C.A. No. 13-01234

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IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

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JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

STATE OF PROGRESS,

Intervenor-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU

Defendant-Appellee, Cross-Appellant

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ON MOTION FOR LEAVE TO APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PROGRESS

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# BRIEF FOR PLAINTIFF-APPELLANT

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TEAM NUMBER 15

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## QUESTION PRESENTED

1. Whether Bonhomme is a "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure.

2. Whether Bonhomme is a "citizen" for the purposes of pursuing a citizen-suit under § 505 of the Clean Water Act.

3. Whether the piles of mining slag left by Ditch C-1 by Maleau are a "point source" under the Clean Water Act.

4. Whether Reedy Creek is a "water of the United States" under the Clean Water Act

5. Whether Ditch C-1 is a "water of the United States" under the Clean Water Act.

6. Whether Bonhomme violated the Clean Water Act by adding arsenic to Reedy Creek through a culvert on his property, even if Maleau is solely responsible for the upstream addition of all pollutants at issue.

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## STATEMENT OF THE CASE

Shifty Maleau operates a gold mining operation in Progress; he trucked mining spoil from this operation and placed it on his Jefferson County property in piles adjacent to Ditch C-1 (R. at 5). rainwater then caused arsenic to leach from this spoil into Ditch C-1. (R.at 5). Ditch C-1 flows from Maleau's property to Reedy Creek and generally has a depth of one foot, but it usually runs dry during yearly drought periods. Id. Reedy Creek is a fifty-mile body of water, running through both the State of New Union and the State of Progress, that flows continuously year-round. Id. Farmers use Reedy Creek in both the State of New Union and in the State of Progress for irrigation and other agricultural needs. Id. The farm products cultivated through this usage are then sold in interstate commerce. Id. Reedy Creek flows into Wildman Marsh, a large wetlands and major waterfowl hunting site that brings in $25 million in revenue from hunters throughout the nation and internationally. Id. at 5-6.

Jacques Bonhomme is a French national (R. at 8). He also owns property downstream of Maleau's property on Ditch C-1; Ditch C-1 crosses Bonhomme's property immediately before discharging into Reedy Creek. Id. at 5. Bonhomme's property fronts the wetlands and contains a hunting lodge; he has often used this property for hunting parties with friends and acquaintances. Id. at 6. After Maleau began dumping mining spoil on his Jefferson County property, Bonhomme tested both Ditch C-1 and Reedy Creek for arsenic. Id. Bonhomme did not detect arsenic in Ditch C-1 upstream of Maleau's property, but he found it in "high concentrations" just downstream of Maleau's property. Id. Bonhomme similarly did not detect arsenic in Reedy Creek just upstream of Ditch C-1, but he did find arsenic "in significant concentrations" just downstream of Ditch C-1. Id. Arsenic was also detectable throughout Wildman Marsh. Id. And "the U.S. Fish and Wildlife Service has detected arsenic in three Blue-Winged Teal found in Wildman Marsh" since

the dumping began. Id. This evidence "strongly suggests the arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles." Id.

Based on this evidence, Bonhomme sued Maleau under the Clean Water Act, 33 U.S.C. §§ 1251-1387, under its citizen suit provision, 33 U.S.C. § 1365. (R. at 4). In turn, the State of Progress filed a citizen suit against Bonhomme, alleging that because the arsenic discharges into Reedy Creek from his culvert, he is liable under the Clean Water Act for Maleau's pollution. Id. at 2. Maleau filed a motion to dismiss Bonhomme's suit, and Bonhomme filed a motion to dismiss Progress's suit. Id. The District Court held that Bonhomme could not maintain his suit because he is not the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure and because a foreign national cannot sue under the Clean Water Act citizen suit provision. Id. at 7-8. The District Court further held that the mining spoil on Maleau's property cannot be a point source under the Clean Water Act and that Ditch C-1 is a point source and therefore cannot be a water of the United States. Id. at 8-9. Further, the District Court held that Bonhomme, as the owner of the culvert from which Ditch C-1 discharges into Reedy Creek, violated the Clean Water Act. Id. at 9. Lastly, the District Court held that Reedy Creek is a navigable water under the Clean Water Act. Id. at 9-10. On September 14, 2013, this Court accepted all three parties' notices of appeal for hearing. Id. at 1-3.

## SUMMARY OF ARGUMENTS

The District Court improperly held that Bonhomme was not a "real party in interest," under Rule 17(a) of the Federal Rules of Civil Procedure. The "real party in interest" requirement of Rule 17(a) merely demands that the plaintiff actually possess, under the substantive law, the right sought to be enforced. Under § 505 of the Clean Water Act, Bonhomme does, in fact, possess the substantive right to maintain a citizen suit against Maleau.

The District Court held incorrectly that Bonhomme was not a "citizen" for the purposes of § 505 of the Clean Water Act. The term "citizen" is defined as "a person or persons having an interest which is or may be adversely affected." There is no dispute as to whether Bonhomme is "a person," and as explained above, he does have a legally cognizable interest in the use and enjoyment of Wildman Marsh and his adjacent property, an interest that has been "adversely affected" by Maleau's conduct.

The mining spoils that Maleau deposited adjacent to Ditch C-1 are point sources under the Clean Water Act. Numerous cases have held that similar piles are point sources, and the precedent cited by the District Court, in fact, does not bar such spoils from being a point source. And even if these spoils are not a point source, Maleau's method for depositing them would be.

The District Court correctly held that Reedy Creek is a navigable water. Reedy Creek plainly meets all of the requirements found in the definitions of "waters of the United States" in the Clean Water Act. And even if it could not meet these definitions, Reedy Creek is a navigable water under either the continuous surface connection test or the significant nexus test.

