Team 17

C.A. No. 13-01234

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,

Plaintiff-Appellant and Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant and Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant and Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant and Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant and Cross-Appellee.

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

BRIEF FOR THE STATE OF PROGRESS
Plaintiff-Appellant and Cross-Appellee

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JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for the District of Progress. The district court had proper subject matter jurisdiction over the case because the issues arise from the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq (2012), under the citizen suit provision of that statute, CWA § 505, 33 U.S.C. § 1365. The CWA is a law of the United States, and federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of Progress. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether Bonhomme has a cause of action under the CWA's citizen suit provision and whether he is the real party in interest under FRCP 17 when he is a foreign national whose alleged loss is a decreased amount of duck-hunting parties.

II. Whether Reedy Creek is a "navigable water/water of the United States" as defined under the CWA when it is a 50-foot long interstate waterway that flows year round, provides water supply to a federal interstate highway rest area, and flows into a marsh on a Federal wildlife preserve, and correspondingly whether Ditch C-1 is a "navigable water/water of the United States" as defined under the CWA when it is a permanent agricultural drainage ditch that connects to Reedy Creek and flows continuously except during periods of drought.

III. Whether Bonhomme violates the CWA because he owns the culvert/point source discharging the pollutant into Reedy Creek, regardless of who added the arsenic to Ditch and whether Maleau's mining waste piles are "point sources" under CWA when the natural occurrence of rainfall causes runoff to percolate through them, and eventually discharges through channels eroded by gravity into Ditch C-1.

STATEMENT OF THE CASE

Following the issuance of a final order of the District Court for the District of Progress, Jacques Bonhomme, the State of Progress and Shifty Maleau each filed a

Notice of Appeal. The District Court order dismissed Bonhomme's CWA citizen-suit against Maleau and denied Bonhomme's motion to dismiss Progress's suit against him for violations of the CWA. Each party takes issue with specific holdings within this decision.

Bonhomme takes issue with the decision of the lower court with respect to its holding that: Bonhomme is not a real party in interest contrary to FRCP 17 because he is a front for Precious Minerals International; Bonhomme is not a "citizen" entitled to file a citizen suit under Clean Water Act (CWA) § 505, 33 U.S.C. § 1365, because he is a foreign national; Maleau's mining waste piles are not "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14), because piles are not conveyances; Ditch C-1 is not a navigable water because it is a point source; and Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert, a "point source," because Maleau first adds the pollutants to navigable water via Ditch C-1. (R.1-2).

Maleau takes issue with the decision of the lower court with respect to its holding that Reedy Creek is a water of the United States under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12), because it does not fit the traditional understanding of "navigable waters," the jurisdictional term in the statute, CWA §502(7), 33 U.S.C. § 1362(7). (R. 2).

Progress takes issue with the decision of the lower court with respect to its holding that Ditch C-1 is not a water of the United States because it does not fit the traditional understanding of "navigable waters", the jurisdictional term in the statute, CWA § 502(7), 33 U.S.C. § 1362(7). (R. 2).

STATEMENT OF THE FACTS

Shifty Maleau, one of Progress's largest employers, operates an open pit gold mining and extraction operation in Lincoln County, Progress. (R. 5-7). Maleau trucks the overburden and slag from said mining operations to his property in Jefferson County, Progress, where he places it in piles adjacent to Ditch C-1. (R. 5). Ditch C-1 is a drainage ditch dug into saturated soils to drain them for agricultural use. Over time, rain falling on the piles of overburden and slag on Maleau's property eroded channels, leaching and carrying arsenic from the piles into the water of the Ditch (R. 5). From Maleau's property line, Ditch C-1 runs three miles through several agricultural properties, which it still drains, before it crosses into the property of Jacques Bonhomme. (R.5). Ditch C-1 eventually discharges into Reedy Creek through a culvert on Bonhomme's property. (R.7).

