CA. No. 13-01234

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,
Intervenor-Plainitff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

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

BRIEF FOR SHIFTY MALEAU
DEFENDANT-APPELLANT, CROSS-APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The case in controversy arises under the Clean Water Act ("CWA"), which is a federal statute. 33 U.S.C. § 1251 et. seq. (2011). Congress granted the federal courts statutory authority to hear federal question cases, which include questions that arise under federal statutes. 28 U.S.C. § 1331 (2011). This is an appeal of right taken from a final judgment by a federal district court. Therefore, this court has jurisdiction. 28 U.S.C. §§ 1291, 1294 (2011).

ISSUES PRESENTED

1. Under the CWA's citizen suit provision, does a person have the right to file a citizen suit when that person is a foreign national and does not have an interest that is or may be adversely affected as the statute requires?
2. Under the Federal Rules of Civil Procedure, which require an action be prosecuted in the name of the real party in interest, is a party barred from bringing suit when he cannot establish he is entitled to enforce the action and is not a listed representative?
3. Under the CWA, does a person violate the Act if the alleged discharge is unchanneled rainwater naturally flowing into non-navigable isolated waters?
4. Under the CWA, does a person violate the Act if he allows a pollutant to enter navigable water through a culvert, which is a point source, on his property?

STATEMENT OF THE CASE

After serving proper notice, Jacques Bonhomme ("Bonhomme") brought a CWA citizen suit against Shifty Maleau ("Maleau") under CWA § 505, 33 U.S.C. § 1365. (R. at 4). Bonhomme alleged that Maleau is violating CWA § 301(a), 33 U.S.C. § 1311(a) by discharging a pollutant without a permit. (R. at 4–5). Subsequently, the State of Progress ("Progress") filed a

citizen suit with proper notice against Bonhomme alleging that Bonhomme is violating the CWA by discharging arsenic from the culvert on his property, which is a point source. (R. at 5).

Maleau intervened as a matter of right in Progress' action against Bonhomme under CWA § 505(b)(1)(B). Maleau and Progress moved to consolidate their case with *Bonhomme v. Maleau*; and Bonhomme did not object. (R. at 5). The court granted and consolidated. (R. at 5). The defendant in each suit filed motions to dismiss. (R. at 5).

On July 23, 2012, the U.S. District Court for the District of Progress held that Bonhomme was not the real party in interest and was not a "citizen" entitled to file a citizen suit; thus, the court granted Maleau's Motion to Dismiss. (R. at 10). Furthermore, the court found that even if Bonhomme could maintain his suit, it would find for Maleau on all issues, except that Reedy Creek is water of the United States. (R. at 10). The court denied Bonhomme's Motion to Dismiss on the rationale that Progress adequately stated a cause of action. (R. at 10). Following the issuance of the Order of the District Court, Bonhomme, the State of Progress, and Maleau each filed a notice of appeal. (R. at 1).

STATEMENT OF FACTS

Maleau operates a gold mining and extraction operation in Lincoln County, Progress. (R. at 5). His operation, which is adjacent to the Buena Vista River, requires CWA permits, and he complies with these permits. (R. at 5). He trucks the overburden and slag from the operation in Lincoln County and places it in piles adjacent to Ditch C-1 in Jefferson County, Progress. (R. at 5). His operations and trucking all remain within the Progress. (R. at 5).

When it rains, rainwater naturally flows through the slag piles into Ditch C-1. (R. at 5). Ditch C-1 is a drainage ditch dug for agricultural use. (R. at 5). This Ditch on average only reaches three feet across and one foot deep. (R. at 5). A restrictive covenant on Maleau's

property requires him to maintain the Ditch on his property. (R. at 5). The Ditch begins before Maleau's property and runs three miles from his property through several agricultural lands. (R. at 5). It continues through Bonhomme's property, where the Ditch water discharges from a culvert on Bonhomme's property into Reedy Creek. (R. at 5).

Reedy Creek runs fifty miles and maintains water throughout the year. (R. at 5). Upstream from Bonhomme's property, Bounty Plaza, in the State of New Union, sells gasoline and food. (R. at 5). Farmers in both New Union and Progress use the water from Reedy Creek for agricultural use. (R. at 5). The Creek ends in Wildman Marsh, a wetland. (R. at 5).

Many ducks and other waterfowl use Wildman Marsh twice a year for a migration stopover point. (R. at 5–6). The birds attract hunters, which helps support the local economy. (R. at 6). Bonhomme is one of these hunters. (R. at 6). His property backs up to the marsh and contains only a hunting lodge. (R. at 6). Bonhomme, the President and 3 percent shareholder of Precious Metals International ("PMI"), uses the property primarily to entertain his business clients and associates. (R. at 7–8). PMI is incorporated in Delaware and headquartered in New York City. (R. at 6). PMI is a rival company to Maleau's mining company. (R. at 6).

Bonhomme decided to test the water in Ditch C-1. (R. at 6). PMI conducted and paid for the samples and analyses to support Bonhomme's theory that Maleau is responsible for the arsenic. (R. at 7). Bonhomme tested the water upstream from Maleau's property and downstream just below Maleau's property, but he did not test any water actually on Maleau's property. (R. at 6). As Ditch C-1 flows from Maleau's property toward Reedy Creek, the concentration of arsenic decreases in proportion to the increasing flow in the Ditch. (R. at 6). Arsenic in Reedy Creek is undetectable upstream of the Ditch. (R. at 6).

Yet, after the ditch water flows through Bonhomme's culvert and into the Creek, arsenic becomes detectable in significant concentrations in Reedy Creek. (R. at 6). Wildman Marsh contains detectable but lower level concentrations of arsenic. (R. at 6). Although arsenic is commonly associated with mining operations, the detectable arsenic concentrations decreased before reaching Bonhomme's property. (R. at 6).

Bonhomme alleges that the arsenic in Reedy Creek and Wildman Marsh fouls the wildlife that he and his business parties hunt. (R. at 6). The amount of hunting parties he takes out has decreased from eight parties a year to only two. (R. at 6). The decrease, however, may be a result of the recession PMI has experienced. (R. at 6).

STANDARD OF REVIEW

This Court reviews a district court's order granting a motion to dismiss *de novo*. *E.g.*, *Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C. Cir. 2006). A complaint may be dismissed under FRCP 12(b)(6) for failure to state a claim if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "[F]or a compliant to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In determining whether a complaint states a plausible claim for relief "requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The court accepts as true all well-pleaded allegations of material fact, and construes them in the light most favorable to the non-moving party. *See United States v. Gaubert*, 499 U.S. 315, 327 (1991).

