Team No. 21

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 13-01234

JACQUES BONHOMME,

***Plaintiff-Appellant, Cross-Appellee*,**

v.

SHIFTY MALEAU,

***Defendant-Appellant, Cross-Appellee*.**

STATE OF PROGRESS,

***Plaintiff-Appellant, Cross-Appellee*,**

and

SHIFTY MALEAU,

***Intervenor-Plaintiff-Appellant, Cross-Appellee*,**

v.

JACQUES BONHOMME,

***Defendant-Appellant, Cross-Appellee*.**

On Appeal from the United States District Court for the District of Progress
Nos. 155-CV-2012 & 165-CV-2012

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

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STATEMENT OF JURISDICTION

Jacques Bonhomme (Bonhomme) seeks review of the final decision of the United States District Court for the District of Progress issued on July 23, 2012, dismissing his claims on a Rule 12(b)(6) motion to dismiss. R. at 10. This decision was final, therefore this Court properly has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006). Subject matter jurisdiction is proper under 28 U.S.C. § 1331 (2006), as the underlying controversy concerns matters of federal law arising under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.* (2006).

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether Bonhomme is the real party in interest under Federal Rule of Civil Procedure 17 to bring suit against Maleau for violating Section 301(a) of the CWA, 33 U.S.C. § 1311(a).

II. Whether Bonhomme is a "citizen" who may sue Maleau under Section 505 of the CWA, 33 U.S.C. § 1365.

III. Whether Reedy Creek is a "water of the United States" under Section 502(7) of the Clean Water Act, 33 U.S.C. § 1362(7), (12).

IV. Whether Ditch C-1 is a "water of the United States" under Section 502(7) of the CWA, 33 U.S.C. § 1362(7), (14).

V. Whether Maleau's mining waste piles are "point sources" under Section 502(12), (14) of the CWA, 33 U.S.C. § 1362(12), (14).

VI. Whether Bonhomme violated the CWA by passively allowing arsenic to flow through a culvert on his property into Reedy Creek, even though Maleau was the original source and but-for cause of the arsenic in Ditch C-1.

STATEMENT OF THE CASE

This is an appeal from the final order of the District Court of Progress dismissing Bonhomme's suit against Shifty Maleau (Maleau) for not being a proper plaintiff, and denying Bonhomme's motion to dismiss the State of Progress' suit against Bonhomme because Progress had adequately stated a cause of action. R. at 10. Bonhomme brought a citizen suit under the CWA, 33 U.S.C. § 1365 (Section 505), seeking civil penalties and injunctive relief. R. at 4. The

State of Progress (Progress) subsequently filed its own citizen suit against Bonhomme for violations of the CWA, to which Maleau joined as a plaintiff-intervenor. R. at 5. Progress and Bonhomme's cases were consolidated. *Id.* Each defendant filed a motion to dismiss. *Id.*

The district court held that (1) Bonhomme is not a real party in interest, (2) Bonhomme is not a "citizen" entitled to file a citizen suit under Section 505, (3) Maleau's mining waste piles are not "point sources" under the CWA, (4) Ditch C-1 is not a navigable water because it is a point source, (5) Reedy Creek is a water of the United States under the CWA, and (6) Bonhomme violated the CWA by allowing pollutants to flow into Reedy Creek through his culvert. R. at 1–2. Following the district court's final order, Bonhomme filed a Notice of Appeal challenging all of the holdings except that Reedy Creek is a water of the United States, which Maleau challenges in his Notice of Appeal. *Id.* Progress filed a Notice of Appeal challenging the district court's holding that Ditch C-1 is not a water of the United States. *Id.*

STATEMENT OF FACTS

Bonhomme owns a hunting lodge that fronts Wildman Marsh in the State of Progress. R. at 6. The Marsh is an extensive wetlands that is contained largely within the Wildman National Wildlife Refuge. R. at 5–6. It is a stopover to over a million migratory waterfowl, attracting sportsmen from across the globe, and contributing over $25 million to the local economy every year from recreational hunting. *Id.* Bonhomme hosts yearly duck hunting parties from his lodge. *Id.* at 6. As President, board member, and shareholder of Precious Metals International, Inc. (PMI), Bonhomme invites both social and business acquaintances to these parties. *Id.* at 6–7.

Reedy Creek spans approximately fifty miles, beginning in the State of Union and ending in Progress, where it empties into the Marsh. *Id.* at 5. Its waters flow year-round, supplying water to merchants along Interstate 250 and to farmers in both states who sell their agricultural products in interstate commerce. *Id.* The creek eventually empties into Wildman Marsh near

Bonhomme's property. *Id.* at 5–6.

Before reaching the Marsh, Reedy Creek is joined by Ditch C-1, a drainage ditch created by landowners in Jefferson County to drain soils for agricultural use. *Id.* at 5. Ditch C-1 flows directly through a culvert on Bonhomme's property. *Id.* The Ditch's water is derived primarily from draining groundwater from saturated soils and rainwater runoff, and is continuously running except during annual periods of drought lasting from several weeks to three months. *Id.*

Ditch C-1 traverses Maleau's property prior to entering Bonhomme's property and Reedy Creek. *Id.* Maleau, a business competitor of PMI, operates gold mining and extraction operations in Lincoln County, Progress. *Id.* Maleau trucks piles of overburden and slag from these operations and places them adjacent to Ditch C-1 in Jefferson County. *Id.* During rain events, rainwater percolates through the piles and discharges through channels eroded by gravity from the configuration of the waste piles into Ditch C-1. *Id.* Arsenic is leached and carried from the piles into the Ditch's water, which eventually joins Reedy Creek and Wildman Marsh. *Id.*

Arsenic is a well-known poison, *id.* at 6, and undisputed pollutant, *id.* at 8, commonly associated with gold mining, *id.* at 6. Bonhomme conducted tests prior to bringing this action that detected arsenic in Ditch C-1 just below Maleau's property, in Reedy Creek just below the point where Ditch C-1 meets Reedy Creek, in Wildman Marsh, and in Blue-winged Teal. *Id.* at 6. The pattern of arsenic concentration strongly suggest that Maleau's mining waste piles are the source of the arsenic in Reedy Creek and Wildman Marsh. *Id.*

Bonhomme accused Maleau of moving the waste piles from his mining operation to their current location adjacent to Ditch C-1 in hopes of avoiding CWA permit requirements. *Id.* at 7. Although Bonhomme is a French national and PMI has aided Bonhomme with certain litigation costs, Bonhomme has an independent interest at stake. *Id*.