Reedy Creek flows for fifty miles through the two states of New Union and Progress before terminating in the wetlands of Wildman Marsh. (R. 5). Farmers in both the state of New Union and the state of Progress use Reedy Creek for irrigation to produce agricultural products used in interstate commerce. (R. 5) Additionally, the service area Bounty Plaza, located on a federally funded interstate highway, uses the waters of Reedy Creek for Bounty Plaza's water supply. (R. 5). Bounty Plaza sells gasoline and food to travelers driving on the federally funded interstate I – 250. (R. 5).

Much of the waters of Reedy Creek that terminate in Wildman Marsh are located on wetlands belonging to the United States since the United States Fish and Wildlife Service owns and maintains most of Wildman March's wetlands through the Wildman

National Wildlife Refuge. (R. 6). Two times a year, ducks and other waterfowl migrating between the Arctic and the tropics use marshland located in the Wildman National Wildlife refuge as a stop over point. (R. 5 - 6). Over a million ducks and waterfowl use the marsh in Wildman National Wildlife Refuge during their migration and this has lead to the area becoming a major destination for both duck hunters of Progress as well as six other neighboring states. (R. 6). The interstate hunters add $25 million to the local economy around Wildman National Wildlife Refuge. (R. 6).

Bonhomme, a French national, owns property with a hunting lounge on the edge of the marsh. (R. 6-8). Bonhomme's property also fronts part of the wetlands. (R. 6). Bonhomme uses his property for duck hunting parties, but has decreased the number of duck hunting parties from eight a year to two a year. (R. 6). Bonhomme attributes this decrease in hunting to contamination of the Marsh originating from the mining waste piles on Maleau's property (R. 2).

Bonhomme is employed as president of Precious Metals International (PMI) (R. 6). PMI competes with Maleau's mining operations and they funded a study that sampled the level of arsenic flowing throughout the Ditch from Maleau's property to the culvert discharging the Ditch water into Reedy creek on Bonhomme's property. (R. 5 &7). The study also studied the level of arsenic upstream from the culvert and downstream from the culvert. (R. 6). The samples from the study found arsenic throughout Wildman Marsh, and also a high concentration of arsenic present in Ditch C-1 after Maleau's property line. (R. 6). None of the samples were taken on Maleau's property.

Bonhomme filed suit against Maleau alleging that arsenic originating from the overburden and slag on Maleau's property has flowed into Wildman National Wildlife Refuge and contaminated the water and ducks that he hunts. (R. 6). Bonhomme asserted that such contamination has lead him to decrease his hunting parties from eight a year to two a year. (R. 6). Bonhomme's employer, PMI paid for all legal fees and expert witness fees related to this suit. (R. 8).

STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Therefore, the issues before this Court are questions of law and should be reviewed de novo. *Scott v. Harris*, 550 U.S. 372 (2007). Accordingly, this Court should afford no deference to the opinions and conclusions of the lower court. *See id.*

SUMMARY OF THE ARGUMENT

The district court correctly concluded that PMI, not Bonhomme, is the real party in interest to this case. The record indicates that the hunting parties Bonhomme complains have been affected by Maleau's mining piles, primarily consist of business partners and clients of Bonhomme's employer PMI. On top of that, PMI paid for all of the costs associated with the testing and analysis of Ditch C-1 and the subsequent costs of initiating and maintaining litigation. As the district court pointed out, PMI cannot buy a plaintiff and substitute Bonhomme as the party in interest when they are truly the party with an interest at stake. Further, Bonhomme's is a foreign national, so he has not right to bring a claim under the CWA's citizen suit provision. Regardless, substantive law does

not recognize the interest asserted by Bonhomme.

Progress agrees with the district court that Reedy Creek is a "water of the United States" under the CWA; however, Reedy Creek is also "navigable water." Congress intended the term "navigable water" to have a very broad meaning and the main purpose of the CWA has nothing to do with navigability. Rather, whether water is "navigable" depends on its use in interstate commerce, as interstate water pollution was the very issue Congress sought to address when enacting the CWA. Reedy Creek, an interstate water with significant usage in interstate commerce, falls within the definition of "navigable." Consequently, Ditch C-1 qualifies as a "water of the United States" under either of the tests derived from the Supreme Court decision in *Rapanos v. U.S.* due to its connection to Reedy Creek.