SUMMARY OF ARGUMENT

The district court properly dismissed Bonhomme's citizen suit because (1) he does not meet the CWA's statutory definition of citizen; (2) he is not the real party in interest; and (3) Maleau did not and is not violating CWA. Each of the district court's holdings is legally supportable under its respective constitutional, statutory, and applicable case law. Therefore, this Court should affirm the district court's order granting Maleau's Motion to Dismiss.

First, the district court correctly held that Bonhomme does not meet the CWA's statutory standing requirements. The CWA authorizes citizens to bring civil actions against any person alleged to be in violation of the statute. However, because citizen enforcement is not meant to supplant governmental enforcement, the potential private attorney general must meet several jurisdictional limitations on citizen suits. One of these limitations is that the private attorney general must be a citizen as defined in the CWA. Under the plain language of the Act, which reflects congressional intent, a foreign national does not meet the definition of citizen. Therefore, this Court should find that Bonhomme does not meet the CWA's statutory standing requirements because he is a foreign national.

Second, Bonhomme's citizen suit is barred because he is not the real party in interest. To prevent the wheels of justice from grinding to a halt, the Federal Rules of Civil Procedure require that an action be prosecuted in the name of the real party in interest to protect the defendant from subsequent actions by the real aggrieved party and to ensure that judgments will have their proper *res judicata*. Bonhomme is not the real party in interest because under the controlling law he is not entitled to bring a citizen suit. Further, Maleau afforded him the opportunity to join the real party in interest, PMI, and he failed to do this. Thus, the district court correctly dismissed Bonhomme's suit.

Third, the district court properly concluded that Maleau did not violate the CWA because he did not discharge a pollutant into navigable water from a point source. Only discharges of pollutants from point sources require a CWA permit, and piles of dirt and stone are not point sources. The runoff from Maleau's property is non-point source pollution that the CWA left to the jurisdiction of the states. Additionally, this non-point source pollution does not enter into navigable water; Reedy Creek and Ditch C-1 are not navigable water. The CWA does not apply to Reedy Creek or Ditch C-1 because they are not traditionally navigable waters, are not tributaries of navigable waters, and are beyond Congress' commerce clause powers.

Although Maleau maintains that the district court erred in finding that Reedy Creek is a CWA jurisdictional water, the court did properly hold that if it is navigable then Bonhomme is violating the CWA. The record shows that Bonhomme is discharging arsenic into navigable water from a point source located on his property—the culvert. The CWA is a strict liability statute that does not contain a causation requirement. Instead, what matters is who discharged the pollutant into navigable water. Therefore, should this Court find that Reedy Creek is a navigable water then this Court should hold that Bonhomme is violating the Act. Accordingly, this Court should affirm the district court's order granting Maleau's Motion to Dismiss.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED BONHOMME'S SUIT BECAUSE HE DOES NOT MEET THE CWA'S STATUTORY DEFINITION OF CITIZEN.

Congress authorized citizens to bring civil actions in federal district court against (1) any person alleged to be in violation of a CWA effluent standard or limitation or (2) against the Administrator when there is an alleged failure to perform a non-discretionary duty. 33 U.S.C. § 1365(a)(1)–(2) (2011). However, this was not a broad grant of authority. The Supreme Court has recognized the CWA's prioritization of governmental action, particularly over citizen suits. *See*

Gwaltney of Smithfield, Ltd.v. Chesapeake Bay Found., 484 U.S. 49, 60–61 (1987). Citizen suits, despite playing an important role in the enforcement of the Act, are limited by the fundamental principle that they "are meant to supplement rather than supplant governmental action." *Id*. at 60. Thus, to maintain the intended role of the citizen, the CWA places several jurisdictional limitations on citizen suits.

For example, citizens may not bring suit unless and until they have given 60 days' notice of their intent to sue to the alleged violator, the State in which the alleged violation occurs, and the EPA. § 1365(b)(1)(A). Citizen suits may be brought only to enjoin or penalize ongoing violations, not wholly past violations. *See* § 1365(a)(1); *see also Gwaltney of Smithfield, Ltd.*, 484 U.S. at 57. In addition to the above limitations, the plaintiff bringing the citizen suit must meet the CWA's definition of citizen. The district court correctly held that a foreign national does not meet this definition and Bonhomme is a foreign national; thus, the Court properly dismissed his suit.

A. <u>The CWA's plain language bars a foreign national from bringing a citizen suit.</u>

The first step of statutory construction is to apply the plain meaning of the statute since there is a "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza–Fonseca*, 480 U.S. 421, 432 n. 12 (1987). The Act defines a citizen as "a person or persons having an interest which is or may be adversely affected." § 1365(g). A person includes "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (2011). The use of the term "any person," however, does not extend citizen suit rights to non-U.S. citizens.

A citizen means a citizen. The dictionary defines citizen as "an inhabitant of a city or town; one entitled to the rights and privileges of a freeman; a member of a state; a native or naturalized person who owes allegiance to a government and is entitled to protection from it." *Miriam Webster's Collegiate Dictionary* 226 (11th ed. 2003). Based on the plain, ordinary meaning of the term, Bonhomme is not a CWA "citizen." Although Bonhomme may own property in the United States, he is a French national who still owes allegiance to France. (R. at 7, 8). He is not yet a naturalized person or someone entitled to the rights and privileges of other U.S. citizens.

Further, by using the term "any person" to define citizen, Congress does not deprive "citizen" of all meaning. The Supreme Court has determined that there is a difference between giving a word limited effect and giving a word no effect at all. *See Solid Waste Agency of N. Cook Cnty. (SWANCC) v. United States Army Corps of Eng's*, 531 U.S. 159, 172 (2001). When Congress defined "navigable waters" as "waters of the United States," the Court determined that the definition did not deprive "navigable" of all meaning. *See id.* at 172; *See also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–08 (1940). The term shows what Congress had in mind as its authority for enacting the CWA. *SWANCC*, 531 U.S. at 172.

Similarly, Congress' use of the term "citizen," a legal term of art, shows who it had in mind to enforce a United States federal environmental law. "Citizen" may extend to entities in the United States, organizations of citizens, and governmental entities on the federal, state, or local level. But, "any person" cannot deprive citizen of all meaning. The use of the word "person" is a typical congressional term used to expand the definition from an individual to entities. *See* 11 U.S.C. § 101(41) (2012); *see also* 42 U.S.C. § 3602(d) (2011); *see also* 7 U.S.C.

§ 2132(a) (2012); *see also* 26 U.S.C. § 7701(a)(1) (2011). Congress uses the term "any person" to expand the citizen suit rights to entities, not expand rights to non-U.S. citizens.

