the CWA under 33 U.S.C. 1365. The Supreme Court of the United States held that in order to file a citizen suit there must be a good faith basis that the alleged violator is in a state of either continuous or intermittent violation of the CWA. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987).

Bonhomme presented sufficient scientific data to demonstrate that arsenic from Maleau's mining waste piles did pollute, and continues to pollute, Ditch C-1, Reedy Creek, and Wildman Marsh. (R. 6). Testing the State's waterways at issue revealed that arsenic was undetected upstream of Maleau's property while significant concentrations of arsenic were detected just

below the property line in Ditch C-1, as well as in Reedy Creek and Wildman Marsh. *Id*. It was also detected that as the three-mile long ditch flowed away from the Maleau property towards Reedy Creek, the concentration of arsenic decreases in proportion to the increasing flow in the ditch. This is indicative of a continuous or intermittent unpermitted discharge of contaminated stormwater runoff from the Maleau property. Bonhomme satisfied the 60-day notice requirement of the citizen suit, which provided the State of Progress ample time to approach the accused and investigate the accusations. However, rather than entering into a consent decree with Maleau to prevent the contaminated storm water runoff from discharging into a tributary of navigable waters, the State filed a citizen suit against Bonhomme. (R. 5).

The Attorney General of the State of Progress proclaimed that the citizen suit initiated against Bonhomme was within the state's "prosecutorial discretion" and commenced in order to "protect both the waters of the state . . . and Maleau, a citizen of the state and one of the region's largest employers." (R. 6). Generally, the judiciary has limited review of a state's decision to file a citizen suit against an alleged polluter because the prosecution is in the best position to determine the "general deterrence value" of bringing suit, and fulfilling the state government's "overall enforcement plan" for protection of its waters. *See Wayte v. United States*, 470 U.S. 598, 607 (1985).

However, in this case, judicial review of the "prosecutorial discretion" of the State of Progress is proper. The state-initiated citizen suit against Bonhomme has general deterrent value, but not to eradicate unpermitted discharges; the only deterrence established here is to inhibit interested parties from filing citizen suits against wealthy point source owners for fear that liability for another's violation will fall on the party filing suit. The State of Progress should be prevented from claiming that it acted within its prosecutorial discretion to protect the waters

of the state when there is no action taken against Maleau, the party actively discharging arsenic into the waters of Progress. Furthermore, the American Bar Association has specified in its Standards of Prosecution Functions that it is improper to use prosecutorial discretion when the decision is based upon a personal or political advantage. ABA Standard 3-3.9 (1993). It would appear that the State of Progress's overall purpose in this litigation is not the protection of its waters and citizens, but rather solely the protection of Maleau, one of its "largest employers," and a major contributor to the Attorney General's election campaign. *Id.*

C. The transfer of water from the culvert into Reedy Creek is exempt from CWA regulation because it constitutes a water transfer absent an intervening use.

The transfer of water from the culvert under Bonhomme's farm road does not constitute a violation of the CWA because it is exempt from regulation under the EPA Water Transfers Rule, which states that transferring waters of the United States, absent an intervening use, to another body of water does not require a NPDES permit, unless it is the transfer that first introduced the pollutants. 40 C.F.R. § 122.3(i). *See generally Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (holding that an addition of pollution occurs only through the initial introduction by a point source, not when the pollutants are moved between navigable waters.) The transfer of water from the culvert on Bonhomme's property is not tainted by an intervening use, nor is it the source of the initial introduction of arsenic. Rather, it is the mining waste piles on Maleau's property that causes the first discharge of pollutants into Ditch C-1, which subsequently flows through the culvert. (R. 5).

Under the unitary waters theory, "pollutants can be added to navigable waters only once, and pollutants that are already in navigable waters are not added to navigable waters again when moved between water bodies." *Friends of the Everglades*, 570 F.3d at 1223. In promulgating the Water Transfers Rule, the EPA incorporated the unitary waters theory on the premise that

pollutants will always be inherent in the Nation's waters, and water that is transferred does not lose its status of waters of the United States until there is an intervening use. NPDES Final Water Transfers Rule, 73 Fed. Reg. 33697-01 (June 13, 2008). Therefore, because the introduction of arsenic begins with Maleau's mining waste piles, the continuing discharge is the only violation of the CWA actionable by a citizen suit under 33 U.S.C. § 1365. The transfer of water from the culvert on Bonhomme's property into Reedy Creek, absent an intervening use that would cause an addition of pollutants not already inherent in the water, falls outside the regulation of the CWA.

The lower court erred in dismissing Bonhomme's citizen suit against Maleau, as the suit against Maleau was the only viable action that would eliminate the dangerous leaching of pollutants into the protected waters of the State of Progress. We therefore respectfully request this Court reverse the lower court's holding, with instructions to proceed against Maleau for his CWA violations.

CONCLUSION

For the foregoing reasons, we respectfully request this Court reverse the ruling of the lower court and reinstate Bonhomme's citizen suit, because Bonhomme is a real party in interest; Bonhomme qualifies as a citizen entitled to file a citizen suit against Maleau; Maleau's mining waste piles are point sources under the CWA; Ditch C-1 is a tributary to navigable bodies of water entitled to protection under the CWA. We also respectfully ask this Court to affirm the lower court's determination that Reedy Creek is a water of the United States.

Respectfully Submitted

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Counsel for Jacques Bonhomme