Maleau's waste piles are not "point sources" because on their face they do not fit the definition of a point source under the CWA. The act defines "point source" as 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. Case law demonstrates that a pile of dirt or stone is not a "discernible, confined and discrete conveyance," to come under the CWA's definition of "point source" and the rainwater from such piles is excluded as "unchanneled and uncollected surface waters."

Maleau did not affirmatively act in order to collect the rainwater from his waste piles, and therefore the waste piles cannot be considered a "point source." While some jurisdictions allow waste piles to be point sources, the jurisdiction makes a contingent

requirement of some affirmative act by the defendant of collecting the rainwater. Maleau did not attempt to collect the rainwater from his waste piles, and therefore cannot be held liable under the CWA for a point source discharge. Regardless, there is insufficient evidence to prove that Maleau's waste piles are the actual point source. Some jurisdictions have held that there must be sufficient evidence to prove that a specific point source is the actual cause of the discharge. Evidence of contamination is not enough, without more, to raise a material issue as to whether a serious risk of endangerment to ground water may be present. While plaintiff alleges that the tested water tends to show the pollution is discharged from Maleau's waste piles, this does not meet the evidentiary standard required, and therefore Maleau cannot be held liable.

ARGUMENT

I. BONHOMME IS NOT THE REAL PARTY IN INTEREST UNDER FRCP 17 AND HE LACKS STANDING TO SUE UNDER THE CITIZEN SUIT PROVISION OF THE CWA.

The Federal Rules of Civil Procedure mandate that, "an action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17 (a). This provision has been interpreted as requiring that an action "be prosecuted in the name of the party, who, by the substantive law, has the right sought to be enforced." *McWhirter v. Otis Elevator Co.*, 40 F. Supp. 11, 8 (W.D.S.C. 1941). The CWA allows for civil actions to be commenced by citizen's "having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). In order to maintain a citizen suit under the CWA, a plaintiff must establish standing by demonstrating an "injury in fact" to cognizable interest. 5 U.S.C.A. § 702.

Bonhomme alleges that he has suffered damages because the arsenic contamination originating from Maleau's property has impaired his ability to host hunting parties at his lodge adjacent to Wildman Marsh. (R. 6). However, the record demonstrates that said hunting parties were conducted for the benefit of PMI, thus rendering PMI the real party in interest under FRCP 17. (R. 7-8). Further, Bonhomme lacks standing to bring suit under the CWA's citizen-suit provision, as he is not a U.S. citizen and the Supreme Court has never recognized harm to recreational hunting of wildlife as an "injury in fact".

a. Bonhomme fails to assert a personal right recognized by substantive law and as such is not a party in interest under Rule 17 of the Federal Rules of Civil Procedure.

The real party in interest test focuses on ownership of a "legal right." *Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975). A real party in interest is one who retains the right to enforce and has a considerable interest in the claim upon which they are suing. *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973). The substantive law upon which the claim is based establishes whether a plaintiff may enforce the asserted right and thus whether the plaintiff is the real party in interest. *See id.*

Bonhomme claims that arsenic contamination stemming from Maleau's property has affected his right to host duck-hunting parties at his lodge adjacent to the Wildman Marsh. (R.6). The record states that Bonhomme does not live at said lodge, and that the allegedly affected hunting parties are composed of business clients and associates of PMI. (R. 7-8) Further, PMI is in direct competition with Maleau and they provided the funding for the sampling, analyses, attorney fees, and expert witness fees in this case. (R.

7). These facts demonstrate that PMI is the entity with a significant interest in the claim, and thus that they are the real party in interest.

In addition, the lack of private property rights in wild game, particularly ducks and waterfowl, is so firmly ensconced in American jurisprudence as to render citation superfluous. The Supreme Court has proclaimed as far back as 1920 that, "Wild birds are not in the possession of anyone; and possession is the beginning of ownership." *State of Missouri v. Holland*, 252 U.S. 416, 434 (1920). State law also fails to recognize a property ownership stake in wild game. For example, Texas has held that, "animals *feræ naturæ* belong to the state and no individual property rights exist as long as the animal remains wild, unconfined, and undomesticated." *Texas v. Bartee*, 394 S.W.2d 34, 41 (Tex. App. 1995).