Additionally, in the citizen suit provision, Congress requires more than citizenship to properly bring a suit. § 1365(g). Congress requires the citizen to show that he or she has an interest in the waterway before bringing an action against a violator. *See Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 506 F. Supp. 902, 908 (W.D. Pa. 1980) ("[T]he plaintiff must demonstrate that it is in the category of persons the statute protects and that it has some special interest in the waterway. . . ."). This is an additional requirement of a citizen not a full, express expansion of the term. Thus, although a U.S. citizen is considered a citizen under the CWA, the citizen will still need to show his or her interest will be adversely affected to properly maintain a suit.

Under the plain language of the statute, which reflects congressional intent, a foreign national is not a proper party to maintain a citizen suit. Thus, because Bonhomme is a foreign national, the district court properly dismissed the suit. In addition, congressional intent and public policy considerations support following the plain interpretation of citizen.

B. The CWA's legislative history suggests and public policy supports that Congress did not intend to allow foreign nationals to bring a citizen suit.

As argued above, the CWA's statutory language unambiguously reflects that foreign nationals are barred from bringing a citizen suit. Because the statutory language is clear, there is no need to analyze the legislative history of the CWA's citizen suit provision. The Supreme Court has repeatedly held that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992). When the words of a statute are unambiguous, then, judicial inquiry is complete. *Id.* However, even assuming arguendo that the CWA's statutory language is ambiguous, its

legislative history clarifies that Congress did not intend to extend statutory standing to non-U.S. citizens.

During the congressional debate leading to the 1972 CWA amendments, Congress noted that it modeled the CWA's citizen suit provision after the Clean Air Act's ("CAA") citizen suit provision. E.g., H.R. Rep. No. 92-911, at 23 (1972). However, Congress stated that one "major distinction is that [the CWA] specifically uses and defines the term 'citizens.'" *Id*. The CAA provides authority for "*any person"* to commence a civil action, while the CWA provides authority for *"any citizen"* to commence a civil action. 42 U.S.C. § 7602 (2011) (emphasis added); § 1365 (emphasis added). This reflects congressional intent to restrict who may bring a suit against a violator. If congress intended to allow foreign nationals, foreign governments, or foreign corporations to bring a suit against a violator including the United States, then Congress could have simply continued using the word person. *See* § 1365(a)(1) (allowing citizens suits against the United States).

Furthermore, public policy considerations support Congress' intent. If the citizen suit is meant to supplement United States federal and state enforcement, then the party bringing the suit should not be foreign but a part of the governed public. The CWA's purpose is to "provide society with a remedy against polluters in the interest of protecting the environment;" and it authorizes private attorneys general power to enforce this remedy on behalf of the public. *See* § 1251; *see also George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616, 621 (D.C. Cir. 1998).

The United States differentiates between U.S. citizens and foreign nationals residing in the United States. Non-U.S. citizens are not afforded the same rights and privileges as U.S. citizens. *Mathews v. Diaz*, 426 U.S. 67, 78 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all

aliens are entitled to enjoy all the advantages of citizenship. . . ."). For example, foreign nationals cannot vote in almost every election. *America Votes! A Guide to Modern Election Law & Voting* 19 (Benjamin E. Griffith ed., 2d ed. 2012) (finding that only a few Maryland municipalities allow resident aliens to vote in local elections and New York City allows resident aliens with children in school to vote for school board elections). The Federal Election Campaign Act prohibits any foreign national from contributing, donating or spending funds in connection with any federal, state, or local election in the United States, either directly or indirectly. State laws, policies, and regulations may also differentiate between U.S. citizens and foreign nationals. *See Foley v. Connelie*, 435 U.S. 291 (1978) (upholding state law that required citizenship to be a state trooper); *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding law that public school teachers must be citizens).

The distinction between citizens and foreign nationals, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. *Ambach*, 441 U.S. at 75. Because of the special significance of citizenship, governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens. *Id*. Thus, Congress properly excluded foreign nationals from acting as private attorneys general.

First, the CWA's plain language limits statutory standing to U.S. citizens. Second, the legislative history reflects that this was Congress' intent. Finally, public policy supports limiting the power to act as a private attorney general supplementing government enforcement of a federal law to U.S. citizens. Even though Bonhomme may own property within the United States, as a French citizen he does not receive the same rights and privileges as U.S. citizens. (R. at 7). Thus, the district court properly dismissed Bonhomme's suit.

II. THE DISTRICT COURT PROPERLY DISMISSED BONHOMME'S CITIZEN SUIT BECAUSE PMI IS THE REAL PARTY IN INTEREST.

The Federal Rule of Civil Procedure 17(a)(1) requires that an action be prosecuted in the name of the real party in interest. Fed. R. Civ. P. 17(a)(1). The function of this rule "is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17(a) advisory committee note (1966). Rule 17(a) requires 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).

Thus, when determining whether a party is the real party in interest, the courts looks to whether the person is entitled to enforce the action based on the controlling state or federal substantive laws. *In re Davis,* 194 F.3d 570, 578 (5th Cir. 1999). First, under the controlling law, Bonhomme cannot bring a citizen suit because as a foreign national he does not meet the statutory standing requirements; thus, he cannot be a real party in interest. Second, although the rule allows certain representatives to sue on behalf of the real party in interest, Bonhomme is not an allowed representative. Thus, the district court correctly dismissed Bonhomme's suit.

A. Because Bohomme does not meet the CWA's standing requirements, he cannot be a real party in interest; and PMI is the real party in interest.

Under the controlling federal law, the CWA's citizen suit provision allows any citizen to commence a suit against an alleged violator. § 1365(a). Accordingly, Bonhomme or PMI may bring a suit if either one falls within the definition of citizen. As explained in Part I, because Bonhomme is a foreign national, he does not have the right to bring a citizen suit despite his allegations that the pollution has adversely affected his business-related hunting trips.

Consequently, Bonhomme cannot be the real party in interest because he cannot meet the statutory standing requirements.

On the other hand, PMI is a potential real party in interest. The CWA defines citizen to include a corporation as long as it has an interest, which is or may be adversely affected. §§ 1365(g), 1362(5). PMI is incorporated under Delaware law and is headquartered in New York City. (R. at 6). Further, PMI has an interest in Wildman Marsh because the company uses the area for recreation by entertaining clients and associates during hunting trips. (R. at 7–8). The alleged pollution may adversely affect this interest. (R. at 6). And, judicially recognized cognizable interests include economic, aesthetic, and recreational values. *See Montgomery Environmental Coal. v. Fri*, 366 F. Supp. 261, 264 (D.C.D.C. 1973). Therefore, under the controlling law, PMI is the real party in interest.

