Team No. 14

C.A. No. 13-1234

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant,

v.

SHIFTY MALEAU,
Intervenor-Appellant,

v.

STATE OF PROGRESS,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGRESS

BRIEF FOR JACQUES BONHOMME,
Plaintiff-Appellant

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STATEMENT OF JURISDICTION

Jacques Bonhomme appeals from a final judgment in a civil case entered in the United States District Court for District of Progress on July 23, 2012. Mr. Bonhomme filed a timely notice of appeal on July 23, 2013. The United States Court of Appeals for the Twelfth Circuit exercises jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES ON APPEAL

I. Whether Mr. Bonhomme is the real party in interest under Rule 17 of the Federal Rules of Civil Procedure when he owns property in an area affected by pollution and regularly visits the area for recreation.

II. Whether Mr. Bonhomme can bring a citizen suit under Clean Water Act § 505, 33 U.S.C. § 1365, when that statute explicitly states that a "citizen" is a "person."

III. Whether Mr. Maleau's mining waste piles constitute "point sources" under Clean Water Act §§ 502(12), (14), 33 U.S.C. §§ 1362(12), (14), when they create channels through which polluted stormwater runoff enters an irrigation ditch.

IV. Whether Reedy Creek is a "navigable water/water of the United States" under Clean Water Act § 502(7), (12), 33 U.S.C. § 1362(7), (12), when it flows through two states, affects the economy of both states, and contributes water to a federal wildlife refuge.

V. Whether Ditch C-1 is a "navigable water/water of the United States" under Clean Water Act § 502(7), (12), 33 U.S.C. § 1362(7), (14), when it flows for most of the year and contributes water to larger, more substantial bodies of water.

VI. Whether Mr. Bonhomme is liable for the presence of arsenic in Ditch C-1 when Mr. Maleau is the but-for cause of the arsenic pollution and the culvert on Mr. Bonhomme's property transfers water from one navigable body to another.

STATEMENT OF THE CASE

Jacques Bonhomme brought a suit against Shifty Maleau for violating the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2012), under the jurisdiction of the citizen suit provision of that statute, CWA § 505, 33 U.S.C. § 1365. (R. at 4.) Some time later, the State of Progress filed a citizen suit under the CWA against Mr. Bonhomme, and Mr. Maleau intervened. (R. at 5.) Mr. Bonhomme and Mr. Maleau filed motions to dismiss the respective suits against them. (R. at 5.)

On July 23, 2012, District Judge Romulus N. Remus of the United States District Court for the District of Progress granted Mr. Maleau's motion to dismiss, finding that Mr. Bonhomme lacked standing because he is not a real party in interest under Rule 17 of the Federal Rules of Civil Procedure and because he is not an American citizen. (R. at 10.) Although it did not need to do so, the court also determined that Ditch C-1, a drainage ditch that runs through Mr. Maleau's and Mr. Bonhomme's properties, was not a water of the United States and that mining waste piles on Mr. Maleau's property were not point sources. (R. at 10.) Further, the court classified Reedy Creek, which flows for fifty miles and through two states, as a water of the United States. (R. at 10.) Finally, the court rejected Mr. Bonhomme's motion to dismiss, holding that Progress had adequately stated a cause of action regarding a culvert on Mr. Bonhomme's property acting as a point source. (R. at 10.)

Mr. Bonhomme now brings this appeal. Mr. Maleau and the State of Progress have each filed cross appeals on various issues.

STATEMENT OF THE FACTS

Mr. Maleau is a local businessman whose open pit gold mining and extraction operation adds arsenic to the environment. (R. at 4.) Mr. Maleau's mining and extraction operation is located near the Buena Vista River in the State of Progress. (R. at 5.) His gold mining company trucks the overburden and slag from his operation near the Buena Vista River to his property in Lincoln County. (R. at 5.) The overburden and slag are placed in piles adjacent to Ditch C-1 located in Jefferson County. (R. at 5.) Both Lincoln County and Jefferson County are located in Progress. (R. at 5.) When rainwater runoff percolates through the piles, it leaches and carries arsenic through channels in the piles to Ditch C-1. (R. at 5.) Then, the arsenic-polluted rainwater runs through Ditch C-1 via a culvert under Mr. Maleau's farm road before being discharged into Reedy Creek. (R. at 5.) After passing through Mr. Bonhomme's property, Reedy Creek flows into Wildman Marsh. (R. at 6.) Arsenic is commonly associated with gold mining and extraction and is a well-known poison. (R. at 6.)

Ditch C-1 is a drainage ditch that flows through Lincoln County and Jefferson County. (R. at 5.) It has an average depth of one foot and an average width of three feet. (R. at 5.) The ditch usually contains running water, except during times of drought. (R. at 5.) The periods of drought last anywhere from several weeks to three months. (R. at 5.) The water in Ditch C-1 is mostly derived from draining groundwater or rainwater runoff. (R. at 5.) None of the properties that Ditch C-1 flows through are uplands. (R. at 5.)

Reedy Creek is a navigable water used in interstate commerce. (R. at 5.) It is about fifty miles long. (R. at 5.) It begins in the State of New Union, where it is used as the water supply for Bounty Plaza, a service area on Interstate 250 ("I-250"), which sells gasoline and food. (R. at 5.) In both Progress and New Union, farmers use Reedy Creek for both agricultural purposes

and irrigation purposes. (R. at 6.) The agricultural products are sold in interstate commerce. (R. at 6.)