STANDARD OF REVIEW

The district court granted Maleau's 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, holding Bonhomme was not a proper plaintiff. This court reviews the district court's dismissal *de novo*. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010); *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 127 (2d Cir. 2009).

SUMMARY OF THE ARGUMENT

Bonhomme is the real party in interest in this case because he has alleged an injury in fact to a concrete individual interest, thereby providing him with the substantive right to bring an enforcement action under the CWA. 33 U.S.C. § 1365(a), (g). Bonhomme's injuries to his personal property and recreational interests as a result of Maleau's mining waste discharges are distinct from any interest held by PMI, and could not be brought as a claim by that corporation. The district court erred in holding that Bonhomme was not the real party in interest.

In addition, Bonhomme has a right to bring a citizen suit under the CWA. The term "citizen" is defined in the CWA without reference to nationality. 33 U.S.C. § 1365(g). Congress instead defined "citizen" as an individual meeting the injury in fact requirement expressed in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Bonhomme qualifies as a "citizen" within the meaning of the CWA because he is an individual who has suffered concrete injuries to his personal property and recreational interests. The district court adopted an improper interpretation of the term "citizen" in the CWA, and thereby erred in dismissing Bonhomme's action simply because he is a French national.

The district court correctly held that Reedy Creek is a water of the United States. The statute defines "navigable waters" as "waters of the United States," 33 U.S.C. § 1362(7), which in turn has been interpreted to include all interstate bodies of water and waters whose use or degradation could affect interstate commerce, 40 C.F.R. § 230.3(s)(1)-(3) (2013); 33 C.F.R.

§ 328.3(a)(1)–(3) (2013). The term is not limited by traditional notions of navigability-in-fact. *Rapanos v. United States*, 547 U.S. 715, 730–31 (2006).

Ditch C-1 is also a water of the United States. Ditch C-1 satisfies both of the modern tests established in *Rapanos* for determining which non-navigable waters, such as small tributaries, fall within the scope of the CWA's protection. Although the district court correctly determined that the inclusion of tributaries of waters of the United States is a reasonable interpretation of the CWA, 40 C.F.R. § 230.3(s)(5); 33 C.F.R. § 328.3(a)(5), it improperly held that Ditch C-1 was a point source and thus could not be a tributary under the regulations.

Maleau's mining waste piles are point sources under the CWA because they discretely discharge pollutants into a water of the United States. *See Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980). The district court failed to recognize that the mining piles, and the channels that have been eroded into them, are identifiable and discrete conveyances that discharge arsenic into Ditch C-1, a water of the United States.

Bonhomme did not violate the CWA by passively allowing previously point source-polluted water to flow through the culvert on his property. The district court erred in holding Bonhomme liable because Maleau discharged arsenic into the water from a discrete and identifiable point source, and Bonhomme did nothing except allow this previously polluted water to transfer from Ditch C-1 to Reedy Creek through his culvert.

ARGUMENT

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, Congress declared that it was "the national goal that the discharge of pollutants into the [waters of the United States] be eliminated." 33 U.S.C. § 1251(a)(1). One means by which Congress chose to effectuate this purpose was to delegate authority to federal agencies to regulate

discharges from point sources through a permitting system, and to make permitless discharges unlawful. 33 U.S.C. §§ 1311 *et seq*. In the absence of the government's willingness or capacity to enforce these provisions of the CWA, Congress created citizen suits to provide a last defense for the nation's waterways. 33 U.S.C. § 1365. The district court's dismissal of Bonhomme's citizen suit is legally improper and contrary to the purposes of the CWA.

I. BONHOMME IS THE REAL PARTY IN INTEREST BECAUSE HE POSSESSES THE SUBSTANTIVE RIGHT ASSERTED IN THIS SUIT.

Federal Rule of Civil Procedure 17(a) (Rule 17(a)) provides that, "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The purpose of this Rule is to ensure that the plaintiff actually possesses the substantive right he/she is seeking to enforce. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010); *United Health Care Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir. 1996). By requiring that the actually aggrieved party is litigating the case, Rule 17(a) ensures that the final judgment will have the proper res judicata effect, and that the defendant will be protected against a subsequent action by the party who was in fact entitled to recover. *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712 (9th Cir. 1992); Rule 17(a) advisory committee's note.

The substantive right asserted in this suit is the right to bring a civil action seeking injunctive relief and civil penalties against an individual who is allegedly discharging in violation of the CWA. 33 U.S.C. § 1365(a). Bonhomme, individually, possesses this substantive right because he has a personal interest that has been adversely affected by Maleau's discharge of mining waste. R. at 5. Because Bonhomme's interest is separate from any interest PMI may have in the outcome of this litigation, the district court erred in holding that Bonhomme was not the real party in interest.

A. Bonhomme possesses the substantive right asserted in this case because his personal interests have been adversely affected.

In order to possess the right to bring a citizen suit under the CWA, the individual bringing the suit must be "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Courts have interpreted the adversely affected interest language of Section 505(g) to incorporate the "injury in fact" requirement articulated in *Sierra Club v. Morton*. *Montgomery Envtl. Coal. v. Costle*, 646 F.2d 568, 578 (D.C. Cir. 1980) (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)). To allege an "injury in fact," a plaintiff must have suffered a concrete and particularized injury to a legally protected interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). Bonhomme has a protected interest in using his property and the Wildman Marsh area for hunting, R. at 6, and thus has been harmed by the discharge of arsenic into the waters of these lands.

1. Bonhomme has alleged an injury to a personal property interest sufficient to confer real party in interest status.

Bonhomme's personal property interests have been concretely impaired as a result of Maleau's mining waste discharges. A demonstrated injury to a tangible property interest is sufficient to satisfy the CWA's injury in fact requirement. *See, e.g.*, *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003–04 (11th Cir. 2004) (holding plaintiff satisfied injury in fact requirement by showing that polluted runoff from defendants' property migrated onto plaintiffs' property, contaminating the soil); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156–57 (4th Cir. 2000) (holding property owner whose lake lay

in the path of defendant's toxic chemical discharge properly demonstrated injury in fact from claimed diminished property value and impaired use of the lake for swimming and fishing).

Bonhomme uses his property for hunting parties to which he invites friends and business associates. R. at 5–6. Bonhomme has reduced the number of visits to this property because of the risk of exposure to arsenic. *Id.* Because Bonhomme's ability to use his property has been impaired, and the presence of arsenic on his property may damage its value, Bonhomme has alleged a valid injury in fact to a protected interest sufficient to bring this CWA citizen suit as the real party in interest.