Bonhomme, however, may attempt to argue that he is an allowable representative of PMI. Yet, this argument would be incorrect because he neither falls into one of the listed representative categories nor is a statute-authorized representative.

B. Because Bonhomme is not a listed representative, he cannot bring a citizen suit in his own name on behalf of PMI.

FRCP 17(a) allows certain representatives to sue in their own names "without joining the person for whose benefit the action is brought." Fed. R. Civ. P. 17(a)(1). Those representatives include "an executor; an administrator; a guardian; a bailee; a trustee of an express trust; a party with whom or in whose name a contract has been made for another's benefit; and a party authorized by statute." *Id.* For example, a trustee of an express trust may bring suit in his own name on behalf of the trust. *See Heine v. Streamline Foods Inc.*, 805 F. Supp. 2d 383 (N.D. Ohio 2011). Bonhomme is neither one of the specifically listed representatives nor does the CWA authorize him to bring suit on behalf of PMI.

Merely being the president or shareholder of a corporation does not entitle a person to bring a suit on behalf of that corporation unless the controlling statute authorizes it. For example, a vice president in custody of accounting records was a real party in interest not because of his position but because he was a member of the class specifically described in the controlling statute. *United States v. Theodore*, 479 F.2d 749, 752 (4th Cir. 1973). Additionally, even if a shareholder owns all or practically all of the shares in a corporation, such a fact does not authorize the shareholder to sue as an individual for injury to the corporation. *E.g., Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969). In the present case, the controlling statute only authorizes a citizen on his own behalf to bring a suit. *See* § 1365. Thus, even though Bonhomme is PMI's President and a 3 percent shareholder, he is not allowed to bring suit in his name on behalf of PMI. (R. 6–7).

Yet, in the interest of justice, a court may not dismiss an action for failure to prosecute in the name of the real party in interest until a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. Fed. R. Civ. P. 17(a)(3); *In re Enron Corp. Secs., Derivative & ERISA Litigation*, 279 F.R.D. 395, 410 (S.D. Tex. 2011). Maleau gave Bonhomme and PMI reasonable time to cure this defect. (R. at 7). In his Answer, Maleau objected to Bonhomme as the real party in interest. (R. at 7). However, PMI failed to ratify, join, or be substituted into the action. (R. at 7). Because PMI refused, even though it was the real party in interest, the trial court properly dismissed Bonhomme's citizen suit.

III. THE DISTRICT COURT CORRECTLY HELD THAT MALEAU DID NOT VIOLATE THE CWA BECAUSE HE DID NOT DISCHARGE A POLLUTANT INTO NAVIGABLE WATERS.

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2011). The Act prohibits the

discharge of pollutants except in compliance with CWA permits. 33 U.S.C. § 1311(a) (2011). As relevant here, the Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). Because arsenic is a pollutant, the only issues before the court are the correct interpretation of point source and navigable waters. The district court correctly held that a pile of dirt and stone is not a point source and that Ditch C-1 is not navigable water. Yet, the district court did err when it held that Reedy Creek is navigable water.

A. The piles of dirt and stone on Maleau's property are not point sources.

For Bonhomme to have a CWA claim, a pile of dirt and stone must be a "point source." § 1311(a). Bonhomme can only establish that dirt piles meet this standard if this Court diverges from persuasive legal authority and adopts definitions of key CWA terms, which are radically divergent from those previously established by courts, regulators, and CWA itself. The district court properly rejected Bonhomme's argument that the dirt and stone piles on Maleau's property are "point sources."

Only discharges of pollutants from "point sources" are regulated under the NPDES program. § 1362(12)(A); *see, e.g.*, *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095 (9th Cir. 1998) ("the [CWA] provides no direct mechanism to control nonpoint source pollution"). The CWA 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.

§ 1362(14) (emphasis added).

Thus, the CWA's point source provisions do not govern the overburden piles at issue. First, the Act's plain language indicates that Congress did not intend the point source provisions

to include every pile of dirt and stone. Second, even where courts have broadly interpreted "point source," some conduct by dischargers to channel pollutants is always implicated. Consequently, rainwater naturally moving through a pile of dirt and stone is non-point source pollution.

1. The plain language of the Act does not allow this Court to find that a pile of dirt and stone is a "point source."

The CWA does not enumerate overburden piles as point sources. § 1362(14). The definition of "point source" requires the presence of a "discernible, confined and discrete conveyance." *Id*. While the definition of point source is not exclusive, words used to define the term ("discernible, confined") and examples given ("pipe, ditch") "evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways. *Id*.; *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993).

Further, a familiar canon of statutory construction, *inclusio unius est exclusion alterius*, teaches that the inclusion of certain things indicates the exclusion of the others. *See United States v. McQuilken*, 78 F.3d 105, 108 (3d Cir. 1996). The Supreme Court has applied the canon "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). For example, the D.C. Circuit applied this canon in rejecting an attempt to expand the Poultry Inspection Act to include retail stores. *Original Honey Baked Ham Co. v. Glickman*, 172 F.3d 885, 887 (D.C. Cir. 1999).

The Poultry Act provided a non-exclusive representative list of establishments that were subject to federal inspection, including "any slaughtering, meat-canning, salting, packing, rendering, or similar establishment." *Id*. (citing 21 U.S.C. § 606). The court refused to expand this list beyond its plain intention, stating that "[t]he functions of slaughtering and packing plants

differ considerably from those of retail establishments." *Id*. Like the Poultry Act, the CWA includes a representative list of "discernible, confined and discrete conveyance[s]," structures like pipes, tunnels, and containers. Because this list does not include natural, amorphous sources (i.e. soil and stones), the district court properly held that the overburden piles cannot be characterized as "point sources."

The detailed statutory description of point source would be unnecessary and misleading if Congress anticipated inclusion of rainwater running through a dirt pile. Had Congress intended the CWA to regulate pollutants moving through soil, it could have forgone terms connoting a distinct, controlled conduit, like "confined" and "discrete" and embraced a vague definition for a broader application.

Moreover, the argument that the list does not provide an exhaustive list of point sources does not leave room for the court to read into the statue any object it wishes. The language confines "point sources" to "discernible, confined and discrete conveyance[s]." § 1362(14). In order to read "piles of soil and stone" into the definition of "point source," the court must conclude that these unconfined piles are analogous to man-made conveyances or structures that that collect and channel pollutants. *See Barnhart*, 537 U.S. at 169 (suggesting that for an unlisted item to be read into a non-exhaustive list it must go "hand in hand" with those expressly listed). Because these piles are not discrete conveyances, the court cannot rationally read dirt piles into the CWA's clear definition of "point source." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (stating a court should interpret a statute according to the plain and ordinary meaning of the language).