Ditch C-1 is also a navigable water for purposes of the Clean Water Act. The District Court only applied the continuous surface connection test when determining otherwise, but it should have applied both the continuous surface connection test and the significant nexus test. Ditch C-1 significantly impacts both Reedy Creek and Wildman Marsh and, therefore, is a navigable water under the significant nexus test.

The District Court improperly held that Bonhomme did not need to have any role in the initial addition of pollutants in order to be liable under the Clean Water Act. The instant case is factually distinguishable from the cases cited, in that Maleau's upstream pollution was deliberately calculated to evade proper enforcement of the Clean Water Act. The policy

implication of endorsing the District Court's interpretation would be to establish and endorse a massive loophole for the circumvention of the Clean Water Act.

## ARGUMENTS

### I. Bonhomme is a "real party in interest" under Rule 17(a) of the FRCP

Under Rule 17(a) of the Federal Rules of Civil Procedure, "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17. Relying on a misguided interpretation of that rule, the District Court held that Bonhomme was not a "real party in interest," and thus, could not maintain his suit. As an overwhelming majority of federal courts have recognized, the "real party in interest" requirement of Rule 17(a) merely demands that the plaintiff "actually possess, under the substantive law, the right sought to be enforced." *United HealthCare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3d 563, 569 (8th Cir. 1996). Under § 505 of the Clean Water Act, Bonhomme does, in fact, possess the substantive right to maintain a citizen suit against Maleau. Accordingly, this Court should hold that Bonhomme is, in fact, a "real party in interest" for the purposes of the instant litigation.

The court "review[s] de novo the district court's dismissal of a complaint for failure to state a claim … The court may affirm the dismissal on any ground supported by the record." *Ecological Rights Found. v. P. Gas and Elec. Co.*, 713 F.3d 502, 507 (9th Cir. 2013). The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Fritz v. Charter Tp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010).

#### A. The District Court's interpretation of Rule 17(a) is inconsistent with case law

In reaching its conclusion with regard to the Rule 17(a) issue, the District Court made absolutely no reference to case law. Instead, the District Court rested its decision exclusively on

its own concern that PMI's technical and financial support of Bonhomme's citizen-suit had somehow magically transmuted Bonhomme from a party with an enforceable individual right into a puppet for the vindication of its own interests. According to the District Court, PMI was the real party in interest, because: (1) "PMI conducted or paid for the sampling and analyses to support Bonhomme's contention that the arsenic in Reedy Creek and Wildman Marsh comes from Maleau," (2) "PMI pa[id] the attorney and expert witness fees for Bonhomme in this case," and (3) "Bonhomme does not live at his lodge adjacent to Wildman Marsh but uses it only for hunting parties composed primarily of business clients and associates of PMI." R. at 7-8. Accordingly, the District Court ruled that "[b]ecause PMI rather than Bonhomme is the real party in interest but is not the plaintiff, Bonhomme's suit is dismissed. R. at 8.

At the outset, it should be noted that the aforementioned facts–even if true–do not, in any way, relate to the standard that federal courts have applied in testing whether a plaintiff is a "real party in interest" for the purpose of Rule 17(a). Although the District Court made no attempt to explain the precise boundaries of its interpretation of Rule 17(a), its arguments provide some hints at its reasoning. Interpreting the District Court's rationale as charitably as possible, a rough statement of its intended rule is as follows: When a person or entity acts in such a way as to involve itself substantially in litigation to which it is not a party, but in which it has an interest consistent with the actual plaintiff, that person or entity should not be able to exert significant influence over the actual plaintiff's case, unless and until it is willing to be joined as an actual party. This construction, though perhaps intuitively desirable as a matter of policy lacks any support in the case law of United States courts.

As the United States Supreme Court has repeatedly recognized, "[t]he phrase, 'real party in interest,' is a term of art utilized in federal law to refer to an actor with a substantive right

whose interests may be represented in litigation by another." *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 934-35 (2009). Thus, the "rule requires that the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United HealthCare Corp.*, 88 F.3d at 569. In the instant case, Bonhomme seeks to enforce rights to the enjoyment and use of his own real property, rights that are protected under the "citizen-suit" provision of the Clean Water Act. 33 U.S.C. § 1365. Accordingly, the question that the District Court should have asked was *not* whether PMI had ulterior motives in providing support for Bonhomme's suit, but rather, whether Bonhomme, individually, possessed an enforceable right to pursue a citizen-suit under § 505 of the Clean Water Act.

B. Bonhomme possesses an enforceable right under § 505 of the Clean Water Act

Under § 505 of the Clean Water Act, "any citizen may commence a civil action on his own behalf-- (1) against any person … who is alleged to be in violation of (A) an effluent standard or limitation under this chapter." 33 U.S.C. § 1365. As the question of whether Bonhomme is a "citizen" for the purposes of § 505 will be addressed in greater detail below, the key subsidiary question is whether Bonhomme, "on his own behalf," possessed standing to pursue a citizen-suit based on Maleau's alleged violations of the Clean Water Act.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the United States Supreme Court made clear that, in order to satisfy standing requirements for a citizen-suit, a plaintiff must show: (1) that it has suffered an "injury in fact," (2) that the injury is "fairly traceable to the challenged action of the defendant," and (3) that it is likely that the injury will be "redressed by a favorable decision." Although neither the District Court nor Maleau made any attempt to consider whether Bonhomme had satisfied these requirements, even a cursory analysis reveals that he did. As the United States Supreme Court explained in *Sierra Club v. Morton*, 405 U.S.

727, 734-36 (1972), in environmental cases, "injury in fact may be aesthetic rather than economic." Thus, "plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 183 (2000).