Wildman Marsh is a vast wetland. (R. at 5.) Over one million waterfowl stop at the marsh during their twice-annual migrations between the Arctic and the tropics. (R. at 5-6.) The area is visited by local, national, and international hunters, generating over $25 million for the local economy. (R. at 6.) Ditch C-1 discharges water directly into Reedy Creek, which, in turn, discharges water into Wildman Marsh. (R. at 5.)

Mr. Bonhomme is a French national who owns property in the wetlands of Wildman Marsh. (R. at 5.) He uses the property to host duck hunting parties with his friends and business associates. (R. at 6.) Some of the hunting parties have been held for the benefit of Precious Metals International, Inc. ("PMI"), a mining corporation for which Mr. Bonhomme acts as president. (R. at 6.) Mr. Bonhomme has decreased his hunting activities from eight a year to two a year. (R. at 6.)

Mr. Bonhomme tested the water in Ditch C-1 both upstream and downstream of Mr. Maleau's property. (R. at 6.) His tests revealed that arsenic was present in the parts of Ditch C-1 just below Mr. Maleau's property. (R. at 6.) The tests also showed that arsenic was present in significant concentrations just below the discharge of Ditch C-1 into Reedy Creek. (R. at 6.) Arsenic was undetectable in the parts of Reedy Creek that precede the point where it meets Ditch C-1 and upstream of Mr. Maleau's property. (R. at 6.) There is no evidence of any obstruction between Ditch C-1 and Reedy Creek. (R. at 6.) The U.S. Fish and Wildlife Service found traces of arsenic in three ducks in Wildman Marsh. (R. at 6.)

Based on these findings, Mr. Bonhomme filed suit against Mr. Maleau for violations of the CWA under the jurisdiction of the citizen suit provision of that statute. (R. at 4.) Mr.

Bonhomme filed suit after giving Mr. Maleau proper notice and sought all of the relief available under CWA § 1365. (R. at 4.) Some time later, after proper notice, Progress filed a citizen suit against Mr. Bonhomme, arguing that a culvert on Mr. Bonhomme's property acted as a point source that discharged arsenic into Reedy Creek. (R. at 4-5.) After Mr. Maleau intervened in Progress's action against Mr. Bonhomme, the cases against Mr. Maleau and Mr. Bonhomme were consolidated. (R. at 5.) Mr. Maleau and Mr. Bonhomme filed motions to dismiss the respective suits against them. (R. at 5.)

The district court granted Mr. Maleau's motion to dismiss the citizen suit brought by Mr. Bonhomme. (R. at 10.) It held that dismissal of Mr. Bonhomme's claim was warranted because it believed that PMI and not Mr. Bonhomme was the real party in interest against Mr. Maleau under Rule 17 of the Federal Rules of Civil Procedure. (R. at 8.) Further, the court believed that the language of the CWA precluded the commencement of a citizen suit by a foreign national such as Mr. Bonhomme. (R. at 8.)

Additionally, the court determined that Ditch C-1 failed to qualify as a water of the United States because it believed that the ditch was a point source instead of a tributary of Reedy Creek. (R. at 9.) The court also found that the overburden piles located on Mr. Maleau's property were not point sources according to the CWA, and that Reedy Creek was a water of the United States. (R. at 9.) Finally, the court denied Mr. Bonhomme's motion to dismiss because it believed that Progress adequately stated a cause of action regarding the culvert on Mr. Bonhomme's property acting as a point source. (R. at 10.) Mr. Bonhomme, Mr. Maleau, and Progress appealed. (R. at 1.)

SUMMARY OF THE ARGUMENT

Mr. Bonhomme initially commenced this suit in an attempt to stop Mr. Maleau from polluting the federal wildlife reserve near his property that he frequently visits throughout the year. Mr. Bonhomme is the real party in interest in the suit against Mr. Maleau because the pollution caused by Mr. Maleau has diminished Mr. Bonhomme's recreational enjoyment of the marsh. The suit against Mr. Maleau will resolve any issues concerning whether the pollution caused by Mr. Maleau affects Mr. Bonhomme's ability to host hunting parties in the marsh. Additionally, Mr. Bonhomme has standing to commence a citizen suit because he is a "person" according to the CWA. Under the CWA's citizen suit provision, a "person" qualifies as a "citizen" and a "citizen" can commence a citizen suit.

Further, Mr. Maleau's mining waste piles are point sources for arsenic pollution because they create channels that carry arsenic to Ditch C-1. The configuration of the waste piles on Mr. Maleau's land leads to the creation of the channels that leach and carry arsenic to the ditch. The pollutants discharged by these channels foul the water in the ditch, which in turn discharges the contaminated water to Reedy Creek and Wildman Marsh. But-for the channels created by the configuration of the piles on Mr. Maleau's property, arsenic would not be present in Ditch C-1, Reedy Creek, or Wildman Marsh.

Ditch C-1 and Reedy Creek are waters of the United States because they are both relatively permanent bodies of water that serve as tributaries of Wildman Marsh. Ditch C-1 flows for at least nine months out of the year and serves as a tributary for Reedy Creek. Reedy Creek flows permanently and continuously and discharges water directly into Wildman Marsh, a traditional navigable water body. The hydrologic connection between the ditch, the creek, and

the marsh creates a significant nexus, in which pollutants added to one tributary can threaten the environmental integrity of other connected water bodies.