In attempt to circumvent the CWA's clear statutory language, Bonhomme cites *Sierra Club v. Abston Construction* as support for the proposition that these piles can be classified as

"point sources." 620 F.2d 41 (5th Cir. 1980). However, his argument is incorrect because the court stated that if an operator collects or channels surface runoff, it then might constitute a point source discharge. *Id*. at 44. "Simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters does not constitute a point source discharge, absent effort to change the surface, to direct the water flow or otherwise impede its progress." *Id*. Unlike the miners that deliberately collected storm water in *Abston Construction*, Maleau has not collected or channeled the rainwater; instead, it flows down and percolates through the piles causing simple erosion.

The dirt and stone piles at issue are not "discernible, confined and discrete conveyances." While a pile of dirt and stone may be "discernible," it is neither "confined" nor "discrete" in any manner contemplated by the plain language of the CWA. Therefore, the district court correctly applied the CWA's plain language and held that the piles are not point sources.

2. Maleau has not collected or channeled the runoff from the piles.

Furthermore, although courts interpret "point source" broadly, it cannot be interpreted so broadly as to read the point source requirement out of the statute. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). Thus, even where courts have interpreted the term "point source" broadly, courts still require some conduct to channel, collect, or guide pollution into navigable water. *See Abston Constr.*, 620 F.2d at 43 (noting that the miners constructed sediment basins to collect the runoff and these basins would overflow into the creek); *Reynolds v. Rick's Mushroom Serv., Inc.*, 246 F. Supp. 2d 449, 457 (E.D. Pa. 2003) (holding a system of berms, sediment basins, and sprayer system designed to collect and channel rainfall runoff is a point source). Here, Maleau took no affirmative action to collect or to channel the rainwater.

In *Greater Yellowstone Coalition v. Lewis*, the Ninth Circuit held that waste rock pits were not point sources within the meaning of the CWA. 628 F.3d 1143, 1152 (9th Cir. 2011). Rainfall would seep through the mining pit cover and into the pits containing waste rock, and then it would filter through the overburden eventually entering surface water. *Id.* at 1153. However, because the rainfall was not collected or channeled, the waste pits did not constitute point sources. *Id.*

Similarly, the Second Circuit stated that the structure of the CWA's definition of "point source" "connotes the terminal end of an artificial system for moving water, waste, or other materials." *Froebel v. Meyer*, 217 F.3d 928, 937 (2d Cir. 2000). In *Froebel*, the court noted that when other courts have concluded that a dam was a point source, they looked at the outlets from the dam itself, like spillways, pipes, and valves. *Id*. Accordingly, because the dam at issue was mostly gone and the river merely flowed unrestrained through a hole, the court held there was no point source. *Id*.

Moreover, this comports with the EPA's regulations, which state that point source includes "surface runoff *which is collected or channeled by man*." 40 C.F.R. § 122.2 (2013) (emphasis added). By implication, surface runoff, which is neither collected nor channeled, constitutes non-point source pollution and consequently is not subject to the CWA permit requirement. *Cordiano*, 575 F.3d at 221. In the present case, Maleau has not collected or channeled the surface runoff from the overburden piles. Bonhomme's conclusory allegations contend that Maleau has configured the piles in such a way that the configuration is channeling the rainwater. (R. at 4). Yet, he has not provided any factual statements supporting this conclusion. Further, Bonhomme actually admits that the stormwater is eroding the piles resulting

in the release of water and other materials into Ditch C-1. (R. at 4–5). Exactly, what *Abston Construction* held did not constitute a point source discharge. 620 F.2d at 44.

Bonhomme incorrectly argues that natural erosion is channeling the rainwater and that it is enough to constitute a point source. However, case law and the EPA's regulations make clear that more than natural surface runoff is needed to constitute a point source. Bonhomme does not allege and Maleau has not collected or channeled the rainwater flowing over and through the piles of dirt and stone. Thus, the district court correctly concluded that these piles do not constitute point sources.

3. The stormwater runoff from the overburden piles is non-point source pollution.

Congress recognized the NPDES program could not address all pollution reaching navigable waters. *See United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); *See also Abston Constr.*, 620 F.2d at 43. Non-point source pollution is comprised of sources ill-suited to permit controls and regulation. 33 U.S.C. §§ 1288, 1329. Although not defined in the Act, non-point source pollution is often associated with a rainfall or snowmelt event and runoff from fields and construction operations. *See Earth Scis., Inc.*, 599 F.2d at 373; *See also Abston Constr.*, 620 F.2d at 45. The legislative history indicates that Congress intended to classify non-point source pollution as runoff caused primarily by rainfall around those types of activities that employ or cause pollutants. S. Rep. No. 92-414, at 37 (1972), *reprinted in* 1978 U.S.C.C.A.N. 3668, 3705.

Association with a discrete conveyance is what distinguishes a point source from a non-point source. *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995) (noting that surface mine sites are common non-point source pollution problem areas). "Storm water that is not collected or channeled and then discharged, but rather runs off and

dissipates in a natural and unimpeded manner, is not a discharge from a point source as defined by § 502(14)." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1079 (9th Cir. 2011).

In the present case, the pollution complained of is not associated with a discernible, confined and discrete conveyance. It is, however, merely surface water runoff from rainfall events, which is a typical trigger of non-point source pollution. Thus, at the most, the rainwater percolating through the overburden piles and then flowing into Ditch C-1 is non-point source pollution. And, because the CWA prohibits discharges only if they originate from a point source, the district court correctly found no violation. In addition, the non-point source pollution does not enter navigable water, which is a key jurisdictional element absent in the present case.

B. Reedy Creek and Ditch C-1 are not navigable waters under the CWA.

The CWA defines navigable water as "the waters of the United States, including the territorial seas." § 1362(7). Congress' authority to regulate navigable waters derives from its Commerce Clause powers. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Therefore, any understanding of the navigable waters governed by the CWA exists within the limits of the Commerce Clause. Because the Commerce Clause limits Congress' power to regulate navigable waters, the scope of the CWA may not be greater than Congress' traditional powers to regulate navigable waters.