2. Bonhomme has alleged an injury to his recreational hunting interests sufficient to confer real party in interest status.

Bonhomme's interest in using Wildman Marsh for recreational hunting has been concretely affected by Maleau's mining waste discharges. A plaintiff who claims an injury to a recreational interest from environmental damage must actually use the area affected by the challenged activity. *Lujan*, 504 U.S. at 565–66. Plaintiffs alleging actual use of a particular area for recreational purposes, and subsequent impairment of their aesthetic and recreational interests in that area due to the discharge of pollutants, satisfy the injury in fact requirement. *See, e.g.*, *Laidlaw Envtl. Servs.*, 528 U.S. at 183 (finding injury in fact requirement met by plaintiff who had documented interest in canoeing a river, but refrained from canoeing in the area due to concerns that the water was contaminated with arsenic from defendant's discharge); *Idaho Conservation League v. Atlanta Gold Corp.*, 844 F. Supp. 2d 1116, 1128–29 (D. Idaho 2012) (finding plaintiff who no longer swam nor fished in river for fear of contamination from discharges of arsenic and iron satisfied injury in fact requirement).

Because of the high levels of arsenic fouling the waters surrounding his property and Wildman Marsh, Bonhomme is afraid to go hunting in the area and has reduced his hunting

excursions from eight parties per year to two. R. at 6. The EPA has detected levels of arsenic in several Blue-Winged Teal at Wildman Marsh, indicating that some hunting birds have been affected by the toxic discharge. *Id.* As Bonhomme is primarily a duck hunter, *id.*, these findings provide evidence that the presence of arsenic may also reduce Bonhomme's enjoyment of hunting by harming the duck population and making the ducks unfit for consumption. Because of this adversely affected personal interest, Bonhomme is the real party in interest and has the right to bring this citizen suit enforcement action against Maleau.

B. Bonhomme's alleged injury is separate and distinct from any interest possessed by PMI, and his position within the company is irrelevant.

The fact that Bonhomme sometimes invites business acquaintances to his hunting lodge, R. at 6, does not negate the fact that he has distinct interests from PMI that have been adversely affected by Maleau's mining waste discharges. The ability to allege a distinct injury from other affected persons is sufficient to confer real party in interest status. *See, e.g.*, *Curtis Lumber Co.*, 618 F.3d at 771. In *Curtis Lumber*, a retail supplier of building products sued a building materials company that failed to honor a rebate promotion on siding products the retail supplier had sold to its customers. *Id.* at 768–69. The Eighth Circuit held that the plaintiff, rather than its customers, was properly named as the real party in interest because the plaintiff had alleged individual injuries, such as lost profits from cancelled sales, which its individual customers could not allege. *Id.* at 771.

Bonhomme similarly possesses distinct injuries from PMI. Bonhomme uses his hunting lodge for personal hunting trips with friends, R. at 6, indicating that he uses the property and hunts in Wildman Marsh for reasons unrelated to his position with PMI. As Bonhomme is the owner of the hunting lodge, he has an individual interest in maintaining the property's use and value, both of which have been negatively affected by Maleau's discharges of pollutants. As PMI

does not own this property, it could not make a claim for injuries to this property interest.

In addition, because Bonhomme has alleged a direct and concrete injury to interests separate from PMI, his position as president and shareholder in that corporation is irrelevant. A lawsuit may be properly brought in a shareholder's name and not that of the corporation, when the shareholder "has suffered a direct, personal injury independent of the derivative injury common to all shareholders." *See, e.g.*, *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 757 (7th Cir. 2008). The injuries Bonhomme suffers as a result of the degradation to his personal property, and the loss of enjoyment from the inability to use his personal property or hunt in the neighboring marsh, are personal to him and could not be alleged by PMI. These injuries are sufficient to grant Bonhomme real party in interest status.

C. The fact that PMI has paid for some litigation costs is not sufficient to transfer Bonhomme's independent claim to PMI.

The fact that PMI has paid for some of Bonhomme's litigation costs, including attorney's fees, expert fees, and water sampling expenses, R. at 7, is irrelevant because Bonhomme has not transferred the individual right he asserts in the case. The mere fact that litigation expenses and attorneys fees are paid by another entity does not make them a real party in interest. *Armour Pharm. Co. v. Home Ins. Co*., 60 F.R.D. 592, 594 (N.D. Ill. 1973); *See also*, *Lanner v. Wimmer*, 463 F. Supp. 867, 876 (D. Utah 1978), *aff'd in part, rev'd in part on other grounds*, 662 F.2d 1349 (10th Cir. 1981) (holding that even though the ACLU provided lawyers to represent the named plaintiffs, the plaintiffs were rightfully named as the real party in interest because they alleged depravation of a legally enforceable right). The district court erred in concluding that litigation costs alone were sufficient to make PMI the substantive right holder in this suit.

A person may assign their substantive right to another through subrogation, which occurs when another party, such as an insurance company, compensates that individual for their loss and

thereby attains real party in interest status. *Armour Pharm.*, 60 F.R.D. at 594. PMI has not compensated Bonhomme for the losses he suffered in this case, and therefore Bonhomme has not assigned or subrogated his right to bring this action to PMI.

PMI is admittedly interested in making sure that their competitors, such as Maleau's corporation, R. at 7, do not obtain a competitive advantage by circumventing the CWA. However, the mere fact that another person may benefit from a particular result in the litigation does not make them the real party in interest. *Armour Pharm.,* 60 F.R.D. at 594. The CWA sets forth the standard for bringing a CWA citizen suit as "having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Bonhomme has sufficiently alleged injury to his own individual interests, satisfying this standard, and giving him the substantive right to bring this citizen suit as the real party in interest.

II. BONHOMME IS A "CITIZEN" WITHIN THE MEANING OF THE CLEAN WATER ACT.

A. The plain text of the Clean Water Act does not require U.S. citizenship as a prerequisite for bringing a citizen suit under Section 505.

The term "citizen" as used in Section 505 is explicitly defined in the plain text of the CWA without regard to geographical concerns or nationality. The CWA provides that "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard of limitation under this Act." 33 U.S.C. § 1365(a). When interpreting a statute, the Court must begin with the assumption that the ordinary text expresses the legislative purpose of the statute. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). It is a fundamental canon of statutory construction that the words of a statute must be read in the context of the overall statutory scheme. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

Section 505 of the CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Except as otherwise provided, the CWA defines the term "person" to mean "an individual, corporation, partnership, association, state, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Thus, while the ordinary meaning of the term "citizen" might have a different meaning in another context,[1] the CWA specifically defines the term as a "person"—regardless of nationality—that has an interest that may be adversely affected.