Finally, Mr. Bonhomme is not liable for the discharge of pollutants through the culvert on his property because the culvert is not introducing pollutants into Reedy Creek. Instead, the culvert transfers water from Ditch C-1 to the creek. This type of transfer does not require a permit, so Mr. Bonhomme did not violate the CWA by failing to obtain one. Mr. Maleau and not Mr. Bonhomme is the but-for cause of arsenic pollution in the ditch, creek, and marsh. A rejection of Mr. Bonhomme's motion to dismiss would allow Mr. Maleau to wrongfully shift the blame for his reckless behavior onto an innocent party.

ARGUMENT

I. Mr. Bonhomme can bring a citizen suit under the Clean Water Act and is an interested party in the suit against defendant.

A. Mr. Bonhomme is the real party in interest in the suit against Mr. Maleau because Mr. Maleau's pollution has diminished Mr. Bonhomme's enjoyment of Wildman Marsh.

Mr. Bonhomme owns property and takes hunting trips in the area affected by Mr. Maleau's pollution. (R. at 5.) As a result of Mr. Maleau's actions, Mr. Bonhomme has decreased the number of hunting trips he makes in the area. (R. at 6.) Whether Mr. Bonhomme is the real party in interest is a legal issue that this Court should review *de novo*. *Curtis Lumber Co., Inc. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010); *Wieburg v. GTE Se. Inc.*, 272 F.3d 302, 305 (5th Cir. 2001).

The district court erroneously applied Rule 17 of the Federal Rules of Civil Procedure when it held that Mr. Bonhomme was not the real party in interest in the case against Mr. Maleau. Rule 17 states that a civil action "must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a)(1). Curiously, the district court believed that Mr. Bonhomme fell short of this requirement because he does not live in the lodge adjacent to Wildman Marsh and because PMI paid for many of Mr. Bonhomme's expenses related to this suit. (R. at 7-8.) However, Rule 17 is not as strict as the court's ruling suggests, and Mr. Bonhomme is clearly the real party in interest.

Mr. Bonhomme is the real party in interest in this case because Mr. Maleau's pollution has affected his enjoyment of the marsh. The real party in interest is the party that, under the substantive law, possesses a right that can be enforced, and not necessarily the party that will

benefit from the recovery. *Wieburg*, 272 F.3d at 306; *Best v. Kelly*, 39 F.3d 328, 329 (D.C. Cir. 1994). In cases involving the citizen suit provision of the CWA, a plaintiff's enjoyment of recreational activities is a right that can be enforced. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). For example, in *Laidlaw*, the Supreme Court granted standing to individuals who were no longer able to enjoy fishing, birdwatching, and other recreational activities in and around a local river due to the presence of harmful pollutants. *Id.* at 182-83.

Based on the facts of this case, Mr. Bonhomme similarly has a right that can be enforced against Mr. Maleau. Before arsenic was introduced to the area, Mr. Bonhomme regularly hosted hunting parties out of the lodge that he owns on Wildman Marsh. (R. at 6.) The presence of arsenic in Wildman Marsh has forced Mr. Bonhomme to decrease the number of hunting parties from eight a year to two a year. (R. at 6.) As in *Laidlaw*, where individuals used the CWA to protect their recreational interests, Mr. Bonhomme can invoke the CWA to enforce his right to enjoy the marsh by duck hunting. Accordingly, Rule 17 is satisfied and Mr. Bonhomme is entitled to bring this suit.

Further, the district court's assertion that PMI rather than Mr. Bonhomme is the real party in interest is incorrect. While Mr. Bonhomme has a direct interest in this case, PMI does not. Mr. Bonhomme, not PMI, owns the lodge and organizes the hunting parties that leave from the lodge. (R. at 6.) While Mr. Bonhomme may organize some of the hunting parties for the benefit of PMI, he also plans parties for purely social purposes with friends and acquaintances. (R. at 6.) PMI, on the other hand, does not own the lodge, and there is no evidence that PMI has used the property in any official corporate capacity. It is true that PMI paid for some of Mr. Bonhomme's expenses during this case and that PMI may benefit from Mr. Bonhomme's recovery. (R. at 7.)

However, these points fall short of proving that PMI has a right that can be enforced. Instead, Mr. Bonhomme, who owns the property and frequently uses it for recreational purposes, is the real party in interest.

This application of Rule 17, and not the one used by the district court, conforms to the Advisory Committee's motivations behind drafting the rule in its modern form. "[T]he modern function of the rule...is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." FED. R. CIV. P. 17(a) Advisory Committee Note (1966).

There is no threat that PMI will bring a subsequent suit against Mr. Maleau. Although a third party may be vitally interested in the outcome of the case, that party is not a threat to bring a subsequent action if the case at hand will resolve the relevant issues under substantive law. *Best*, 39 F.3d at 329-30. The relevant issues here deal with Mr. Maleau's violations of the CWA and how those violations have impacted Wildman Marsh. Even if PMI had standing to bring a subsequent action against Mr. Maleau, those issues will have already been decided under substantive law. PMI could not argue later that Mr. Maleau's overburden piles diminish Mr. Bonhomme's recreational enjoyment of the marsh because this Court will have already ruled on that subject. Therefore, a judgment in the dispute between Mr. Bonhomme and Mr. Maleau will have its proper effect as res judicata and satisfy Rule 17.

B. The citizen suit provision of the Clean Water Act encompasses Mr. Bonhomme because he is a "person" as the term is used in the Act.