While the EPA has interpreted the statute's language as a broad delegation of authority, the Supreme Court has not read the CWA's jurisdiction-conferring provisions as generously. *See Rapanos v. United States*, 547 U.S. 715 (2006); *SWANCC v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001). The agencies' regulations define navigable waters to include virtually all waters in the nation, including navigable waters, non-navigable waters, interstate waters, and other waters that could affect interstate or foreign commerce. S*ee* 40 C.F.R. § 122.2 (2013). However,

with the exception of traditional navigable waters, these regulations reflect the agencies' broad interpretation of the CWA but not the Supreme Court's more restrictive reading of the CWA. The regulations are over twenty-five years old, outdated, and no longer authoritative in light of *SWANCC* and *Rapanos*. The CWA does not apply to Reedy Creek and Ditch C-1 because they are not traditionally navigable waters, are not tributaries of navigable waters, and are outside of Congress' Commerce Clause powers.

1. Reedy Creek and Ditch C-1 are neither traditionally navigable waters nor tributaries of such navigable waters.

While portions of the EPA's regulations are invalid, the EPA still properly regulates traditional navigable waters. The Supreme Court held that, by using the term "navigable waters," Congress intended only to exert its commerce power over navigation:

> 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.

SWANCC, 531 U.S. at 172. The EPA defines traditional navigable waters as "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce." 40 C.F.R. § 122.2.

However, as the district court correctly noted, the Supreme Court stated that water must be a channel of interstate commerce to be considered traditional navigable water. *SWANCC*, 531 U.S. at 173. Neither party alleges that Reedy Creek or Ditch C-1 are or ever have been used for waterborne transportation or could be so used with reasonable improvements. (R. at 9). Thus, neither Reedy Creek nor Ditch C-1 is traditionally navigable water.

Nevertheless, even in the fractured *Rapanos* decision, the Court agreed that the term "navigable waters" includes more than traditional navigable waters. 547 U.S. at 731. The term also includes non-navigable tributaries of traditional navigable waters. *Id*. at 767. The Supreme

Court in *SWANCC* rejected the Corps' authority over a non-navigable, isolated, intrastate water. 531 U.S. at 162. The Court reasoned that the Act does not reach non-navigable waters unless there exists a "significant nexus" between the water in question and the navigable waters. *Id.* at 167.

In *Rapanos*, the Supreme Court further clarified the meaning of "navigable waters" and thus the reach of the CWA. Under the plurality, a tributary must be a relatively permanent body of water forming a geographic feature with a surface connection to traditional navigable waters. 547 U.S. at 742. Importantly, applying this definition to man-made drainage ditches stretches the term "waters of the United States" "beyond parody." *Id.* at 734. Thus, Ditch C-1 is not a water of the United States. In addition, the CWA defines point sources to include ditches. § 1362(14). As the plurality noted, the definitions of point sources and navigable waters conceive of them as separate and distinct categories. *Rapanos*, 547 U.S. at 735. "The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Id*. Not only is Ditch C-1 not a navigable water, but it cannot be a tributary because it is a point source.

Under Justice Kennedy's concurring opinion, "waters of United States" includes not only navigable waters but also non-navigable waters that have a significant nexus to navigable-in-fact waters. *Id*. at 759. The significant nexus must be assessed in terms of the CWA's goals and purposes. *Id*. at 779. A tributary is jurisdictional water if it "either alone or in combination with similarly situated lands in the regions, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780.

The close *Rapanos* decision has caused a split in the circuit courts with the First, Third, and Eight Circuits concluding that jurisdiction may be established if the site meets either the plurality's or Kennedy's standard. *E.g.*, *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir.

2006). And, the Seventh, Ninth, and Eleventh Circuits decided that jurisdiction may be established only if the site meets Kennedy's test. *E.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006). Thus, the controlling law is unclear.

However, regardless of whether this Court applies the plurality's test or Justice Kennedy's test, this case falls outside the scope of the CWA. Reedy Creek and Ditch C-1 are non-navigable waters with no connection, whether a surface connection or a significant nexus, to any traditionally navigable waters. The Supreme Court noted in *Riverside Bayview* that while it may be acceptable to forego "traditional tests of navigability" and include non-navigable waters connected to traditionally navigable waters, the CWA does not support completely abandoning "navigability" altogether. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133–34 (1985) (noting that the concerns and goals of Congress indicate an intent to regulate wetlands "inseparably bound up with the 'waters' of the United States").

Moreover, Bonhomme's and Progress' attempt to place within the CWA's jurisdiction the wetlands in Wildman Marsh simply because the wetlands are located on a national wildlife refuge, and thereby include Reedy Creek as a tributary, is untenable for several reasons. First, even in EPA's overly expansive regulations, waters on federal property are not automatically included as navigable waters. *See* 40 C.F.R. § 122.2. Second, a review of the relevant case law, pre-*Rapanos* and post-*Rapanos*, does not support this automatic inclusion because no case law was found holding that waters on federal land are excluded from meeting the Supreme Court's jurisdictional tests. Thus, the stronger argument is that water bodies on federal property are subject to the above stated jurisdictional requirements.

Neither Bonhomme nor Progress ever alleged that Wildman Marsh is or has ever been used for waterborne transportation or could be so used with reasonable improvements. (R. at 9–

10). Thus, Wildman Marsh is not a traditionally navigable, or navigable-in-fact, water. Further, Wildman Marsh is not a tributary of any traditionally navigable waters under either Supreme Court test. (R. at 5–6). Therefore, Wildman Marsh is not a navigable water under the CWA; and as such, Reedy Creek and Ditch C-1 are not jurisdictional tributaries of Wildman Marsh.

2. EPA exceeded its congressional authorization under the CWA by defining "navigable waters" to include all interstate waters.

Under EPA's outdated regulations, all interstate waters are included as "waters of the United States." 40 C.F.R. § 122.2; *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) (noting that the EPA did not refine its view of its authority in light of *SWANCC*, and instead chose to adhere to its essentially boundless view of the scope of its power). This regulatory expansion does not warrant Chevron deference because it surpasses the agencies' authority granted by Congress and exceeds the bounds of constitutional authority. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (explaining that reasonable administrative interpretations are normally entitled deference); *but see SWANCC*, 531 U.S. at 172 (declining to extend Chevron deference where the administrative interpretation exceeds its constitutional grant of authority). Congress has clearly defined what it intended the CWA to regulate—discharges of pollutants into navigable waters.

The EPA assumed it could regulate interstate waters simply because they are interstate. Historically, however, "interstate waters" has not been a specified category of waters among the "navigable waters of the United States" which the Corps had regulated under the Rivers and Harbors of 1899. 33 U.S.C. § 401 (2011); 33 C.F.R. § 329.4 (2013). In fact, the history of the CWA indicates a narrowing of federal jurisdiction over "waters of the United States." Prior to 1961, Congress regulated all interstate waters. Pub. L. No. 80-845, § 2(d)(1), 62 Stat. 1155, 1156 (1948). In 1961, Congress amended the CWA to regulate either interstate or navigable waters.