The district court held that the CWA's definition of a "citizen" as the broader concept of a person does not deprive "citizen" of its nationality-focused meaning, just as the Supreme Court reasoned that the CWA's use of the phrase "navigable waters" to include the broader concept of "waters of the United States" did not deprive navigable of all its meaning. R. at 8; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'r*s, 531 U.S. 159, 172 (2001) [hereinafter *SWANCC*]. In doing so, the district court improperly ignored the Supreme Court's reasoning for adopting that particular interpretation of the term "navigable waters"; reasoning that is inapplicable to the current case. In *SWANCC* the Supreme Court was concerned that adopting a broad interpretation of the term "navigable" to encompass all "waters of the United States" would push the outer limits of congressional authority. 531 U.S. at 172–73. To avoid this constitutional problem, the Court instead invoked the canon of constitutional avoidance to narrow the interpretation of the term. *Id.* By contrast, there is no constitutional problem

[1] Webster's Dictionary defines citizen as: "(a) a member of a state . . . (b) a native or naturalized person of either sex who owes allegiance to a government and is entitled to reciprocal protection from it and to enjoyment of the rights of citizenship." Webster's Third New International Dictionary of the English Language Unabridged 411 (Philip Babcock Gove et al. eds., 3d. ed. 1961).

implicated in allowing foreign nationals to bring a citizen suit under Section 505, as this is entirely consistent with the constitutional grant of judicial authority under Article III, § 2 allowing federal courts to hear cases arising under the laws of the United States, as well as controversies between citizens of a state and foreign citizens. U.S. Const. art. III, § 2. There is no need to construe the definition of "citizen" to incorporate concepts falling outside the plain text of the statute in this case.

The plain text of the statute clearly defines who may bring an enforcement action under the CWA and makes no express reference to nationality. The court should resist reading words into a statute that do not appear on its face. *Bates v. United States*, 522 U.S. 23, 29 (1997). As there is no textual basis for the district court's reading of the statute, this Court should avoid making such a broad statement of congressional intent without textual or historical support.

B. Legislative history of the Clean Water Act supports a definition of citizen as an individual with an affected interest, without regard to nationality.

The district court's reasoning, at best, renders the plain text of the statute ambiguous as to whether Congress intended to define citizen without regard to nationality. This Court should look to legislative history to shed further light on the meaning of the word "citizen" under the CWA.

1. Legislative history indicates clear congressional intent that a citizen suit not be contingent on geographical considerations.

Debates over the initial proposal for the language of Section 505 indicate that Congress intentionally chose to define "citizen" broadly, without limiting the term to geographical considerations. *Sierra Club v. SCM Corp.*, 747 F.2d 99, 103–05 (2d Cir. 1984). The initial proposal for the language of Section 505 would have defined "citizen" to mean: "For the purposes of this section the term 'citizen' means . . . a *citizen* (A) *of the geographic area* and (B) having a direct interest which is or may be affected." Pub. L. No. 92-500, 86 Stat. 816 (1972),

reprinted in 10 Legislative History of the Federal Water Pollution Act Amendments of 1972, at 381 (1972) (emphasis added).

Comments made during the floor debates for the initial bill acknowledged the strained and restrictive nature of this limitation on the term citizen:

> In all other actions where this house has recently provided for citizen litigation we have provided that any "person" may bring suit. In the Clean Air Act Amendments of 1970 . . . we described the standard to sue precisely: any person may commence a civil action on his own behalf . . . When we enacted the Noise Control Act . . . we said again: "any person" can sue. Yet in this bill the committee attempts to say that only a citizen can sue and then defines a citizen in terms that are extremely strained.

118 Cong. Rec. H2742 (daily ed. Mar. 29, 1972) (statement of Rep. McCloskey).

In the final bill as passed, Congress abandoned the more restrictive language, instead defining a "citizen" as any "*person*" with an "interest that may be adversely affected." *SCM Corp.*, 747 F.2d at 104–05 (emphasis added) (citing S. Rep. No. 92-1236, at 146 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823); 33 U.S.C. § 1365(g). Congress could have restricted the meaning of "citizen" to a citizen of a particular geographic region. However, by opting for the less restrictive definition of "citizen," the legislature left the right to bring suit under the CWA open to foreign nationals, like Bonhomme.

2. Congress intended to define the term "citizen" in the Clean Water Act to codify the standing requirements of Sierra Club v. Morton.

Shortly before Congress passed the CWA, the Supreme Court held that a party seeking review under the Administrative Procedures Act must have personally suffered an injury by the actions or inactions complained of in order to bring suit. *SCM Corp.*, 747 F.2d at 103–04; *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). The language adopted in Section 505, requiring the plaintiff allege an "interest which is or may be adversely affected" has been interpreted to incorporate the injury in fact standing requirement articulated in *Morton* into the definition of the

term "citizen." *SCM Corp.*, 747 F.2d at 103–04; *see also Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 209 (4th Cir. 1985) (accepting for purposes of that case that Congress defined the term "citizen" in § 1365(g) to incorporate the standing requirements outlined in *Sierra Club v. Morton*); 33 U.S.C. § 1365(g).

Legislative history from the enactment of the CWA supports this interpretation of the term "citizen." In fashioning the definition of "citizen" in Section 505, a Senate Committee report stated, "the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton.*" *SCM Corp.*, 747 F.2d at 104–05 (citing S. Rep. No. 92-1236, at 146 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823).

The legislative history shows that the definition of the term "citizen" within Section 505 was intended to merely codify the standing requirement that an individual bringing a citizen suit under the CWA allege a concrete injury in fact, suffered as a result of the complained violation. *Id.* Because Bonhomme has alleged a concrete injury to a personal interest in the continued use of both his property and Wildman Marsh for hunting purposes, and because this injury flows directly from Maleau's alleged violations of the CWA, Bonhomme qualifies as a "citizen" under Section 505(g) of the CWA to maintain a citizen suit against Maleau. The district court's decision to dismiss Bonhomme's claims was therefore reversible error.

III. REEDY CREEK AND DITCH C-1 ARE PROTECTED UNDER THE CLEAN WATER ACT AS WATERS OF THE UNITED STATES, REGARDLESS OF WHICH MODERN TEST THE TWELFTH CIRCUIT ADOPTS.