Mr. Bonhomme is the victim of pollution caused by Mr. Maleau. He should be able to pursue the appropriate remedy under the jurisdiction of the citizen suit provision of the CWA. This Court should review the district court's interpretation of the citizen suit provision *de novo*,

using traditional tools of statutory construction to determine the intent of Congress. *U.S. v. Vreeland*, 684 F.3d 653, 662 (6th Cir. 2012); *Fruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010); *Atl. Research Corp. v. U.S.*, 459 F.3d 827, 830 (8th Cir. 2006).

Section 505 of the CWA grants "any citizen" the right to maintain a civil action against violators, with "citizen" defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), 1365(g). Section 502(5) describes a "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §1362(5). The district court, noting that Section 502(5) does not include "foreign national" as an example of a "person," determined that Mr. Bonhomme was not a "person," and, therefore, not a "citizen" under Section 505. (R. at 8.)

The district court's narrow interpretation of the word "citizen" prohibits Mr. Bonhomme from stopping pollution in his own backyard. The court was misguided to focus on what Congress may have omitted from the act, and should have looked closer at what the act actually says. *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004). "[W]hen the statute's language is plain, the sole function of the courts...is to enforce it according to its terms." *Id.* at 534 (*quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). The CWA clearly considers an individual to be a "person" without any mention of the individual's citizenship. Axiomatically, that individual qualifies as a "citizen" under Section 505(g). Therefore, Mr. Bonhomme, who is an individual, can commence a citizen suit according to the plain text of the CWA.

A brief examination of the remaining canons of statutory interpretation shows that this is the only reasonable interpretation of the citizen suit provision. As with any statute, it is

necessary to look next into the ordinary meaning of the words in question. *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356 (2012). Of course, "citizen" can mean "an inhabitant of a city or town" or "a native or naturalized person who owes allegiance to a government;" but, it can also mean "a civilian as distinguished from a specialized servant of the state." *Merriam-Webster's Collegiate Dictionary* 208 (10th ed. 2001). While Mr. Bonhomme does not legally belong to the United States, he is a civilian since he is not acting as a specialized servant of the state. Thus, according to this definition, Mr. Bonhomme is a "citizen."

This analysis of the word "citizen" would be strained if read in isolation. However, Congress stipulated in Section 505 that a "citizen" should also be understood to be a "person." The primary definition of "person" is "human." *Id.* at 865. This sweeping definition encompasses every individual human being without reference to any particular nationality. Since he is a human being, Mr. Bonhomme qualifies as a "person" according to the ordinary meaning of the word and, consequently, a "citizen" under Section 505.

However, statutory language cannot be construed in a vacuum, and the words of a statute must be read in their context within the overall statutory scheme. *Roberts*, 132 S. Ct. at 1357. If possible, the court must fit all parts of the statutory scheme together into an harmonious whole. *FDA v. Brown & Williamston Tobacco Corp.*, 529 U.S. 120, 133 (2000). To this end, it is appropriate to look not only elsewhere in the CWA, but also at other regulations that allow citizen suits. *See id.* Significantly, Section 509(b)(1) of the CWA grants "any interested person" the right to request judicial review of actions by the Administrator of the Environmental Protection Agency ("EPA"). 33 U.S.C. § 1369(b)(1). Similarly broad language can be found in the Clean Air Act, Noise Control Act, and Safe Drinking Water Act, all three of which allow "any person" to commence a citizen suit. Clean Air Act § 304(a), 42 U.S.C.A. § 7604(a) (West

2013); Noise Control Act § 11(a), 42 U.S.C.A. § 4911(a) (West 2013); Safe Drinking Water Act § 8(a), 42 U.S.C.A. § 300j-8(a) (West 2013). Clearly, the use of the word "citizen" in Section 505 is the exception to the general use of the word "person" in the CWA and throughout the pollution control statutory scheme. *See* JEFFREY G. MILLER, *Citizen Suits: Private Enforcement of Federal Pollution Control Laws* 17 (1987). Therefore, a contextual reading of Section 505 suggests that any person can commence a citizen suit.

Additionally, interpretations of a statute that produce absurd results should be avoided. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). If the district court's interpretation of the citizen suit provision is enforced, then a foreign national such as Mr. Bonhomme will be unable to enforce pollution control laws as pollution is happening around him. This is the kind of scenario that one might expect to see in a scene from *Waiting For Godot*, with pollution occurring, but, until an American citizen arrives, nothing happening. Interpreting the statute in the way that the district court did means that an individual such as Mr. Bonhomme, who owns property along Reedy Creek and Wildman Marsh, is bound to watch helplessly as the local ecosystem is destroyed by arsenic. Consequently, the only sensible interpretation of 502(5) and 505(g) is that a foreign national is a "person" and, as a result, a "citizen."

Finally, the legislative history behind a statute may provide insight into how the statute should be interpreted. *See Roberts*, 132 S. Ct. at 1365. In the case of the CWA, Congress at one point considered drafting the statute with the goal to make all the nation's waters clean enough to swim in without health hazard. PAUL CHARLES MILAZZO, *Unlikely Environmentalists: Congress and Clean Water, 1945-1972* 196-97 (2006). The Senate Public Works Committee eventually refined this goal, focusing the Act on the promotion of healthy ecosystems and the prevention of

pollution at its source. *Id.* at 205-11. As one attempt to accomplish this goal, the Senate drafted a bill allowing "anyone" to initiate a civil suit against polluters. S. Conf. Rep. 92-1236, pp. 3822-23 (1972). A subsequent House amendment to the Senate bill limited the right to commence citizen suits to those "persons" directly affected by a violation of the act. *Id.* at 3823. The Conference substitute incorporated both the Senate bill and the House amendment, adding the stipulation that a "citizen" be thought of as a "person" and a note explaining that its decision was based on the Supreme Court's ruling in *Sierra Club v. Morton*, 405 U.S. 727 (1972). S. Conf. Rep. 92-1236, p. 3823; *see also Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). Accordingly, a brief analysis of *Sierra Club* will inform any understanding of legislative intent in Section 505.