Bonhomme's claim alleged that he owns real property adjacent to Wildman Marsh, and that he regularly enjoys use of the area by hosting hunting parties. R. at 6. Bonhomme also alleged that his own reasonable concerns about the dangers associated with Maleau's arsenic discharges have significantly lessened his ability to enjoy the aesthetic and recreational values of Wildman Marsh. These allegations, standing alone, are more than sufficient to meet the relatively low bar for "aesthetic injury" set forth by the United States Supreme Court in *Sierra Club*. 405 U.S. at 734-36. The results of Bonhomme's upstream/downstream tests strongly support the inference that the increased arsenic concentration in Wildman Marsh is "fairly traceable" to Maleau's actions. Similarly, the harm suffered by Bonhomme is highly likely to be "redressed by a favorable decision," in that the imposition of civil penalties and/or an injunction would almost certainly cause Maleau to cease his dumping of overburden and slag material around and along Ditch C-1. Thus, Bonhomme's initial allegations are sufficient to satisfy the standing requirements of a citizen-suit, as established under *Lujan*. 504 U.S. at 560.

C. The Advisory Committee did not intend for Rule 17(a) to exclude § 505 citizen-suit plaintiffs with similar or related interests

In its note to the 1966 Amendment to Rule 17(a), the Advisory Committee explained that "[i]n its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name." Fed.R.Civ.P. 17(a), Advisory Committee

Note. Acknowledging, however, that that purpose had already been accomplished by other rules, the Advisory Committee went on to explain that "the modern function of the rule in its negative aspect 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." *Id*. Thus, since as early as 1966, the Advisory Committee has recognized that the original purpose of Rule 17(a) is anachronistic, and that the rule's modern purpose is only to prevent plaintiffs from using parties *without enforceable rights of their own* as a tool to subject defendants to repeat actions for the same misconduct.

In light of this modern purpose, the nature of the remedies available under § 505 of the Clean Water Act provide compelling evidence that the current version of Rule 17(a) was not intended to be deployed as a bar against citizen-suits. As the United States Supreme Court explained in *Laidlaw*, § 505 grants a district court authority to administer two types of remedies in a citizen-suit, it "may prescribe injunctive relief in such a suit; additionally or alternatively, the court may impose civil penalties payable to the United States Treasury." 528 U.S. at 173. When one considers how such remedies are applied in a § 505 citizen-suit, it becomes readily apparent that the use of Rule 14(a) to dismiss related–but distinct–claims of parties, merely because they have cooperated to support each other's citizen-suits, cannot possibly serve the modern purpose identified by the Advisory Committee. Because any civil penalties are paid to the United States Treasury–and not to the individual plaintiffs–there is no monetary incentive to risk substantial attorney's fees (recovery of costs in a § 505 citizen-suit is only available under limited circumstances, and, of course, only if the suit is successful) in a repeat-action. 33 U.S.C. § 1365. Additionally, consider the effect of an injunction in a citizen-suit with two potential plaintiffs, "A" and "B." If an injunction is granted to A, there are two possible results. In the

first scenario, the specific injury suffered by B is actually identical to that of A; under those circumstances, B would have no incentive to pursue a subsequent action (because his or her rights have already been enforced), and dismissal of A's claim under Rule 17(a) would serve only to waste judicial resources by "pressing reset" on litigation over the exact same alleged misconduct. In the second scenario, B has suffered an injury that is distinct from that of A; under those circumstances, a subsequent action by B would obviously be justified (because he or she would have a distinct, enforceable right that has yet to be vindicated by the court). In either case, it cannot reasonably be said that the refusal to dismiss A's claim under Rule 17(a) has subjected the defendant to *unjustified* subsequent actions.

In the instant case, Bonhomme seeks to enforce his individual rights to the enjoyment and use of Wildman Marsh, as well as his own real property. That PMI may also have a similar enforceable right in its own use and enjoyment of Wildman Marsh does not, in any way, alter or negate the existence of Bonhomme's individual, enforceable rights. If Bonhomme is granted an injunction against Maleau's continued polluting, either: (1) the injury suffered by PMI is actually identical to Bonhomme–in which case PMI would have absolutely no incentive to subject Maleau to a subsequent action, or (b) PMI *has* suffered an injury that is distinct from Bonhomme–in which case any subsequent action would be justified by the separate and distinct harms caused by Maleau's actions. Thus, dismissal of Bonhomme's citizen-suit cannot possibly serve the modern purpose of Rule 17(a) as identified by the Advisory Committee.

**II. Bonhomme is a "citizen" under § 505 of the Clean Water Act**

Under § 505(a) of the Clean Water Act, "any citizen may commence a civil action on his own behalf-- (1) against any person … who is alleged to be in violation of (A) an effluent standard or limitation under this chapter." 33 U.S.C. § 1365 (a). The term "citizen" is defined in

§ 505(g) as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365. Under § 502(5) the term "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362. There is no dispute as to whether Bonhomme is "an individual," and as explained above, he does have a legally cognizable interest in the use and enjoyment of Wildman Marsh and his adjacent property, an interest that has been "adversely affected" by Maleau's conduct. In spite of all of this, the District Court held that Bonhomme was not a "citizen" for the purposes of § 505 of the Clean Water Act, because Bonhomme is a French national, and "the CWA, including sections 505(g) and 502(5), does not expressly authorize foreign nationals to commence citizen suits." R. at 8. Perhaps aware of the spurious nature of that rationale, the District Court also attempted to justify its decision by drawing a nonsensical analogy to the United States Supreme Court case of *Solid Waste Agency of N. Cook Cnty v. U. S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). That analogy relies on a fundamental misunderstanding of both the context and reasoning applied by the United States Supreme Court in that case. The District Court's interpretation of the term "citizen" in the Clean Water Act is wholly inconsistent with the plain language of §§ 505(g) and 502(5). This Court should reject that interpretation, and instead construe the term "citizen" in accordance with the plain language of the statute. Under such a construction, Bonhomme is clearly a "citizen" for the purposes of § 505 of the Clean Water Act.