Pub. L. No. 87-88, § 8, 75 Stat. 204, 208 (1961). However, in 1972, Congress refined its jurisdiction to regulate only navigable waters. Pub. L. No. 92-500, § 502, 86 Stat. 816, 886–87 (1972) (codified as amended at 33 U.S.C. § 1362 (2011)).

If Congress intended to continue regulating non-navigable interstate waters, it could have retained the term "interstate" in the 1972 amendments. Given that Congress eliminated the term "interstate," the reasonable interpretation is that Congress intended to refine the CWA jurisdiction to only "navigable waters." And, significantly, in EPA's 2008 guidance memorandum, the EPA removed interstate waters from the waters it would assert jurisdiction over. U.S. E.P.A. & Army Corps of Eng'rs, *Clean Water Act Jurisdiction* (2008), *available at* http://www.epa.gov/osweroe1/docs/oil/spcc/guidance/H_2008_Memo_CWA_Jurisdiction_WetlandsRapanos.pdf. Courts cannot read "navigable" out of the Act completely by allowing the replacement of the statute's definition with an interpretation so far removed from navigability that it allows jurisdiction over isolated waters like Reedy Creek. Thus, non-navigable isolated Reedy Creek is not jurisdictional water even though it crosses a state boundary.

3. EPA exceeded its statutory power by attempting to regulate all waters that affect or could affect interstate commerce.

The EPA in its outdated regulations further defines "waters of the United States" to include all waters "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce." 40 C.F.R. § 122.2. For the reasons stated above and below, the EPA has clearly exceeded its authority under the CWA. The interstate commerce regulatory extension was intended and previously applied only for regulation of waters "inseparably bound" to navigable waters. *See SWANCC*, 531 U.S. at 167–68; *see also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408–10 (1940) (explaining that jurisdiction does not include every water from which one molecule might eventually find its way into a navigable water).

In addition, the Corps' regulations, exactly like the EPA's regulations, define "waters of the United States" to include all waters the use or degradation of would affect or could affect interstate commerce. 33 C.F.R. § 328.3(a)(3) (2013). The Supreme Court determined that section 328.3(a)(3), as interpreted by the Migratory Bird Rule, is not a permissible construction of the term "navigable waters" as used in the CWA. *SWANCC*, 531 U.S. at 174. Under the reasoning of the Court, all of section 328.3(a)(3) is invalid, which would include EPA's version of that section. *See also United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) (invalidating all of 328.3(a)(3) because it requires neither a substantial affect on interstate commerce or any sort of nexus with navigable waters). This definition of "waters of the United States" necessarily invokes the third category of Congress' authority under the Commerce Clause as spelled out in *Lopez*. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) ("[T]he power to regulate those activities having a substantial relation to interstate commerce. . . .").

Since the Court read the term "navigable" as showing that Congress only had in mind its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made," claiming jurisdiction under the third category of *Lopez* is not a permissible interpretation of the statute. *SWANCC*, 531 U.S. at 172. The *SWANCC* opinion requires that any assertion of jurisdiction under the CWA be based on Congress' authority to regulate channels of interstate commerce; therefore, only traditionally navigable waters or their tributaries are jurisdictional waters. *Id*. at 167. EPA exceeded its authority attempting to regulate all waters that could affect interstate commerce. However, if this court finds Congress intended the CWA to extend to these waters, then Congress exceeded Commerce Clause authority.

4. Congress exceeded its Commerce Clause power by attempting to regulate all waters that would affect or could affect interstate commerce.

The Supreme Court limited Congress' Commerce Clause powers to three distinct categories: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities that have a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). The alleged discharge into Reedy Creek or Ditch C-1 fails to satisfy any one of these three categories.

Lopez highlights the importance of protecting "the distinction between what is national and what is local" to maintain constitutional limits on the federal government's power. 514 U.S. at 565–67 (citing *United States v. A.L.A. Schecter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935) (Hand, J., concurring)). Finding the Gun Free School Zones Act unconstitutional, the Court based its reasoning on two main propositions. First, the Court found that the regulated activity was a non-economic activity and therefore outside of Congress' commerce power. *Id*. at 565. The Court also concluded that the activity did not, even when taken cumulatively, substantially affect interstate commerce. *Id.* at 565.

The Supreme Court addressed this issue in the context of the CWA in *SWANCC*. In that case, the Court struck down regulation of an isolated water, holding that where the only tie between the water and interstate commerce was the presence of migratory birds, its regulation under the Commerce Clause power raised serious constitutional questions. *SWANCC*, 531 U.S. at 173. However, the Court did not reach the constitutional question, instead, resolving the case on the grounds that the water did not fall within the definition of a "navigable water." *Id.* at 174. Even acknowledging evidence of an expansive, multi-million dollar industry surrounding recreational pursuits relating to migratory birds, the court maintained that this application of the Commerce Clause power was constitutionally questionable. *Id*. at 173.

Similarly, in this case, Congress' power under the Commerce Clause does not extend to cover regulation of an isolated non-navigable water with only an attenuated connection to interstate commerce. The alleged discharges into Ditch C-1 and Reedy Creek cannot be regulated under either the channels of commerce or the instrumentality of commerce theory. Because Reedy Creek and Ditch C-1 are not navigable, they do not support the transport of interstate commerce. Additionally, regulating the alleged discharges of pollutants into Reedy Creek or Ditch C-1 is not an attempt "to prohibit the interstate transportation of a commodity through the channels of commerce." *Lopez*, 514 U.S. at 559. The discharge of pollutants is not necessarily an item of interstate commerce; here any alleged discharge was merely intrastate—simply, the alleged discharge takes place after the non-navigable Reedy Creek enters the State of Progress and the creek ends in the State Progress.

Thus, the only area in which Reedy Creek might be regulated would be as an activity that substantially affects interstate commerce, but the impact must be substantial. *Id*. at 559 (concluding that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce"). Bonhomme and Progress have failed to provide any evidence that the alleged discharges "substantially affect" interstate commerce.

Bonhomme and Progress point to one private company, Bounty Plaza, who uses Reedy Creek as a water supply. (R. at 5). Bounty Plaza's water diversion is not an economic activity; the facts do not state that the diversion of water is for profit so there is no evident commercial nexus. Instead, the facts state that Bounty Plaza sells gasoline and food. (R. at 5). Moreover, Bounty Plaza is located upstream from any alleged discharges; thus, these discharges do not affect Bounty Plaza's water supply. (R. at 5).