In *Sierra Club*, the Court rejected the argument that an organization has standing even though none of the organization's members directly suffered an injury. 453 U.S. at 739. The Court's decision established the rule that "a party seeking review must allege facts showing that he is himself affected." *Id.* at 740. The opinion did not mention citizenship or imply that standing should be limited in any way other than ensuring that the plaintiffs are "those who have a direct stake in the outcome." *Id.* In fact, courts have interpreted the *Sierra Club* decision as liberally granting standing in cases where the plaintiff lives in or uses the area affected by violations. *See Nat'l Sea Clammers*, 453 U.S. at 16-17 (stating that Section 505(g) creates a "broad category of potential plaintiffs"); *see also* MILLER, *supra*, at 20. Thus, it is clear that Congress was concerned with satisfying the Court's requirement of actual injury, and not the plaintiff's nationality, when it drafted Section 505.

Taken together, the canons of statutory interpretation demonstrate that Section 505 was written to allow any person who has suffered an injury to commence a citizen suit. While the

phrase "citizen suit" itself might suggest that American citizenship is a prerequisite, analysis of Section 505 shows that the phrase is nothing more than a term of art. Considering that Section 505(g) states explicitly that a "citizen" is a "person" without any mention of American citizenship, it is clear that Congress intended to make citizen suits broadly available. Furthermore, even if the plain language of the statute is insufficient, traditional statutory construction provides abundant support for the position that a foreign national can commence a citizen suit. Accordingly, Mr. Bonhomme is a "citizen" under Section 505 and has standing in this case.

II. The mining waste piles are point sources under the Clean Water Act because they are human-made, discernable, confined, and discrete conveyances of arsenic into a navigable water, and it was Congress' intent to include such piles in the Act's broad definition of point sources.

In its dismissal of Mr. Bonhomme's claim, the district court held that the overburden piles on defendant's property were not covered by the CWA's examples of conveyances, and, thus, not point sources. (R. at 9.) The court came to this conclusion despite the fact that rainwater runoff that flows from Mr. Maleau's piles create channels that deposit arsenic into Ditch C-1. (R. at 5.) This Court should review the district court's application of the CWA *de novo*, *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 185 (2d Cir. 2010); *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002), and construe any factual allegations regarding defendant's overburden piles in the light most favorable to Mr. Bonhomme. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 850 (8th Cir. 2012); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 274 (6th Cir. 2010).

Congress intended for the CWA to regulate "to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *U.S. v. Earth Scis.*, 599 F.2d 368, 373 (10th Cir. 1979); *see also* MILAZZO, *supra,* at 196-197 (stating that Congress at one point considered drafting the statute with the goal to make all the nation's waters swimmable). To further that goal, the point source concept was designed in such a way that embraces "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Earth Scis.*, 599 F.2d at 373. Courts have maintained that the term "point source" is to be interpreted broadly. *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) (overturned in part on other grounds by *City of Burlington v. Dague*, 505 U.S. 557 (1992)).

The CWA prohibits the unlicensed addition of any pollutant to navigable waters from a point source. CWA §§ 301(a), 301(12), 33 U.S.C. §§ 1311(a), 1362(12). A point source is any discernable, confined, and discrete conveyance. CWA § 301(14), 33 U.S.C. § 1362(14). These conveyances can include pipes, tunnels, wells, containers, and, significantly, channels. *Id.*

Several courts have held that human-made piles composed of debris, overburden, or spoil may constitute point sources of pollution via storm-water runoff. *Sierra Club v. Abston Constr.*, 620 F.2d 41, 45 (5th Cir. 1980); *Parker v. Scrap Metal Processors Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Friends of Santa Fe Cnty. v. Lac Minerals*, 892 F. Supp. 1333, 1359 (D.N.M. 1995). "Storm-water runoff does not, in all circumstances, originate from a point source, but several courts have concluded that it does when storm water collects in piles of industrial debris and eventually enters navigable water." *Parker*, 386 F.3d at 1009. Further, "[a] point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a

navigable body of water by means of ditches, gullies and similar conveyances." *Abston Constr.*, 620 F.2d at 45. A gravity flow that causes the deposition of sediment or water into a navigable body of water may be the result of a point source discharge if miners initially collected or channeled the sediments or water. *Id.*

In *Parker*, the court held that piles of industrial waste or debris were point sources within the meaning of the CWA. 386 F.3d at 1009. The piles of debris, which were composed of scrap metal or scrap tires, were located near the top of a hill. *Id.* at 1002-1009. Stormwater collected in the industrial waste piles and then flowed into a stream after travelling downhill in gullies formed by erosion. *Id.* at 1009.