Not only does Bonhomme fail to assert a right recognized under substantive law, it is PMI, not Bonhomme, who has a considerable interest at stake in this case. Thus, the decision of the district court holding that Bonhomme is not the real party in interest under FRCP 17 must be upheld.

b. Bonhomme has no right to bring an action under the CWA citizen-suit provision as he is not a U.S. citizen and lacks the necessary standing.

The CWA's citizen-suit provision applies only to a citizen who can claim "some injury from a violation of the Act*." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). In order to bring a claim under this provision, a plaintiff must demonstrate standing by showing that it has suffered an "injury in fact" that is "fairly traceable to the challenged action of the defendant." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

Although the Supreme Court has recognized damage to aesthetic and recreational value to be an "injury in fact," they have never extended that interpretation to cover recreational hunting of wildlife. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Thus, the injury asserted by Bonhomme, damage to his ability to duck-hunt, fails this prong of the standing inquiry. Next, the CWA citizen-suit provision requires that claims of injury stem from a violation of the act. 33 U.S.C. § 1365(g). The record indicates that Maleau is not the "point source" of the arsenic and is currently CWA compliant, so Bonhomme fails to establish that his "injury" is traceable to the Maleau's action. (R. 5).

In addition to lacking the necessary standing to bring a claim under the citizen-suit provision of the CWA, Bonhomme is arguably precluded from its coverage in light of a plain reading of the statute. As the district court logically pointed out, the CWA's citizen-suit provision restricts its coverage to "citizens," and no portion of the Act authorizes foreign nationals to commence citizen suits. (R. 8). Therefore Bonhomme, a foreign national, has no right of action under the CWA.

II. BOTH REEDY CREEK AND DITCH C-1 QUALIFY AS NAVIGABLE WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT, ITS IMPLEMENTING LEGISLATION, AND CASE LAW.

In 1972 Congress enacted the Federal Clean Water Act (CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see* Pub. L. No. 92-500, 2, 86 Stat. 816, *as amended by* Pub. L. No. 95-217, 91 Stat. 1566 (33 U.S.C. §§ 1251-1387). In order to effectuate this goal, the CWA prohibits the "addition of any pollutant to navigable waters from any point source." 33

U.S.C. § 1362(12). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The EPA and the Corps, the entities responsible for executing the CWA, have promulgated nearly identical regulatory definitions of the term "waters of the United States." *See* 33 C.F.R. § 328.3(a) (Corps definition); 40 C.F.R. § 230.3(s) (EPA definition). The definition includes: traditional navigable waters, which covers tidal waters and waters susceptible to use in interstate commerce, 33 C.F.R. § 328.3(a)(1), 40 C.F.R. § 230.3(s)(1); interstate waters, 33 C.F.R. § 328.3(a)(2), 40 C.F.R. § 230.3(s)(2); "tributaries" of interstate or traditional navigable waters, 33 C.F.R. § 328.3(a)(5), 40 C.F.R. § 230.3(s) (5); and wetlands that are "adjacent" to other covered waters, 33 C.F.R. § 328.3(a)(7), 40 C.F.R. § 230.3(s)(7).

In light of the CWA's purpose and the definitions promulgated by its implementing legislation, Reedy Creek is a navigable water because it is an interstate waterway that is heavily used in interstate commerce. (R. 3). Ditch C-1 is a tributary of the navigable interstate Reedy Creek, thus it is a "water of the United States" subject to the CWA under either test from *Rapanos v. U.S.*, 547 U.S. 715 (2006).

a. Reedy Creek meets the standard for a traditional "navigable water" when considering its uses and the scope and purpose of the CWA.

Interpreting the term "navigable water" must be done logically, and in light of the clear purpose of the CWA. It was the interstate nature of water pollution prompted Congress enacted water pollution control legislation. *See, e.g.,* Act of Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903 (1965). Accordingly, decisions that have confronted the traditional definition of "navigable" have focused on the role of the waterway in interstate commerce. *See, e.g., United States v. Appalachian Electric Power Co*., 311

U.S. 377 (1940) (defining navigable waters as those that could be used as interstate highways).