The contemporary meaning given to the term "navigable waters," defined in the CWA as "waters of the United States," 33 U.S.C. § 1362(7) (Section 502), does not retain the traditional requirement that the body of water be navigable-in-fact. The United States Army Corps of

Engineers (the Corps) and the Environmental Protection Agency (the EPA), pursuant to their delegated authority to issue permits for certain discharges otherwise prohibited by the CWA, 33 U.S.C. §§ 1342–1344, originally adopted a narrow interpretation of "navigable waters" which encompassed only those interstate waters that were navigable-in-fact or readily susceptible of being rendered so, *The Daniel Ball*, 77 U.S. 557 (1871). However, modern regulatory schemes have replaced this traditional notion with a broader construction of the meaning of "waters of the United States," striking a balance between states' sovereignty and Congress' authority to regulate waters that are of national interest under the Commerce Clause. *SWANCC*, 531 U.S. at 168–69. The Corps and EPA (the agencies) have thus adopted regulatory frameworks that were intended to expand the definition of the term to "the outer limits of Congress' commerce power," 42 Fed. Reg. 37122, 37144 n.2 (July 19, 1977), and include "[a]ll interstate waters [and] other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce." 40 C.F.R. § 230.3(s) (2013); 33 C.F.R. § 328.3(a) (2013).

This shift was met with resistance from the Supreme Court in *Rapanos*, which resulted in two different tests for determining which bodies of water properly fell within the scope of the Commerce Clause and under the agencies' jurisdiction. *Rapanos v. United States*, 547 U.S. 715 (2006) (resolving consolidated cases that considered whether wetlands, which were located near ditches or man-made drains that eventually emptied into navigable waters, qualified as waters of the United States). The Court issued a split decision construing the phrase "waters of the United States" as used in the CWA. The plurality concluded that, under the plain meaning of the statute, the phrase could only include "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams . . . oceans, rivers, [and] lakes'" (relatively-permanent flow test). *Id.* at 739. While

concurring in judgment, Justice Kennedy articulated a test that requires a "significant nexus," between the body of water in question and a water of the United States, regardless of whether it was intermittent or not (significant nexus test). *Id.*

A. Agencies and courts have adopted a broad construction of "waters of the United States" that encompasses both Reedy Creek and Ditch C-1.

1. Under the plain meaning of the statute, it is not required that a body of water be navigable-in-fact to fall under the protection of the Clean Water Act.

When unambiguous, the plain meaning of a statute's language governs its interpretation. *Rapanos*, 547 U.S. at 730–36. The Supreme Court looks to dictionary definitions to determine the plain meaning of the statute. *Id.* at 739. The CWA authorizes federal jurisdiction over "waters." 33 U.S.C. § 1362(7). Using the dictionary chosen by the *Rapanos* plurality, "waters" can mean a number of things that are not necessarily navigable: "[s]treams and bodies forming geographical features[;] A body of water, standing or flowing; . . . a stream of intermediate in size between a river and a brook, a brook, or other body of water." Webster's New International Dictionary 2882 (2d ed. 1954). Consequently, the Court did not limit the term "navigable waters" to include only interstate waters that are navigable-in-fact or "readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723.

This broad definition is supported by looking at the term in context with other provisions of the CWA. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (noting the plain meaning of a statute is also gleaned by considering the broader context of the statute as a whole). Section 404 discusses "navigable waters . . . other than those . . . presently used, or are susceptible to use . . . as a means to transport interstate or foreign commerce." 33 U.S.C. § 1344(g)(1). This is evidence that a body of water's navigability was not intended to be dispositive on whether it falls within the scope of the definition of waters of the United States.

Even if the plain meaning of "navigable waters" was not clear, legislative history also supports the interpretation that Congress did not intend to exclude non-navigable waters from the scope of the CWA. If the plain meaning is not clear, the Court will also look to legislative history to uncover Congress' intent. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131–32 (1985). Congressional records indicate that "navigable waters" was meant to "be given the broadest possible constitutional interpretation," H.R. Rep. No. 92-1465, at 144 (1972), and that it "does not mean 'navigable . . .' in the technical sense," 118 Cong. Rec. H9124–25 (daily ed. Oct. 4, 1972) (remarks of Rep. Dingell).

This interpretation does not conflict with reasoning in *SWANCC*, which suggested that "navigable" should not be deprived of all of its traditional meaning. 531 U.S. at 172. The contemporary interpretation retains the requirement that the waterway either has some impact on interstate commerce or is susceptible to being rendered navigable in fact. *See, e.g.,* 40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a). In the present case, both bodies of water impact interstate commerce due to their agricultural use. R. at 5–6. Maleau's argument that a body of water must be capable of being floated in order to fall under the definition of "navigable water," *id.* at 9, is therefore contrary to the plain meaning, legislative history, and Supreme Court precedent.

2. Both bodies of water fall within the agencies' reasonable construction of the Clean Water Act due to their effect on interstate commerce.

Seeking to extend their jurisdiction under the CWA to the "outer limits of Congress's commerce power," 42 Fed. Reg. at 37144 n.2, the agencies define "waters of the United States," in part, by a body of water's impact on interstate commerce. In interpreting the CWA, the agencies have adopted identical definitions for "waters of the United States":

> All interstate waters [and] other waters such as intrastate . . . streams (including intermittent streams) . . . the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters . . . [w]hich are or could

be used by interstate or foreign travelers for recreational or other purposes . . . .

40 C.F.R. § 230.3(s)(1)–(3); 33 C.F.R. § 328.3(a)(1)–(3). Courts have deferred to this construction and affirmed that it encompasses wholly intrastate and non-navigable bodies of water. *United States v. Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006) (citing *Riverside*, 474 U.S. at 133); *see also Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–44 (1984).

The district court misinterpreted *Rapanos* by adding the additional requirement that a waterway must serve as a channel of interstate commerce under the first prong of *United States v. Lopez* in order to fall within Congress' Commerce Clause jurisdiction. R. at 9–10 (citing *United States v. Lopez*, 514 U.S. 549 (1995)). The plurality in *Rapanos* specifically refused to define the "extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act," 547 U.S. at 731, and did not require that a body of water literally serve as a channel of interstate commerce, *Lopez*, 514 U.S. at 558. Instead, the Court indicated that the term "includes something more than traditional navigable waters," and requires "the ordinary presence of water" to fall under the Commerce Clause. *Rapanos*, 547 U.S. at 731, 734.