The court "review[s] de novo the district court's dismissal of a complaint for failure to state a claim … The court may affirm the dismissal on any ground supported by the record." *Ecological Rights Found*, 713 F.3d at 507. The standard of review for a Rule 12(c) motion is the

same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Fritz*, 592 F.3d at 722.

A. This Court should apply the plain language of §§ 505 and 502 of the Clean Water Act

The United States Supreme Court has long since recognized the familiar canon of statutory construction that "the starting point for interpreting a statute is the language of the statute itself." *Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989). Accordingly, the vast majority of courts now understand that "*[u]nless otherwise defined*, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (emphasis added). Although Congress made a point of explicitly defining the terms "citizen" and "person" within the Clean Water Act, the District Court chose to disregard that direction. As the United States Supreme Court noted in *Davis v. Pall*, 442 U.S. 228, 241 (1979) (internal citations omitted) (emphasis added):

> Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner. For example, statutory rights and obligations are often embedded in complex regulatory schemes, so that if they are not enforced through private causes of action, they may nevertheless be enforced through alternative mechanisms, such as criminal prosecutions, or other public causes of actions. *In each case, however, the question is the nature of the legislative intent informing a specific statute.*

Thus, in determining whether a foreign citizen possesses the statutory right to pursue a citizen-suit under § 505, the key question is "the nature of the legislative intent informing [the Clean Water Act]." *Id.*

Not only does the District Court's reasoning make no attempt to consider the legislative intent informing the Clean Water Act, its interpretation actually does grammatical and linguistic violence to the plain language of the Clean Water Act. As explained above, the plain language of the Clean Water Act reflects no intention to limit the term "citizen" to include only *United*

*States* citizens. The term is defined in § 505(g) as "a person or persons having an interest which is or may be adversely affected," and under § 502(5) the term "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §§ 1365, 1362. Had Congress intended to exclude foreign citizens from access to § 505, it would have required virtually no effort for it to state such a limitation within the statutory definition. Perhaps most telling of all, Congress provided an explicit statement of its intention and purpose within the Clean Water Act itself. As the statute explains, the primary objective "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251. In explicating this primary intention, Congress went on to state that "it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution." *Id*. The District Court's interpretation results in a rule diametrically opposed to these primary objectives, in that it effectively excludes an enormous pool of potential citizen-suit plaintiffs (there are well over 20 million foreign nationals living in the United States), based solely on their nationality. This Court should reject an interpretation of a statute that directly impedes the explicitly stated purpose of that statute.

As explained above, there is no dispute as to whether Bonhomme is "an individual," and his interest in the use and enjoyment of Wildman Marsh and his adjacent property has been "adversely affected" by Maleau's conduct. Under the plain language of the statute, Bonhomme is a "citizen" for the purposes of the Clean Water Act.

B. *Solid Waste Agency* does not support the District Court's interpretation of "citizen"

In attempting to justify its holding, the District Court drew a tenuous analogy to the United States Supreme Court case of *Solid Waste Agency*. 531 U.S. at 172. According to the District Court, the *Solid Waste Agency* Court "held that by defining the narrow phrase 'navigable waters' as the arguably broader concept of 'waters of the United States,' Congress did not deprive the term "navigable" of all meaning." R. at 8. Accordingly, the District Court argued that it could ignore the plain language of the explicit definition of the term "citizen" in the Clean Water Act, and instead substitute its own definition, based on its understanding of the term's general, common-person usage. The problem with such a rule is manifest: if such a standard were to be applied broadly, any term within the Clean Water Act may be interpreted in accordance with the presiding court's general understanding of the term's underlying meaning, *even if that interpretation directly conflicts with an explicit definition in the statute*. This Court should refuse to endorse a rule of statutory construction that allows judges to obliterate explicitly stated definitions within the very acts that are to be construed.

Additionally, the District Court's analogy completely ignores the specific context in which the *Solid Waste Agency* Court reached its narrow holding. In *Solid Waste Agency*, the United States Supreme Court was faced with language that it viewed as lacking an alternative interpretation which would not disturb the traditional jurisdiction of Congress. 531 U.S. at 172. As the *Solid Waste Agency* Court explained:

> But it is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

*Id*. In the instant case however, there are at least two reasonable interpretations of "what Congress had in mind," and neither interpretation would disturb its traditional jurisdiction. As explained above, it is fully within the power of Congress to decide which actors may or may not pursue a particular statutory right. *Davis*, 442 U.S. at 241. Regardless of whether Congress intended "citizen" to mean "United States citizen" or "citizen of a country," either interpretation would fit squarely within the jurisdictional reach of the legislature.

**III. Maleau's Waste Piles are a Point Source**

The District Court did not find that Maleau's mining spoil constituted a point source and, therefore, Bonhomme did not state a claim. Motions to dismiss for failure to state a claim are reviewed de novo. *Ecological Rights Foundation*, 713 F.3d at 507. Under 33 U.S.C. § 1362, a "point source" is "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). "[T]he definition of a point source is to be broadly interpreted." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (quotations omitted). Maleau trucked in and placed mining spoil adjacent to Ditch C-1; rainwater then caused arsenic to leach from this spoil into Ditch C-1. (R.at 5). Several courts have held that similar piles of spoil or debris constitute a point source, but the District Court held instead that such piles could not be point sources. In so holding, the District Court ignored precedent that found not only such spoils but also Maleau's method of depositing the spoils to be point sources.

A. Courts of Appeals Recognize Similar Point Sources

In *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004), the plaintiff alleged that debris at a scrap metal yard acted as a point source when storm water collected in the debris and flowed into a stream. *Parker*, 386 F.3d at 1002. The court, "interpret[ing] the term 'point source' broadly," found that because "the piles of debris . . . collected water, which then

flowed into the stream," the debris was a point source under the Clean Water Act. *Id*. at 1009. The same reasoning was applied by the Fifth Circuit in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983). The Fifth Circuit even applied this reasoning to mining spoil piles in *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980).