The Supreme Court has held that under the CWA Congress intended, "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The District court incorrectly interpreted the ruling in *Rapanos*, when they stated that rivers *must* be highways of interstate commerce to fall within the definition of "navigable waters" under the CWA. The *Rapanos* case dealt with isolated wetlands and sought to clarify what constitutes "navigable water" regulated under the CWA. 547 U.S. 715. Each Justice reaffirmed that the CWA encompasses some waters that are not navigable in the traditional sense. *See id*. at 731 (plurality opinion); *id.* at 767-68 (Kennedy, J., concurring in the judgment); *id.* at 793 (Stevens, J., dissenting).

Reedy Creek is a substantial body of interstate water that flows for fifty miles through the two states of New Union and Progress before terminating in the wetlands of Wildman Marsh. (R. 5). Reedy Creek is essential to interstate commerce as its waters are diverted by farmers in both the state of New Union and the state of Progress for irrigation that produces agricultural products used in interstate commerce. (R. 5) Additionally, the service area Bounty Plaza, located on a federally funded interstate highway, uses the waters of Reedy Creek for Bounty Plaza's water supply. (R. 5). Bounty Plaza sells gasoline and food to travelers driving on the federally funded interstate I – 250. (R. 5). Reedy Creek's connection to interstate and federal commerce renders it a navigable water of the United States in the plainest sense.

Finally, as the district court aptly pointed out, the waters of Reedy Creek terminate in Wildman Marsh, which is located on the Wildman National Wildlife Refuge, owned and maintained by the United States Fish and Wildlife Service. (R. 6). Over a million ducks and waterfowl use the marsh in Wildman National Wildlife Refuge during their migration and this has lead to the area becoming a major destination for both duck hunters of Progress as well as six other neighboring states. (R. 6). The interstate hunters add $25 million to the local economy around Wildman National Wildlife Refuge. (R. 6).

Considering Congress's intention for "navigable waters" to be interpreted broadly in order to protect interstate commerce and the Nation's waters, Reedy Creek is a "navigable water" under the CWA.

b. Ditch C-1 is a "water of the United States" under either test promulgated in *Rapanos v. U.S.* because it is a relatively permanent body of water that connects to the navigable Reedy Creek.

The *Rapanos* decision set forth two models for analysis when determining the existence of a "water of the United States": the plurality two-part approach analyzing adjacency and continuous surface connection, and the Kennedy concurrence "significant nexus" test. 547 U.S. 715. Following the *Rapanos* case, a number of Federal circuits have held that the United States may establish CWA jurisdiction over a water body by applying either the Kennedy or the plurality standard. *See United States v. Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 182-83 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2011).

A four-Justice plurality in *Rapanos* interpreted the term "waters of the United States" to cover "relatively permanent, standing or continuously flowing bodies of water," that

are "connected to traditional navigable waters," as well as wetlands with a "continuous surface connection to such relatively permanent water bodies." 547 U.S. at 739. The plurality noted that its reference to "relatively permanent" waters did not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Ditch C-1 is a "water of the United States" under this test. First, Ditch C-1 is arguably permanent; it has existed since 1913 and is maintained via restrictive covenants. (R. 3). Ditch C-1 is continuously flowing as the record states that it contains running water except during annual periods of drought, an exception explicitly carved out in *Rapanos*. (R. 4). The second prong of the *Rapanos* test is also easily satisfied because Ditch C-1 runs directly into Reedy Creek, which is a traditionally navigable water for the reasons discussed *supra.* (R. 2).

Justice Kennedy interpreted the term "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Wetlands "possess the requisite nexus" if they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id.* The record indicates that Reedy Creek, and subsequently the Wildman Marsh, contain detectable levels of arsenic originating from Ditch C-1. (R. 7). Thus, Ditch C-1 possesses a "significant nexus" to navigable waters as its flow affects the biological integrity of Reedy Creek and Wildman Marsh.

The district court's ruling as to Ditch C-1 must be reversed, as Ditch C-1 falls under the definition of "waters of the United States" under either *Rapanos* test and is capable of spreading environmental damage, the very issue the Clean Water Act was designed to reduce.