Similarly, the court in *Abston Construction* explained that spoil piles are point sources when the basins at the bottom of the piles and other devices could be characterized as encompassing containers from which pollutants were discharged. 620 F.2d at 47. Though the court did not issue a holding concerning the spoil piles, the guidance that the court gave is helpful in determining when those piles constitute point sources. The court stated that although the point source definition excludes uncollected surface waters, surface runoff from rainfall, when collected or channeled in connection with mining activities, constitutes point source pollution. *Id.*

In this case, the district court overlooked the clear weight of precedent, mistakenly neglected the nature of the overburden piles, and categorically ruled that piles cannot be point sources. (R. at 9.) The courts in *Parker* and *Abston Construction* correctly analyzed the nature of the overburden piles, and recognized that the piles, given their ability to either collect or channel rainwater, constituted point sources. The rulings in both cases are particularly relevant

to this case because Mr. Maleau's overburden piles channel the contaminated water to Ditch C-1. (R. at 5.)

As in *Parker* and *Abston Construction*, where waste piles acted as point sources when stormwater hit the piles and then traveled to navigable waters through channels formed by the piles, the piles in this case created channels that discharged arsenic into Ditch C-1. The piles are the origin of the arsenic, and the configuration of the piles is the but-for cause of pollution in Ditch C-1, Reedy Creek, and Wildman Marsh. (R. at 5.) When Mr. Maleau's piles discharge the arsenic into Ditch C-1 via the channels that the piles create, they act within the scope of the broad definition of point sources. Accordingly, the waste piles on Mr. Maleau's property are point sources under the CWA.

III. Reedy Creek and Ditch C-1 are waters of the United States because they are permanently flowing or relatively permanent bodies of water and because they affect the integrity of a navigable water body.

Reedy Creek and Ditch C-1 both flow continuously along recognized paths for at least nine months out of the year. (R. at 5.) Together, the creek and the ditch contribute water to Wildman Marsh. (R. at 5.) Despite these similarities between the two water bodies, the district court determined that only Reedy Creek is a "water of the United States" according to the CWA as interpreted by *Rapanos v. U.S.*, 547 U.S. 715 (2006). (R. at 10.) This Court should review the district court's application of the CWA *de novo*, *Peconic Baykeeper*, 600 F.3d at 185; *Forsgren*, 309 F.3d at 1183, and construe any factual allegations regarding Reedy Creek and Ditch C-1 in the light most favorable to Mr. Bonhomme. *Richter*, 686 F.3d at 850; *Terry*, 604 F.3d at 274.

A. This Court should follow the First, Third, and Eighth Circuits and analyze the "waters of the United States" issue under both rules articulated in *Rapanos*.

The CWA prohibits the discharge of pollutants from a point source into waters of the United States. CWA §§ 301(a), 301(12), 33 U.S.C. §§ 1311(a), 1362(12). In *Rapanos*, the Supreme Court provided multiple definitions of "waters of the United States," with no single opinion carrying a majority. The plurality opinion articulated by Justice Scalia used the definition "relatively permanent, standing, or flowing bodies of water." *Rapanos*, 547 U.S. at 732. Meanwhile, in his concurrence, Justice Kennedy argued for the "significant nexus" test to determine whether the water body "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, or biological integrity of other waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in judgment). Justice Stevens' dissenting opinion would have applied a broader standard, but stated that it would nevertheless qualify a body of water as "waters of the United States" if it passed either Justice Kennedy's or the plurality's tests. *Id.* at 810 (Stevens, J., dissenting).

Courts of Appeals have similarly been split over which definition of "waters of the United States" should apply. The United States Courts of Appeals for the Seventh and Eleventh Circuits have held in favor of Justice Kennedy's opinion, *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006); *U.S. v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. 2007). Conversely, the Fourth, Fifth, Sixth, and Ninth Circuits have expressly reserved the issue of which test or tests should be used. *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011); *U.S. v. Lucas*, 516 F.3d 325-27 (5th Cir. 2008); *U.S. v. Cundiff*,

555 F.3d 200, 210 (6th Cir. 2011); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2010).

The First, Third, and Eighth Circuits, have taken yet another approach, using both Justice Kennedy's and the plurality's rules jointly and separately. *U.S. v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *U.S. v. Donovan*, 661 F.3d 174, 184 (3d Cir. 2011); *U.S. v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). This dual view takes into account the conditioned support given to each standard by Justice Stevens' dissent. *See Donovan*, 661 F.3d at 181-84. To justify this method, the court reasoned that, "in *Rapanos*, there is a point of agreement and no basis for disregarding the Supreme Court's directive that two new tests should apply." *Id.* at 183-84. Consequently, a water body should qualify as "waters of the United States" if it satisfies either the plurality's "relatively permanent, standard, or flowing bodies of water" test or Justice Kennedy's "significant nexus" test.

B. Reedy Creek is a water of the United States because it is a permanently flowing body of water and it contributes water to Wildman Marsh.

Reedy Creek is a water of the United States because it satisfies both the plurality's and Justice Kennedy's tests. Under the plurality's test, water bodies that are connected to traditional navigable water bodies and that have a relatively permanent flow qualify as waters of the United States. *Rapanos*, 547 U.S. at 742. Creeks meet these requirements if they contribute water to oceans, lakes, rivers, or other navigable water bodies and flow seasonally except during dry months. *U.S. v. Moses*, 496 F.3d 984, 991 (9th Cir. 2007); *U.S. v. Brink*, 795 F.Supp.2d 565, 579 (S.D. Tex. 2011). Further, a creek is a water of the United States if it is a tributary of a navigable water body. 40 C.F.R. § 122.2 (2013).