Maleau trucks overburden and slag from his mining operations "and places it in piles adjacent to Ditch C-1." (R. at 5). Rainwater then "flows down the piles and percolates through them," leaching arsenic and discharging it into Ditch C-1. *Id*. This "percolation" and discharge is identical to the point source and pollution in *Abston Construction* and very similar to the point source in *Parker*. And *Avoyelles* explicitly approved of considering such piles point sources. Given that these sorts of piles have been considered point sources through decades of precedent, it is baffling that the District Court held that the piles are not point sources.

B. *Consolidated Coal* and *Appalachian Power* Do Not Change Precedent

The District Court held that the piles were not a point source "because a pile of dirt and stone is not a 'discernible, confined and discrete conveyance.'" (R.d at 9) (citing 33 U.S.C. § 1362(14)). The District Court supported this reasoning with *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) and *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). But the *Abston Construction* court actually cited both cases as support for its holding that mining spoil piles are, in fact, point sources. The *Appalachian Power* court did hold that "unchanneled and uncollected surface waters" do not constitute a point source. *Appalachian Power*, 545 F.2d at 1373. But the *Consolidation Coal* court did not use this holding to state that surface runoff can or cannot be a point source; the court instead stated that such a question "presents issues which cannot be satisfactorily resolved in the absence of a full factual

background." *Consolidated Coal*, 604 F.2d at 250. Since the *Abston Construction* court did have such a factual background, it found that *Appalachian Power* and *Consolidated Coal* "tend to support the view [that mining spoil piles can be a point source]." *Abston Construction*, 620 F.2d at 45.

C. Maleau's Truck is itself a Point Source

Even if this Court does not believe that the mining spoil piles constitute a point source, an additional point source was used by Maleau. Maleau "trucks the overburden and slag" to the Jefferson County property. (R. at 5). The use of the word "trucks" shows that Maleau used a vehicle of some sort to move the spoilage to the Jefferson County property. And such vehicles are point sources under existing case law. *See, e.g., Parker*, 386 F.3d at 1009 ("backhoes and other earth-moving equipment"); *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) (liquid-manure-spreading vehicles); *and Avoyelles*, 715 F.2d at 922 (bulldozers and backhoes). Whatever vehicle Maleau used to move the mining spoil piles should be considered a point source.

**IV. Reedy Creek is a Water of the United States under the Clean Water Act and *Rapanos***

The District Court found that Reedy Creek was a navigable water but nonetheless dismissed Bonhomme's claim. Motions to dismiss for failure to state a claim are reviewed de novo. *Ecological Rights Foundation*, 713 F.3d at 507. Under 33 U.S.C. § 1311(a), "the discharge of any pollutant by any person shall be unlawful;" 33 U.S.C. § 1362(12) specifies that "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12). 33 U.S.C. § 1362(7) defines "navigable waters" as "waters of the United States;" the regulations interpreting the Clean Water Act define "waters of the United States" as "[a]ll waters which are currently used . . . in interstate or foreign

commerce." 33 C.F.R. § 328.3(a)(1). The Supreme Court has endeavored to clarify when nontraditional "navigable waters" qualify as navigable waters under this definition.

The District Court correctly determined that Reedy Creek is a navigable water under the Clean Water Act, but it did so via an incorrect application of the law. Under the definitions above, Reedy Creek is a traditional navigable water. And even if this Court holds that it is not, Reedy Creek still qualifies as a navigable water under the tests set forth by the Supreme Court.

A. *Rapanos* Does Not Apply to Reedy Creek

The District Court applied *Rapanos v. United States*, 547 U.S. 715 (2006) to determine if Reedy Creek is a water of the United States. In doing so, the District Court completely misinterpreted *Rapanos*'s application. The Supreme Court in *Rapanos* designed tests to determine "whether four Michigan wetlands, which lie near ditches or man-made drains that *eventually empty into traditional navigable waters*, constitute 'waters of the United States.'" *Rapanos*, 547 U.S. at 729 (plurality decision) (emphasis added). But Reedy Creek is not an isolated body of water; it is itself a traditional navigable water.

According to the regulations interpreting the Clean Water Act, "waters of the United States" includes "[a]ll waters which are currently used . . . in interstate or foreign commerce." 33 C.F.R. § 328.3(a)(1). Farmers use Reedy Creek in both the State of New Union and in the State of Progress for agricultural purposes. (R. at 5). The farmers then sell these goods in interstate commerce. *Id*. Reedy Creek flows into Wildman Marsh, a large wetlands and major waterfowl hunting site that brings in $25 million in revenue from hunters throughout the nation and internationally. *Id*. at 5-6. Both Reedy Creek's impact on the farming community and its impact on Wildman Marsh's hunting show that Reedy Creek is used in interstate commerce and thus within the regulatory powers of Congress and the Clean Water Act. *See United States v. Lopez*,

547 U.S. 549, 558-59 (1995) (holding that Congress can "regulate and protect the instrumentalities of interstate commerce . . . even though the threat may come only from intrastate activities" and can "regulate those activities having a substantial relation to interstate commerce.").

Somehow, the District Court took the *Rapanos* decision to mean that "a waterway must be within the first prong of [*Lopez*] rather than within the second or third prongs of *Lopez* jurisdiction." (R. at 9-10). This would limit the Clean Water Act to "regulat[ing] the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. But the *Rapanos* decision never even discusses *Lopez* or its test for Commerce Clause applicability; the closest discussion of this topic by the plurality was mentioning "that the qualifier 'navigable' is not devoid of significance." *Rapanos*, 547 U.S. at 731 (plurality decision). But the plurality similarly stressed that "the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term." *Id*. (plurality decision). Given that *Rapanos* never limited the Clean Water Act's applicability to the first *Lopez* prong, and that all of the aforementioned economic activity can be regulated under the second and third *Lopez* prongs, the District Court should have held that Reedy Creek is a traditionally navigable water.