III. BONHOMME IS RESPONSIBLE FOR ADDING A POLLUTANT TO REEDY CREEK AS THE CULVERT ON HIS PROPERTY IS THE "POINT SOURCE" OF THE ARSENIC.

a. Maleau's waste piles are not "point sources" because on their face they do not fit the definition of a point source under the CWA.

The CWA defines "discharge of a pollutant" and the term "discharge of pollutants" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The act defines "point source" as "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." *Id*. This term does not include agricultural storm water discharges and return flows from irrigated agriculture. 33 U.S.C. 1362 (14).

Maleau piles dirt on his property in order to perform his lawful gold mining business. (R. 5). On the face of the CWA, defendant Maleau's waste piles do not come under the definition of a "point source." The CWA enumerates a list of what may constitute a "point source" including: pipes, ditches, channels, tunnels, conduits, wells, discrete fissures. 33 U.S.C. 1362 (14). None of these examples resemble a pile of dirt or stone from mining activities. In addition, case law demonstrates that piles of dirt or stone are not "discernible, confined and discrete conveyances," falling under the CWA's

definition of "point source" and that rainwater from such piles are excluded as "unchanneled and uncollected surface waters." *Consolidated Coal C. V. Costle*, 604 F.2d 239, 249 (4th Cir. 1979); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

b. Maleau did not affirmatively act in order to collect the rainwater from his waste piles, and therefore the waste piles cannot be considered a "point source."

A few courts have held that slag piles can be part of a point source. *See, e.g., Sierra Club v. Abston Const. Co*, 620 F.2d 41 (5th Cir. 1980). However, those courts that have allowed mining piles or waste piles to be considered "point sources" have done so contingent on the required presence of some affirmative act by the defendant. *See id*. The mere nature of gravity, and erosion caused by rainwater, will not cause a waste pile to become a "point source" under the CWA. *See* 33 U.S.C. 1362(14).

In *Sierra Club* the defendant coal mining company had generated waste piles in connection with their coal mining activity. 620 F.2d at 47. Natural rainfall eroded these piles and carried away pollutants, and the defendant created sediment basins for the purpose of collecting the rainwater after it had eroded a path from the slag piles. *See id.* On occasions of high rainfall the sediment basins would overflow causing a discharge from the collection sites into a navigable water. *See id*. The *Sierra Club* decision held that the sediment basins were the "point source", and that rainfall collecting and carrying pollutants from waste piles absent such purposeful collection constitutes "unchanneled and uncollected surface waters" that fall outside of the definition of "point source." *See id*. (citing *Consolidated Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979)).

There notion laid out in *Sierra Club*, requiring an affirmative action by the defendant to collect the rainfall from waste piles in order to create a "point source," has been embraced by a number of other circuits. In *United States v. Earth Sciences, Inc.*, the 10th Circuit held that a gold leaching process using sumps, ditches, hoses and pumps is a "circulating or drainage system" and therefore a "point source." 599 F.2d 368 (10th Cir. 1979). In *Earth Sciences*, the record showed an unusually rapid melting of snow caused by primary and reserve pumps, designed to catch excess runoff and gold leachate, to overflow, resulting in the discharge of a pollutant into a creek. *See id*. The defendant's argued the CWA's reference to "conveyance" in the point source definition, requires the existence of a ditch or pipe, "or some instrument intended to be used as a conduit;" however, the court rejected defendant's argument finding the *affirmative action* of collecting the waste water through the combination of sumps, ditches, hoses and pumps is a circulating or drainage system was a "point source." *See id.* Similarly, the 9th Circuit, in *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, held that "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the [discharger] at least initially *collected or channeled* the water and other materials." 962 F. Supp. 1312 (9th Cir. 1997).

The facts support a finding that Maleau's waste piles are not point sources. Maleau did not attempt to collect the rainwater from his waste piles. Maleau lawfully placed his waste piles on his own private property. (R. at 5.) The natural processes of rainfall, gravity, and erosion caused the piles to leach into the ditch. (R. at 5.) Therefore, under these facts, which demonstrate an absence of affirmative action by Maleau, his waste cannot be considered a "point source" under the CWA.

c. There is insufficient evidence to prove that Maleau's waste piles are the actual source of the arsenic.