In this case, Wildman Marsh is a traditional navigable water body because it is owned by the federal government and because the degradation of its waters would affect interstate and foreign commerce. (R. at 10.) Reedy Creek, which is permanently flowing and continuous, discharges water directly into the marsh. (R. at 5.) As in *Moses* and *Brink*, where creeks that contributed water to rivers were waters of the United States, Reedy Creek is a permanent tributary of the traditional navigable water body Wildman Marsh. Consequently, Reedy Creek is a water of the United States under the plurality's standard.

Additionally, the fact that the Creek is a tributary to Wildman Marsh means that it necessarily satisfies Justice Kennedy's "significant nexus" test. In order for a water body to meet Justice Kennedy's standard, it must be a significant contributor to a larger hydrologic system. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). If the water body by itself or in connection with other tributaries affects the environmental integrity of waters more traditionally understood as navigable, then it is a part of the "significant nexus." *Id.* Because they are capable of contributing significant amounts of water to navigable water bodies, creeks satisfy Justice Kennedy's test. *Moses*, 496 F.3d 984 at 990; *see also Cundiff*, 555 F.3d at 211 (stating that a series of tributaries makes up a nexus).

Here, Reedy Creek directly contributes water to Wildman Marsh throughout the year. (R. at 5.) Accordingly, any harmful chemical added to Reedy Creek would eventually find its way to Wildman Marsh and threaten the environmental integrity of the marsh's waters. This relationship between the creek and the marsh is clearly the sort of nexus that Justice Kennedy described. As a result, Reedy Creek is a water of the United States according to Justice Kennedy's "significant nexus" standard.

C. Ditch C-1 is a water of the United States because it is a relatively permanent flowing body of water and because it contributes water to Wildman Marsh.

Ditch C-1 flows at least nine months out of the year on an established route between the areas surrounding the Buena Vista River and the point at which it meets Reedy Creek. (R. at 5.) The ditch has been a feature of the local geography since 1913, and it covers an area that spans at least two counties and multiple farm properties. (R. at 5.) In this way, the ditch affects the land through which it flows much like a river, stream, or other natural water body that is more readily recognized as a water of the United States. *See U.S. v. Vierstra*, 803 F.Supp.2d 1166, 1168-69 (D. Idaho 2011). Clearly, a water body with these properties satisfies either the plurality's or Justice Kennedy's rules in *Rapanos*.

Under the plurality's test, Ditch C-1 is a water of the United States because it contains running water for enough time to impact other water bodies downstream. According to the plurality, intermittent or ephemeral water bodies that only carry water periodically do not meet the "relatively permanent" requirement. *Rapanos*, 547 U.S. at 749. However, seasonal water bodies that contain water during some parts of the year, but that might dry up during dry months or extraordinary circumstances such as drought, are not excluded. *Id.* at 732, n. 5 (internal citations omitted). As a result, water bodies that usually contain water except during dry months can qualify as "relatively permanent" under the plurality's standard. *Moses*, 496 F.3d at 991; *Brink*, 795 F.Supp.2d at 578.

This interpretation of the plurality's standard necessarily includes man-made ditches and canals that are capable of carrying pollution into navigable or interstate waters. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009); *Vierstra*, 803 F.Supp.2d. at 1170-71. The decision in *Vierstra* provides helpful insight into how Ditch C-1

passes the plurality's test. As in this case, the court in *Vierstra* was asked to classify a man-made water body that flows for fewer than ten months out of the year. 803 F.Supp.2d at 1167. Further, the canal in that case was likewise part of a system that contributed waters to a larger, more substantial water body. *Id.* at 1169. Because the canal flowed for several months and had the potential to impact the navigable waters connected to it, the *Vierstra* court determined that it was a water of the United States according to the plurality's rule. *Id.* at 1170. Ditch C-1 similarly satisfies the plurality's requirement that a water body be relatively permanent.

Alternately, Justice Kennedy's rule demands that a tributary be a significant contributor to a larger "nexus" in order for it to be classified as a water of the United States. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). The water body, either alone or in combination with other similarly situated bodies, must affect the environmental integrity of other waters more readily understood as navigable. *Id*. Wildman Marsh is a navigable water body because it is on federal property and because its wildlife attracts interstate and foreign commerce. (R. at 10.) Ditch C-1 deposits water directly into Reedy Creek, which in turn contributes water to Wildman Marsh. (R. at 5.) Accordingly, for up to nine months out of the year, chemicals that enter Ditch C-1 at one end exit into Reedy Creek at the other, and Reedy Creek, in turn, transports those chemicals to Wildman Marsh.

The hydrologic connection created by the ditch, the creek, and the marsh is clearly the sort of nexus that Justice Kennedy's opinion described. *See Cundiff*, 555 F.3d at 211 (stating that a series of tributaries makes up a nexus); *see also Vierstra*, 803 F.Supp.2d at 1172 ("the mere connection between...various waterways is a nexus"). But-for the nearly year-round flow of Ditch C-1, the water from the area upstream, and the pollutants that it carries, would not be

present in Reedy Creek and Wildman Marsh. Therefore, Ditch C-1 contributes to the nexus with the other two water bodies and meets Justice Kennedy's standard.

IV. Mr. Bonhomme does not violate the Clean Water Act by adding arsenic to Reedy Creek through a culvert on his property because the culvert transfers the arsenic from one navigable water, Ditch C-1, into another navigable water, Reedy Creek.