B. A Water is a "Water of the United States" if Either *Rapanos* Test is Satisfied

Even if this Court decides to apply *Rapanos* to Reedy Creek, it must first decide which *Rapanos* test to apply. The Supreme Court created two tests for determining what constitutes "waters of the United States" in *Rapanos*. The Court split in a 4-1-4 plurality decision. Justice Scalia, speaking for the plurality, found that bodies of water covered by the Clean Water Act must meet two criteria: first, the body of water must be connected by an "adjacent channel" to a water of the United States, and second, the body of water must have "a continuous surface

connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos*, 547 U.S. at 742 (plurality decision). Justice Scalia noted that waters without such connection fail to demonstrate a need for the Corps to resolve any ambiguity as to where the water ends and the land begins. *Id*. (plurality decision). The plurality held that the cases should be remanded so that the new test could be applied. *Id*. at 757 (plurality decision).

Justice Kennedy concurred in the judgment but not in the test proposed by the plurality, finding "that wetlands' status as 'integral parts of the aquatic environment'-that is, their significant nexus with traditional navigable waters-was what established the Corps' jurisdiction over them as waters of the United States." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). This significant nexus exists when the body of water "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780 (Kennedy, J., concurring).

Justice Stevens' dissent noted that no clear majority had emerged, yet the case was remanded for further consideration. *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting). Justice Stevens held "Given that all four Justices who have joined [Justice Stevens' dissent] would uphold the Corps' jurisdiction in . . . all . . . cases in which either the plurality's or Justice Kennedy's test is satisfied," the lower court judgments should be reinstated "if *either* of those tests is met." *Id*. (Stevens, J., dissenting) (emphasis in original).

The Courts of Appeals do not agree on how to interpret *Rapanos*. The First, Third, and Eighth Circuits have found that either the continuous surface connection test or the significant nexus test can be used to show Corps jurisdiction over wetlands. *See United States v. Johnson*, 467 F.3d 56, 62-66 (1st Cir. 2006), *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009), *and United States v. Donovan*, 661 F.3d 174, 181-82 (3rd Cir. 2011). The Eleventh Circuit has

found the significant nexus test to be the "narrower" test and thus have found only it to be controlling. *See U.S. v. Robinson*, 505 F.3d 1208, 1221-22 (11th Cir. 2007). The Fourth, Sixth, Seventh, and Ninth Circuits have only applied the significant nexus test so far but have not ruled out the possibility of using the continuous surface connection test in future cases. *See Precon Dev. Corp. v. United States Army Corps of Eng'rs*, 633 F.3d 278, 283 (4th Cir. 2011), *United States. v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009), *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 723-725 (7th Cir. 2006), *and N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 769 (9th Cir. 2010). The Second and Fifth Circuits have considered cases regarding jurisdictional waters post-Rapanos but have yet to find one or both tests controlling. *See Nat'l Resources Defense Council v. F.A.A.*, 564 F.3d 549 (2d Cir. 2009) *and United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008). Given that almost every circuit has applied the significant nexus test, and that most have at least considered the continuous surface connection test, this court should find that Reedy Creek (and, as argued below, Ditch C-1) is a water of the United States if either test is satisfied.

C. Reedy Creek Satisfies the Continuous Surface Connection Test

Under the continuous surface connection test, "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams . . .'" would be considered waters of the United States. *Rapanos*, 547 U.S. at. at 739 (plurality decision). Further, the use of the term "navigable waters" only shows that the Clean Water Act "confers jurisdiction only over relatively *permanent* bodies of water." *Id*. at 733 (plurality decision). Reedy Creek stretches for fifty miles and flows continuously. (R. at 5). It thus forms a major geographic feature and flows continuously. And because it never stops flowing, Reedy Creek is a permanent body of water. Under the continuous

surface connection test, then, Reedy Creek is a navigable water and, thus, a water of the United States.

D. Reedy Creek Satisfies the Significant Nexus Test

As noted earlier, the significant nexus test would find a significant nexus between a traditional navigable water and another body of water if the second body of water "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). Assuming that Reedy Creek is not a traditional navigable water, it can only be protected under the Clean Water Act if it shares a significant nexus with such a traditional navigable water. And, as explained in Section IV.A of this brief, Wildman Marsh is currently used in interstate and foreign commerce as a major waterfowl hunting site. (R. at 5-6). Under *Lopez* prongs two and three, then, Wildman Marsh is a site of interstate and foreign commerce and, therefore under 33 C.F.R. § 328.3(a)(1), can be regulated under the Clean Water Act as a traditional navigable water. *See Lopez*, 514 U.S. at 558-59, *and* 33 C.F.R. § 328.3(a)(1).

Thus, if Reedy Creek impacts the Wildman Marsh, it has a significant nexus with a traditional navigable water and can be regulated under the Clean Water Act. Since Maleau's dumping began, evidence has been found that "strongly suggests the Arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles." (R. at 6). Further, "the U.S. Fish and Wildlife Service has detected arsenic in three Blue-Winged Teal found in Wildman Marsh" since the dumping began. *Id*. The evidence suggests that Maleau's dumping has impacted Wildman Marsh; since arsenic could only have gotten from his property to Wildman Marsh via Reedy Creek, it follows that Reedy Creek can significantly impact Wildman Marsh. Therefore,

Reedy Creek has a significant nexus with Wildman Marsh and can therefore be regulated under the Clean Water Act.