The degradation of Reedy Creek and Ditch C-1 resulting from arsenic pollution affects interstate and foreign commerce, thereby placing both waters squarely within the agencies' definition of waters of the United States, and thus navigable waters under Section 502. Not only does Reedy Creek travel across state borders, from the State of New Union to the State of Progress, but it is also a necessary source of water for travelers along I-250 and farmers in both states who sell their goods in interstate commerce. R. at 5. Similarly, Ditch C-1 supplies a much-needed service to the agricultural industry; it collects draining water from farmlands, allowing for agricultural production in proper soil conditions. *Id.* at 5. Even small and intermittent interstate tributaries, without such obvious connections to travelers and producers, are of national concern because they affect interstate commerce and fall under the definition of waters of the

United States. *See United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007).

In addition, the waters of Reedy Creek and Ditch C-1 reach Wildman Marsh, a federal wildlife refuge essential for migratory ducks and water fowl, R. at 10, that supports a $25 million industry for hunters from around the world, R. at 6. The agencies can regulate interstate and intrastate waters that are "used by interstate or foreign travelers for recreational or other purposes." 40 C.F.R. § 230.3(s)(3)(i); 33 C.F.R. § 328.3(a)(3)(i). Wildman Marsh is used by both interstate and foreign travelers for recreational purposes that bring the Marsh under the plain language of the regulations. Regulating discharges into Reedy Creek and Ditch C-1 is necessary to protect Wildman Marsh from pollutants and preserve the Marsh's use for interstate tourism.

B. Even if Ditch C-1 does not qualify on its own as a water of the United States, it is protected under the Clean Water Act as a tributary of a navigable water.

Although this Court should find that Ditch C-1 is a water of the United States because of its impact on interstate commerce, should the court find otherwise, Ditch C-1 still falls within the scope of the CWA as a tributary of Reedy Creek, a water of the United States.

1. Tributaries of navigable waters are generally deemed waters of the United States, subject to the limitations of conflicting tests expressed in Rapanos.

As a tributary to Reedy Creek, Ditch C-1 falls within the plain meaning of a water of the United States by nature of its connection to the larger interstate body of water. The agencies determined that "tributaries" of waters of the United States are covered under the CWA in their own right. 40 C.F.R. § 230.3(s)(5); 33 C.F.R. § 328.3(a)(5). "Tributary" has been interpreted to mean a body of water that contributes its flow to a larger body of water. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (citing Random House College Dictionary 1402 (rev. ed. 1980)). The water from Ditch C-1 feeds directly into Reedy Creek, an interstate body of water, R. at 5, and thus falls under the scope of the regulations.

Courts, including the district court in this case, have held that the agencies' inclusion of tributaries in the definition of waters of the United States is a permissible interpretation of the CWA given its purpose. *Hubenka*, 438 F.3d at 1032–33 ("[U]nder Chevron's second step, this court will defer to the Corps' tributary rule as a valid interpretation of the [CWA]"); *see also Rapanos*, 547 U.S. at 726–27. The nature of the tributary—whether man-made, natural, channeled, culverted, or covered—is irrelevant. *See United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) ("[I]t does not make a difference whether the channel by which water flows . . . was manmade or formed naturally"); *Hubenka*, 438 F.3d at 1029–32 (finding a heavily modified channel a water of the United States); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002) (finding truck wash drains and man-made channels waters of the United States); *United States v. TGR Corp.*, 171 F.3d 762, 765 (2d Cir. 1999) (holding that a small brook was a tributary of Ash Creek, regardless of whether it was channeled into pipes in some areas, and fell under federal regulatory jurisdiction). Notwithstanding the clear language of the regulations, both the relatively-permanent flow test and the significant nexus test from *Rapanos* resulted in a narrowing of the agencies' jurisdiction by placing additional restrictions on bodies of water, like Ditch C-1, that fall outside of the traditional notion of navigable waters.

In the wake of the *Rapanos* decision, the Courts of Appeals and agencies have struggled to apply either the relatively-permanent flow test or the significant nexus test uniformly.[2] Given

[2] The Seventh, Ninth, and Eleventh Circuits have adopted the significant nexus test as the controlling test. *United States v. Robinson*, 505 F.3d 1208 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006); *No. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2006). The Tenth Circuit has not definitively adopted an approach, although district courts have indicated that they will follow the relatively-permanent flow test. *See, e.g.*, *United States v. Hamilton*, 2013 U.S. Dist. LEXIS 94255, at *12–13 (D. Wyo. July 1, 2013). The First, Third, and Eighth Circuits have indicated that they will find federal jurisdiction whenever either test is satisfied. *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006). Finally, the remainder of the Courts of Appeals have either reserved the issue or adopted a mixed approach. *Deerfield Plantation Phase II-B Prop. Owners Ass'n v.*

the Court's failure to agree upon a single test, and the current Circuit split, this Court is not bound to adopt either test. Because it flows throughout most of the year and significantly impacts the chemical, physical, and biological integrity of Reedy Creek, Ditch C-1 satisfies both tests. Therefore, this Court's choice of test will not be determinative on the outcome.

2. Ditch C-1 satisfies the relatively-permanent flow test because it maintains a continuous flow for most of the year.

Ditch C-1 satisfies the requirements of the relatively-permanent flow test which invites a common-sense judgment and does not require an even or uninterrupted flow. *Rapanos*, 547 U.S. at 732 n.5. The *Rapanos* plurality employed a strict interpretation of the CWA's plain meaning, finding that Congress intended only to include relatively permanent, standing or continuously flowing bodies of water forming geographical features that are ordinarily described as streams, oceans, rivers, and lakes. *Id.* at 732–33. "Permanence" under this test refers to whether a flow exists in a channel over a period of time. *Hamilton*, 2013 U.S. Dist. LEXIS 94255, at *11. Furthermore, it does "not necessarily exclude streams . . . that might dry up [during] drought . . . [or] seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Rapanos*, 547 U.S. at 732 n.5. Although the *Rapanos* plurality did not decide exactly how frequent the drying-up of a stream would need to be to disqualify it from being a water of the United States, it stated that streams whose flows are "broken," "fitful," or "short-lived" would fall in the outer bounds of permissibility. *Id*. The Court also criticized various lower court decisions which held that bodies of water maintaining only intermittent

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United States Army Corps of Eng'rs, 501 Fed. Appx. 268 (4th Cir. 2012) (adopting a mixed test); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009) (has not definitively answered); *Cundiff*, 555 F.3d 200 (expressly reserved the issue); *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (noting that because the Court failed to reach a consensus, it would continue to use precedent from its own circuit); *see also* Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, *1 (Dec. 2, 2008), *available at* http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf (guidance document establishing mixed test) [hereinafter Guidance Document].

flows were waters of the United States, suggesting that those decisions provide additional guidance about the line between acceptable seasonal flows and unacceptable intermittent flows. *Id.* at 727.