In addition, Bonhomme and Progress argue that because farmers whose land adjoins the Creek divert the water for agricultural purposes and then sell their products in interstate commerce, the Creek affects interstate commerce. (R. at 5). However, the Supreme Court has rejected this argument. The Migratory Bird Rule stated that the CWA could be extended to isolated, non-navigable waters based on three factors being present. The third factor was the use of the water to irrigate crops sold in interstate commerce. 51 Fed. Reg. 41217 (Nov. 13, 1986). In SWANCC, the Supreme Court invalidated the Migratory Bird Rule; thus, using the water for irrigation is not enough to turn Reedy Creek into a jurisdictional water. *See SWANCC*, 531 U.S. 159.

Further, the record does not contain any evidence, much less substantial evidence, that the duck hunters at Wildman Marsh have an effect on interstate commerce. Instead, the facts clearly state that the hunters affect the local economy. (R. at 6). Just as the various recreational uses for migratory birds in *SWANCC* were a questionable link to interstate commerce, these duck hunting activities are a questionable link to interstate commerce and cannot form the basis for regulating Reedy Creek under the CWA.

In addition, unlike the statute in *Lopez*, which was held unconstitutional in part for lacking a "jurisdictional element," the CWA does contain a "jurisdictional element." *Lopez*, 514 U.S. at 561–62. Regulated discharges are restricted to those discharges occurring into "navigable waters." Although, the definition of navigable waters extends to non-navigable tributaries, the expanded definition retains the jurisdictional limit. In the present case, the alleged discharges enter isolated non-navigable water. Courts require the jurisdictional element to maintain the constitutionality of a statute under Congress' commerce power. *Lopez*, 514 U.S. at 561–62. If Congress were allowed to insert a jurisdictional element solely to uphold the constitutional issue,

but then be allowed to exceed its limitation, the requirement for a jurisdictional element would be futile.

Even if a valid argument existed that the use of Reedy Creek affects interstate commerce, this extension would intrude upon Progress' sovereignty. *United States v. Morrison*, 529 U.S. 598, 556–57 (2000). The regulatory power granted to the EPA over navigable waters is always balanced against states' police power. *See SWANCC*, 531 U.S. at 172–73. Congress did not intend to circumvent the states' control in land and water management. 33 U.S.C. § 1251(b) (1987). But even without this clear congressional intent, courts are still required to read statutes to evade constitutional problems. *SWANCC*, 531 U.S. at 173; *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) (explaining the constitutional avoidance doctrine).

Progress is entitled to preserve their police power and maintain its established rights to waters within their boundaries. Federal agencies should cooperate with states in an effort to prevent, reduce, and eliminate pollution in concert with programs for managing water resources. §1251(g). Significantly, Progress' Attorney General stated that he was protecting the waters of the State—Reedy Creek. (R. at 6). For all the reasons stated above, neither Reedy Creek nor Ditch C-1 are CWA jurisdictional waters; thus, the district court correctly dismissed Bonhomme's suit.

IV. HOWEVER, EVEN IF THIS COURT FINDS THAT REEDY CREEK IS A NAVIGABLE WATER, THE DISTRICT COURT STILL CORRECTLY HELD THAT MALEAU DID NOT VIOLATE THE CWA.

If this Court agrees with the district court that Reedy Creek is a navigable water, then Bonhomme is violating the CWA by discharging a pollutant without a CWA permit. 33 U.S.C. § 1311(a). Again, the Act defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." § 1362(12)(A). Bonhomme does not dispute that

arsenic is a pollutant. (R. at 8). As explained above, Maleau is not discharging a pollutant because the overburden piles are not point sources and Ditch C-1 is not jurisdictional water. However, assuming arguendo that Reedy Creek is navigable water, the arsenic enters navigable water from a point source located on Bonhomme's property. Thus, the district court correctly determined that if Reedy Creek is a navigable water then Bonhomme is violating the CWA.

The CWA defines "point source" as "any discernible, confined and discrete conveyance" including a ditch, channel, tunnel, or conduit. § 1362(14). Courts have no difficulty holding culverts as point sources. *E.g.*, *Ecological Rights Found. v. Pacific Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013). Thus, Bonhomme's only remaining defense is that he is not liable because Maleau indirectly adds the arsenic to Ditch C-1 and he merely allows it to pass through his culvert into navigable water. (R. at 5). However, his argument misses the mark; there is simply no causation requirement in the statute. *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010).

On its face, the statute bans "the discharge of any pollutant by any person" regardless of whether that "person" was the but-for cause or merely the current controller of the discharge. § 1311(a). Importantly, courts are consistent in their recognition that the CWA is a strict liability statute. *See United States v. Earth Scis., Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). Unsurprisingly, the case law has likewise rejected Bonhomme's proposed causation requirement.

For example, the Fourth Circuit affirmed a CWA violation when the defendant failed to operate a water treatment system effectively. *United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992). Although the defendant had not generated the pollution being discharged, he was liable for allowing the pollutants to enter navigable waters. *Id.* at 979. Correspondingly, the Tenth Circuit stated, "[t]he liability and permitting sections of the [CWA] focus on the point of

discharge, not the underlying conduct that led to the discharge." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005). Thus, the but-for cause was irrelevant.

Although Bonhomme may not have generated the pollution being discharged from his culvert, he is nevertheless liable for allowing those pollutants to enter into navigable water. Significantly, the Supreme Court rejected as "untenable" the argument that NPDES permits are only required when a pollutant "originates from the point source." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 104–05 (2004). Instead, the Court determined that permits are required for discharges from point sources "that do not themselves generate pollutants" but merely "convey [pollutants] to 'navigable waters.'" *Id*. at 105. In *Rapanos*, the plurality reaffirmed this principle. 547 U.S. at 743. Therefore, the case law makes clear that under the CWA the issue of who generated pollutants is irrelevant—what matters is who is currently discharging pollutants into navigable waters. Bonhomme is currently discharging arsenic through the culvert located on his property into Reedy Creek.

CONCLUSION

The district court correctly dismissed Bonhomme's citizen suit. First, because Bonhomme is a foreign national, he does not meet the CWA's statutory standing requirements. Second, Bonhomme is not the real party in interest, and he did not join PMI, the real party in interest.

Third, Maleau is not violating the CWA because he is not discharging a pollutant into navigable water from a point source. The overburden piles on his property are not point sources. And, neither Reedy Creek nor Ditch C-1 is navigable water under the CWA. Finally, although the district court erred in holding that Reedy Creek is a jurisdictional water, it correctly concluded that Bonhomme is the one violating the CWA. Therefore, Shifty Maleau respectfully

requests this Court to affirm the district court's judgment except as to Reedy Creek being a CWA navigable water.