**V. Ditch C-1 is a Water of the United States under *Rapanos***

The District Court did not find that Ditch C-1 was a water of the United States and, therefore, Bonhomme did not state a claim. Motions to dismiss for failure to state a claim are reviewed de novo. *Ecological Rights Foundation*, 713 F.3d at 507. The relevant statutory and case law are discussed in the opening to Section IV of this brief. The District Court failed to apply *Rapanos* correctly when analyzing whether Ditch C-1 is a water of the United States. Because of this failure, the District Court incorrectly found that Ditch C-1 was not a water of the United States despite it being a protected water under the significant nexus test.

A. Ditch C-1 can be Water and a Point Source

The District Court held that Ditch C-1 is a point source and therefore cannot be a water of the United States. (R. at 9). The District Court made this determination based on the plurality opinion in *Rapanos*, which stated that because the Clean Water Act lists "ditch" as a possible point source, ditches cannot be "navigable waters" under the Clean Water Act because ditches cannot be both a "point source" and "navigable waters." *Rapanos*, 547 U.S. at 735-36 (plurality decision). The plurality also held that only "continuously present, fixed bodies of water," not "channels containing merely intermittent or ephemeral flow," can be regulated as waters of the United States. *Id*. at 733-34 (plurality decision). But the Court in *Rapanos* did not reach a majority agreement on these arguments; in fact, five justices disagreed with it.

Justice Kennedy took issue with two aspects of the plurality's distinction. First, "[n]othing in the point-source definition requires an intermittent flow. Polluted water could flow night and day . . . and yet still qualify as a point source." *Rapanos*, 547 at 772 (Kennedy,

J.,concurring). Second, "certain water-bodies could conceivably constitute both a point source and a water." *Id*. (Kennedy, J., concurring). The dissent agreed with Justice Kennedy, first stating that the continuous-flow requirement would mean that the government "can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days a year—even if the [pollution in each] would have the same effect." *Id*. at 800 (Stevens, J., dissenting). The dissent secondly noted that the point source definition "has no conceivable bearing on whether permanent tributaries should be treated differently from intermittent ones." *Id*. at 802 (Stevens, J., dissenting). Thus, five justices—Justice Kennedy and the four dissenting justices—explicitly rejected the rationale that an intermittently-flowing ditch cannot be a point source and a water of the United States.

Justice Kennedy and the *Rapanos* dissenters correctly rejected the plurality's refusal to see a body of water as a point source and a water of the United States. The Clean Water Act was enacted "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Rapanos*¸ 547 U.S. at 779 (Kennedy, J., concurring) (quoting 33 U.S.C. § 1251). "'Congress' intent in enacting the [Act] was clearly to establish an all-encompassing program of water pollution regulation.'" *Rapanos*, 547 U.S. at 804 (Stevens, J., dissenting) (quoting *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). And for the government to effectively regulate water pollution, "it must regulate pollutants at the time they enter ditches or streams with ordinary high-water marks." *Rapanos*, 547 U.S. at 804 (Stevens, J., dissenting). Preventing ditches like Ditch C-1 from qualifying as both a point source and a water of the United States would undermine the very purpose of the Clean Water Act.

B. Ditch C-1 is a Water under the Significant Nexus Test

Because the District Court held that Ditch C-1 could not be a point source and a water of the United States, it never considered whether Ditch C-1 could be a water of the United States under either *Rapanos* test. As noted in Section IV.B of this brief, eight other Courts of Appeals have applied the significant nexus test as stated in *Rapanos*, and two other Courts of Appeals have simply not yet reached the issue.[1] Given that all Courts of Appeals to consider the issue since *Rapanos* have either applied the significant nexus test or not yet determined which test should be controlling, this Court should also apply the significant nexus test when determining if Ditch C-1 is a water of the United States.[2]

As noted earlier, the significant nexus test would find a significant nexus between a traditional navigable water and another body of water if the second body of water "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). When such a nexus is found, the second body of water "come[s] within the statutory phrase 'navigable waters'" and thus is regulated under the Clean Water Act. *Id*. (Kennedy, J., concurring). Sections IV.A-C of this brief explain why, under either the traditional definition of navigable waters or either *Rapanos* test, both Reedy Creek and Wildman Marsh should qualify as navigable waters. Thus, if Ditch C-1 has the requisite impact on either of these bodies of water, then it should have a significant nexus with a traditional navigable water and, thus, be considered a water of the United States for purposes of the Clean Water Act.

[1] Bonhomme states that, at this time, no Tenth Circuit case interpreting the *Rapanos* decision has been found.

[2] Bonhomme maintains that this Court should apply *both* the continuous surface connection test and the significant nexus test when determining if a body of water is a water of the United States. But because Ditch C-1 does not meet the standards of the continuous surface connection test, only the significant nexus test is discussed in this section.

Bonhomme found no detectable arsenic in Ditch C-1 upstream of the Maleau property, but he found it in "high concentrations" just downstream of the Maleau property. (R. at 6). Likewise, Bonhomme found no detectable arsenic in Reedy Creek just upstream of Ditch C-1, but he did find arsenic "in significant concentrations" just downstream of Ditch C-1. *Id*. Reedy Creek then flows into Wildman Marsh, where arsenic was detected in three Blue-winged Teal. *Id*. No arsenic was found in Reedy Creek upstream of Ditch C-1. Downstream of Ditch C-1, however, Reedy Creek contains such a high concentration of arsenic that it has already contaminated at least one species in Wildman Marsh. This arsenic spread from Ditch C-1, showing that DitchC-1 significantly affected the chemical, physical, and biological integrity of both Reedy Creek and Wildman Marsh. Ditch C-1 therefore shares a significant nexus with two navigable waters and is thus considered a water of the United States under the significant nexus test.