The annual drought events lasting from several weeks to a few months do not preclude Ditch C-1 from being considered a water of the United States under the relatively-permanent flow test. *See id.* at 732 n.5; R. at 5. The present case is distinguishable from *Headwaters*, which the *Rapanos* plurality criticized because of the intermittent nature of the waters at issue. *Id.* at 727. In that case, the Ninth Circuit held that irrigation canals that exchanged waters with various natural stream systems, but only flowed from late spring to early fall, were waters of the United States. *Headwaters*, 243 F.3d at 528, 532.

The present case is analogous to a recent district court decision, which applied the relatively-permanent flow test to a small man-made and intrastate creek that was also fed primarily by irrigation runoff. *Hamilton*, 2013 U.S. Dist. LEXIS 94255, at *12–13. In *Hamilton*, the district court held that, even though the creek had fluctuating flow rates, because it flowed almost year-round it was a relatively-permanent tributary to a larger interstate waterway and was therefore within the scope of the CWA. *Id.* Ditch C-1 similarly flows for most of the year, except for a short period caused by seasonal drought events. R. at 5.

3. Ditch C-1 satisfies the significant nexus test because it significantly affects the chemical, physical, and biological integrity of Reedy Creek.

The significant nexus test focuses on the exchange between bodies of water, applying a liberal understanding of which waterways fall under the CWA. In his concurrence, Justice Kennedy stated that the Corps can exercise jurisdiction over a body of water if it can establish that the body of water "significantly affect[s] the chemical, physical, and biological integrity" of a body of water more readily understood as navigable. *Rapanos*, 547 U.S. at 779–80. Courts

applying the this test have found evidence of downstream pollutant transport to a navigable waterway, or even the potential for such transport, to be dispositive of a finding that the water is a tributary and itself a water of the United States. *Hubenka*, 438 F.3d at 1034; *Wis. Res. Prot. Council v. Flambeau Mining Co.*, 903 F. Supp. 2d 690, 715 (W.D. Wis. Apr. 13, 2012), *rev'd on other grounds*, 727 F.3d 700 (7th Cir. 2013); *Headwaters*, 243 F.3d at 534. The significant nexus test does not require that there be continuous flow. *Rapanos*, 547 U.S. at 800–01.

The fact that water and arsenic traveling through Ditch C-1 reach Reedy Creek establishes a sufficient connection between the two bodies of water to satisfy the significant nexus test. The Ninth Circuit in *Moses* held that a creek, which only emptied into the Snake River when filled with spring runoff for two months every year, was a water of the United States by the mere fact that water passing through it could pick up pollutants along the way and eventually reach a navigable waterway. 496 F.3d at 991. The court decided this without any evidence of pollutants actually reaching the Snake River during those two months. *Id.* The water that flows through Ditch C-1 undeniably reaches Reedy Creek, an interstate body of water, and thus satisfies this liberal test. R. at 5.

In addition, pollutants from Ditch C-1 actually reach Reedy Creek. R. at 6. In *Flambeau Mining*, the district court was presented with evidence that copper and zinc from the defendant's mine had discharged into a downhill stream and ultimately reached a water of the United States. 903 F. Supp. 2d at 701. The court found this evidence dispositive of a finding that the stream was a tributary of a water of the United States. *Id.* at 715. The present case is analogous to *Flambeau Mining*; the tests conducted by Bonhomme show that the arsenic discharged from Maleau's mining piles into Ditch C-1 eventually reaches Reedy Creek, an interstate waterway, in significant concentrations. R. at 6. Given Ditch C-1's impact on Reedy Creek's integrity, it

would be contrary to the purposes of the CWA to exempt Ditch C-1.

4. Ditch C-1 functions as a tributary of Reedy Creek, not as a point source.

Maleau's argument that Ditch C-1 is a point source merely because "ditch" is found in the statute's list of possible point sources defies the common-sense judgment invited by the Court in *Rapanos*. The CWA defines point source as "any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel . . . ." 33 U.S.C. § 1362(14). The *Rapanos* plurality notes that these names are "ordinarily used to describe the watercourses" that carry intermittent flows, but may also carry permanent flows. 547 U.S. at 735–36 n.7. Ditches and channels that carry only intermittent flows are not waters of the United States. *Id.* at 743; *Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2013) (Scalia, J., dissenting) (noting a system of ditches that is subject to intermittent flows in response to occasional heavy rain events will readily be identified as a point source). However, "[a]n open channel through which water permanently flows is ordinarily described as a stream, not as a channel, because of the continuous presence of water." *Rapanos*, 547 U.S. at 735–36 n.7. Even before the *Rapanos* decision, the Corps would consider a body of water that functionally served as a tributary to a larger body of water to be a water of the United States rather than a point source, regardless of whether it was deemed by locals to be a ditch. *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (property owners referred to body of water as a ditch while Corps called it a creek). This interpretation is consistent with the Corps current position that ditches will generally be excluded from consideration as a water of the United States only if "excavated wholly in and draining only uplands *and* [they] do not carry a relatively permanent flow of water." Guidance Document *1 (emphasis added).

Ditch C-1, like many rivers and streams, is not a discrete conveyance that flows only

intermittently. It is an aggregation of many sources of water that are not clearly identifiable or discrete, including groundwater from saturated soil as well as rainwater. R. at 5. To hold that Ditch C-1 is a point source merely because it conveys matter from one point to another would imply that every body of water could potentially be considered a point source.

The contemporary interpretation of the CWA does not require that bodies of water be navigable-in-fact to qualify as protected waters. The Twelfth Circuit should therefore declare that Reedy Creek and Ditch C-1 are both waters of the United States due to their impact on interstate commerce, either directly or as a tributary with a relatively-permanent flow, and their clear impact on the chemical, physical, and biological integrity of the Nation's waters.

IV. MALEAU'S MINING WASTE PILES ARE "POINT SOURCES" UNDER THE CLEAN WATER ACT SECTION 502(12), (14).

Maleau's mining waste piles are point sources under the CWA because they are discrete and identifiable conveyances of pollution that flow into a water of the United States. The district court improperly held that Maleau's mining waste piles are not point sources because they are piles of dirt, improperly overlooking that the piles are identifiable sources that have discrete channels through which arsenic flows into Ditch C-1.