The CWA prohibits the discharge of pollutants except in compliance with CWA permits. CWA § 301(a), 33 U.S.C § 1311(a). The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C § 1362(12).

The EPA recently adopted the National Pollutant Discharge Elimination System ("NPDES") "Water Transfers Rule," which recognizes what is known as the "unitary waters" theory. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105-06 (2004). The "unitary waters" theory posits that an NPDES permit is not required for a point source that is transferring a pollutant from one navigable body of water to another navigable body of water without itself adding any pollutants. *Id.* at 106. Therefore, if a conveyance transfers polluted water from one navigable water to another, it does not require a permit.

Until 2008, most courts that heard a "unitary waters" argument rejected the theory. *Friends of the Everglades*, 570 F.3d at 1217-1218 (collecting cases from the First, Second, and Ninth Circuits). The Eleventh Circuit, however, recognized the "unitary waters" theory and upheld the "NPDES Water Transfers Rule." *Id.* at 1228. This Court must now determine whether the district court properly applied the CWA to the facts of the present case. The district court's findings should be reviewed *de novo*. *Peconic Baykeeper*, 600 F.3d at 185 (2nd Cir. 2010); *Forsgren*, 309 F.3d at 1183.

The Supreme Court has not definitively ruled on the unitary waters theory, but it has signaled that it would approve of the theory. In *Miccosukee*, the Court did not apply the unitary waters argument because the petitioners in that case failed to raise the argument before the lower courts or in their briefs regarding the petition for certiorari. *Id.* Even so, the Court noted that the unitary waters argument would be available to both parties on remand. *Id.*

Looking next to the Courts of Appeals, the Eleventh Circuit heard arguments against the "NPDES Water Transfers Rule" in *Friends of Everglades*. 570 F.3d at 1219. In its ruling, the court first determined that the language in the CWA defining the term "discharge" as "any addition of any pollutant to navigable waters from any point source" was ambiguous. *Id.* at 1227. The court reasoned that the language was ambiguous because it could mean any addition to any navigable waters, or it could mean any addition to navigable waters as a unitary whole, both of which the court deemed reasonable interpretations. *Id*. Next, the court determined that the "NPDES Water Transfers Rule" was a reasonable, and thus permissible, construction of the ambiguous language. *Id*. at 1228. The court believed that the rule was a reasonable construction of the ambiguous language because the argument could be made that no pollutants are added when water is simply transferred from one navigable water body to another. *Id.*

In this case, Ditch C-1 is a water of the United States. *See supra* at 23. The arsenic-contaminated water in Ditch C-1 discharges through a culvert directly into Reedy Creek. (R. at 5.) The district court held that Reedy Creek is a navigable water of the United States. (R. at 10) The culvert is located on Mr. Bonhomme's property. (R. at 5.) Since the water is channeled into Reedy Creek through the culvert, the culvert should be recognized as a point source.

Typically, point sources that discharge a pollutant such as arsenic are subject to NPDES permit regulations. However, given the EPA's "NPDES Water Transfers Rule," the culvert

should not be subjected to permitting regulations since the culvert merely transfers polluted water from one navigable body of water, Ditch C-1, to another navigable body of water, Reedy Creek. The EPA's "NPDES Water Transfers Rule" explicitly allows this transfer of water from one navigable water body to another without a permit. As a result, Mr. Bonhomme does not need an NPDES permit. Thus, Mr. Bonhomme does not violate the CWA by adding arsenic to Reedy Creek through the culvert on his property.

A judgment in Mr. Bonhomme's favor would help stop pollution in Wildman Marsh by shifting the focus of this case back to the real cause of the arsenic contamination, Mr. Maleau's mining waste piles. Mr. Maleau, who cuts corners in other aspects of his business, attempted to bypass EPA requirements by moving his piles to the area near Ditch C-1 instead of the traditionally navigable Buena Vista River. (R. at 6-7.) Because of Mr. Maleau's unscrupulous attempt to cut costs, arsenic is now present in the ditch, creek, and marsh. (R. at 6.) Instead of taking responsibility for the damage that he caused to the local environment, Mr. Maleau chose to intervene in the citizen suit against Mr. Bonhomme and divert attention away from the true cause of the pollution, the piles on Mr. Maleau's property. (R. at 5.)

The district court allowed Mr. Maleau to pass the buck for his reckless behavior on to Mr. Bonhomme, whose only crime is that he owns the property on which the culvert lies. (R. at 10.) The court did so, despite the fact that its ruling would allow Mr. Maleau to continue to stack his piles in such a way that they will continue to discharge arsenic into the ditch. Thus, focusing on the culvert will fail to solve the problem of arsenic in Wildman Marsh, since the culvert is only transferring water that has already been contaminated from one navigable water body to another. Consequently, a judgment in Mr. Bonhomme's favor is appropriate, since it will hold Mr. Maleau accountable for his actions.

CONCLUSION

This Court should find that Mr. Bonhomme is the real party in interest in the suit against defendant and that he can commence a citizen suit under the CWA. Additionally, this Court should find that Reedy Creek and Ditch C-1 are waters of the United States. Finally, this Court should find that Mr. Maleau is liable for the waste piles on his property acting as point sources for arsenic pollution, and Mr. Bonhomme is not liable for the transfer of contaminated water from one navigable water body to another through the culvert on his property. Accordingly, this Court should overturn the district court's ruling and grant Mr. Bonhomme's motion to dismiss.