**VI. Bonhomme does not violate the Clean Water Act, because Maleau is the "but-for" cause of all of the arsenic pollution emitted from the culvert on Bonhomme's property**

As explained above, Ditch C-1 and the Reedy Creek are both navigable waters of the United States. Because the arsenic would not be draining through those waterways absent Maleau's strategic dumping, Maleau is clearly the "but-for" cause of all of the arsenic pollution being emitted from the culvert on Bonhomme's property. Although the District Court acknowledged these facts, it held that Bonhomme did not need to have any role in the initial addition of pollutants in order to be liable under the Clean Water Act. (R. at 9). This holding relied on a significant misunderstanding of the United States Supreme Court case of *S. Florida Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The instant case is factually distinguishable from *Miccosukee*, in that Maleau's upstream pollution was deliberately calculated to evade proper enforcement of the Clean Water Act. Because of the policy

implications of applying Miccosukee broadly to these kinds of bad-faith upstream polluters, this Court should hold that Maleau, and not Bonhomme, is liable for the violations of the Clean Water Act.

The court "review[s] de novo the district court's dismissal of a complaint for failure to state a claim … The court may affirm the dismissal on any ground supported by the record." *Ecological Rights Found*, 713 F.3d at 507. The standard of review for a Rule 12(c) motion is the same as for a motion under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Fritz*, 592 F.3d at 722.

A. Maleau is the "but-for" cause of the arsenic pollution

There appears to be little dispute that the arsenic is traceable, and that it originated from Maleau's mining waste piles. Bonhomme's tests of the water in Ditch C-1 revealed that arsenic was completely undetectable upstream–and present in high concentrations immediately downstream–of the Maleau property. The District Court acknowledged that arsenic "is commonly associated with gold mining and extraction," and also that this "pattern of arsenic concentration, if proven, strongly suggests the arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles." (R. at 6). But for Maleau's strategic dumping of his mining waste, no arsenic would be emitted from Bonhomme's culvert.

B. *Miccosukee* is both inapplicable to and factually-distinguishable from the instant case

In reaching its conclusion, the District Court relied heavily on the United States Supreme Court case of *Miccosukee*. 541 U.S. 95. Unfortunately, this misplaced reliance was, in large part, due to a fundamental misunderstanding of the specific facts and circumstances there presented. In the District Court's opinion, because *Miccosukee* held that "owners of point sources do not have to initially add pollutants to water to be liable under the CWA as long as their point sources

convey the pollutants to navigable waters," all owners of point sources should therefore be liable when a third party deliberately uses those point sources as a vehicle to avoid proper enforcement of the Clean Water Act. (R. at 9). This extreme oversimplification of *Miccosukee* completely ignores that factual circumstances there involved.

In *Miccosukee*, the United States Supreme Court considered whether elements of a drainage and flood control system constituted "point sources," even though they did not themselves generate the pollutants being discharged. *Id*. at 98-102. Because the installation of the drainage system inadvertently created an extremely effective mechanism for pollutants to flow downstream to navigable waters, the plaintiffs argued that elements of the system should be treated as point sources for the purpose of the Clean Water Act. *Id*. at 102-104. In explaining the damage caused by the new system, the *Miccosukee* Court opined:

> [T]he Project has wrought large-scale hydrologic and environmental change in South Florida, some deliberate and some accidental. Its most obvious environmental impact has been the conversion of what were once wetlands into areas suitable for human use. But the Project also has affected those areas that remain wetland ecosystems.

*Id*. at 101. Fearing that the complete refusal to include certain downstream pollution-transportation vehicles within the definition of "point source," the *Miccosukee* Court concluded that "a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters.'" *Id*. at 105.

The instant case is factually-distinguishable from *Miccosukee* in that the initial polluter is both: (a) readily identifiable, and (b) deliberately relying on a perceived loophole to attempt to subvert the proper enforcement of the Clean Water Act. There is virtually no question that Maleau is the original source of the pollutants at issue. Because Maleau's strategic dumping allows him to avoid liability for runoff pollution at his own mining site, there is a strong

inference that he is intentionally exploiting a loophole in the enforcement of the Clean Water Act. As explained below, the policy implications of this Court endorsing and affirming such a loophole would be catastrophic.

C. Policy implications militate against this Court endorsing a broad application of *Miccosukee*

As explained above, a broad application of *Miccosukee* would effectively create a loophole for polluters that would–and should–be liable under the Clean Water Act. The *Miccosukee* Court had good reason to impose liability against a party whose installation of new point sources effectively created a vehicle to transport pollutants that would not have otherwise come anywhere near a navigable water of the United States. *Id*. at 105-106. Unlike in *Miccosukee* however, the instant case concerns a party's deliberate attempt to circumvent enforcement of the Clean Water Act by intentionally dumping pollutants next to an innocent party's property. If this Court allows Maleau to get away with such misconduct, it effectively endorses deliberate circumvention of federal law. Even worse, such a ruling would set an example for other would-be polluters. Individuals who would otherwise have constrained polluting behavior based on fear of liability might instead opt to dump pollutants along the ditches and pipes of their neighbors.

## CONCLUSION

In view of the above, we would respectfully submit that the District Court's granting of Maleau's motion to dismiss be reversed, that Bonhomme's motion to dismiss the state of Progress be granted, and that this Court grant such other relief as is necessary and proper.

Respectfully Submitted,

Team 15

APPENDIX: CITED STATUTES

**33 U.S.C. § 1251**

**§ 1251. Congressional declaration of goals and policy**

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

**33 U.S.C. § 1311**

**§ 1311. Effluent limitations**

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

**33 U.S.C. § 1362**

**§ 1362. Definitions**

Except as otherwise specifically provided, when used in this chapter: . . .

(7) The term “navigable waters” means the waters of the United States, including the territorial seas. . . .

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. . . .

(14) The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure,

container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

APPENDIX: CITED REGULATIONS

**33 C.F.R. § 328.3**

For the purpose of this regulation these terms are defined as follows:

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;