Sufficient evidence must exist in order to prove that a specific point source is the actual cause of the claimed discharge. *See Cordiano v. Metacon Gun Club, Inc.*,575 F.3d 199 (2nd Cir. 2009); *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 94 (2d Cir. 2001); *Trustees for Alaska v. EPA*, 749 F.2d 549 (9th Cir.1984). In *Cordiano*, the court discussed at length the difference between a "point source" and a "non-point source." 575 F.3d at 206. The court held that "runoff caused primarily by rainfall around activities that employ or create pollutants" are non-point sources as such runoff could not be "traced to any identifiable point of discharge." *See id.* The court in *Cordiano* concluded that there was not enough evidence to show that a berm collecting lead ammunition from a firing range was a point source, despite soil samples from the berm that exceeded the state's threshold for pollutant mobility, as such evidence is not enough to raise a material issue as to whether a serious risk of endangerment to ground water may be present. *See id.*

Bonhomme has not provided the requisite evidence to show that Maleau's waste piles are a point source. While the record shows that Bonhomme tested the water in Ditch C-1 to show the pollution is discharged from Maleau's waste piles, the performed testing does not meet the standard set out in *Cordiano*. (R. 6.) There is no evidence in Bonhomme's testing that links the waste piles to the rise in arsenic that would demonstrate a serious risk of endangerment to ground water. (R.7). Moreover, the testing provided is less reliable than the evidence proffered in *Cordiano*, which consisted of several reports conducted by a non-interested party in the litigation. However, in the case at hand the evidence was provided by the Bonhomme and analyses was paid for by PMI,

so it must be scrutinized to higher standard to avoid a self-fulfilling prophecy. (R. at 6.) Further, the linkage of pollution to Reedy Creek by Maleau is extremely attenuated as the record shows that Ditch C-1 runs through several agricultural properties after Maleau's property, draining each, before it crosses into Bonhomme's property and discharges into Reedy Creek. Therefore, the evidence proffered by plaintiff is not enough to show Maleau's waste piles are a point source.

d. Bonhomme violates CWA by adding arsenic to Reedy Creek as the CWA does not contemplate original causation.

It is well established that culverts are point sources. See *Dague v. Burlington*, 935 F.2d 1342 (2nd Cir. 1991) *rev'd on other grounds*, 505 U.S. 557 (1992). Furthermore, the Supreme Court has 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. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 at 105 (2004).

Bonhomme owns the property in which the culvert as a point source discharges arsenic into Reedy Creek, a navigable waterway. (R. 5.) Therefore, the operative facts render Bonhomme the party that is violating the CWA, not Maleau. Bonhomme's only contention to his violation of the CWA is that Maleau's actions are the but-for cause of Bonhomme's discharge into Reedy Creek. (R. at 6.) Bonhomme argues that if not for Maleau's waste piles directly adding arsenic into the ditch, then no arsenic would discharge from his point source. (R. at 9.) However, plaintiff's argument fails because the CWA does not contemplate causation. The CWA does not define "discharge" or "addition" in terms of causation, direct addition or indirect addition. *See* 33 U.S.C. § 1311. Furthermore, "discharge of a pollutant," for which a National Pollutant Discharge

Elimination System (NPDES) permit is required under the CWA, includes point sources that do not themselves generate pollutants. See *South Fla. Water Mgmt. Dist.*, 541 U.S. 95 (2004). In conclusion, Bonhomme's actions, not Maleau's, are prohibited by the CWA.

CONCLUSION

For the foregoing reasons, this Court should find that Bonhomme is neither the real party in interest to bring this case under FRCP 17, nor does he have a right to bring the claim under the CWA's citizen-suit provision because he is not a citizen. Further this court should hold that both Reedy Creek and Ditch C-1 are navigable waters of the United States in order to effectuate the intent of Congress to regulate channels of interstate commerce and to prevent interstate pollution under the CWA. Finally, this court should find Bonhomme responsible for violating the CWA as the culvert on his property is the "point source" responsible any contamination to Reedy Creek.