A. Maleau's mining waste piles are point sources because they are the discrete and identifiable conveyances of arsenic into Ditch C-1.

One of the primary aims of the CWA is to restore the nation's waters to their natural integrity by eliminating the discharge of pollutants from point sources. 33 U.S.C. § 1251(a). The CWA defines "point source" as "any *discernible*, *confined* and *discrete* conveyance, included but not limited to any . . . ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). Maleau's mining waste piles are point sources because they fit the statutory definition.

1. To accomplish the Clean Water Act's goals, the definition of point source should be interpreted to control pollution at its identifiable source.

To achieve the goals of the CWA, the definition of point source is to be broadly interpreted. *Dague v. City of Burlington*, 935 F.2d 1343 (2d. Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). The Tenth Circuit explained:

> [T]he [CWA] was designed to regulate to the fullest extent possible *those sources* emitting pollution into rivers, streams and lakes. The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste . . . We believe it contravenes the intent of [the CWA] . . . to exempt from regulation any activity that emits pollution from *an identifiable point*.

United States v. Earth Scis., Inc., 599 F.2d 368, 373 (10th Cir. 1979) (emphasis added).

The Eleventh Circuit followed *Dague*'s reasoning, holding that piles of debris in a scrap-metal yard that collect water and discharge into a water of the United States are point sources. *Parker v. Scrap Metal Processors, Inc.* 386 F.3d 993, 1009 (11th Cir. 2004). In *Parker*, the court found that the discrete scrap piles of debris collecting water that was then discharged through eroded "gullies leading downhill to [a] stream" were point sources. *Id.* at 1009.

In the present case, Maleau's mining waste piles discharge arsenic into a water of the United States. R. at 5. Maleau designed these piles in such a way that rainwater erodes discrete channels through the piles and discharges into Ditch C-1. *Id.* Maleau's mining piles thus fall under the interpretation of point source, supported by the Tenth and Eleventh circuits, because they form identifiable sources from which pollution is emitted.

2. Under the plain meaning of the statute, Maleau's piles are point sources because they are "discrete," "confined," and "discernible" conveyances.

Maleau's mining waste piles are discrete, confined, and discernible sources of pollution. The Supreme Court emphasized that the essence of a point source is that it is a discrete conveyance of pollutants from one place to a water of the United States. *S. Fla. Water Mgmt.*

Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004).

Mining waste piles are point sources when they discretely convey pollutants into waters of the United States via identifiable channels. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980). In *Abston*, the Fifth Circuit held: "surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution." *Id.* at 47. Miners do not need to construct the channels through which water flows; as long as rainwater erodes discrete channels conveying discharges into a water of the United States, those piles may be point sources. *Id.* at 45.

Similarly, the Ninth Circuit has held that stormwater runoff that is collected into ditches and channels and then discharged into a water of the United States is a point source discharge. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), *rev'd*, *Decker v. Nw. Envtl. Def. Ctr.* 133 S. Ct. 1326 (2013), *on remand*, 728 F.3d 1085 (9th Cir. 2013). In *Decker*, the Supreme Court left intact the lower court's holding that stormwater runoff from logging roads, which was collected and discharged into a system of ditches flowing into a waterway, was a point source discharge. *Decker*, 728 F.3d at 1087. By leaving the Ninth Circuit's general holding regarding channeled road stormwater discharge, the Supreme Court implicitly agreed that this channeled runoff is a point source discharge.

Like the miners in *Abston*, Maleau has constructed mining waste piles in such a way that the capture of rainwater and subsequent erosion is possible. R. at 5. This collection and design is all the work that is necessary to create a point source. *Abston*, 620 F.2d at 45. The court in *Abston* is clear that channels created by stormwater runoff being pulled through waste piles by gravity are identifiable channels, and attendant discharge is from a point source. *Id.* Therefore, Maleau's waste piles are point sources.

B. In holding that Maleau's waste piles were not point sources, the district court failed to distinguish between channeled and unchanneled surface runoff.

The district court asserted that "[p]iles are not normally considered conveyances," and on that basis held that Maleau's mining waste piles were not point sources. R. at 9, 10. However, the district court failed to distinguish between "a pile of dirt and stone," R. at 9, through which stormwater flows freely without any constraints, and Maleau's mining waste piles, which have eroded channels through which arsenic from the waste piles is discretely conveyed into Ditch C-1. The CWA does not have direct regulatory authority over general runoff—a nonpoint source—while it does have regulatory authority over point source discharges. U.S. Environmental Protection Agency, *Nonpoint Source: Introduction*, EPA (Nov. 23, 2013), *available at* http://water.epa.gov/polwaste/nps/nonpoin1.cfm; *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979), *rev'd on other grounds*, *Envtl. Prot. Agency v. Nat'l. Crushed Stone Assoc.*, 449 U.S. 64 (1980). The court's failure to distinguish between the two, and its subsequent holding that Maleau's waste piles were not point sources, is reversible error.

Maleau and the district court improperly relied on *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) to assert that "a pile of dirt and stone" is not a point source. R. at 9. In *Appalachian Power*, the court stated that the definition of point source "does not include *unchanneled* and *uncollected* surface waters." 545 F.2d at 1372–73 (emphasis added). Other courts have drawn this distinction between the regulation of point sources and the regulation of surface water runoff that is not channeled. *See, e.g.*, *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143 (9th Cir. 2010) (holding that the EPA did not have jurisdiction over mining pits when owner was specifically preventing water from channeling in or through them); *Consolidation Coal*, 604 F.2d at 249 (noting the definition of point source "excludes *unchanneled* and *uncollected* surface waters").

The courts in both *Appalachian Power* and *Consolidation Coal* clarified that the CWA does not regulate unchanneled, nonpoint source, surface water. The present case is not concerned with nonpoint sources because the water is channeled into discrete conveyances as it flows down and through Maleau's piles. R. at 5. Holding that Maleau's mining waste piles are point sources would be proper because the runoff discharges through these discrete channels.

V. BONHOMME DID NOT VIOLATE THE CLEAN WATER ACT BECAUSE MALEAU IS THE BUT-FOR CAUSE OF THE PRESENCE OF ARSENIC IN DITCH C-1.

Maleau—not Bonhomme—is in violation of the CWA because Maleau's mining piles are the original source of arsenic in Ditch C-1. To achieve the CWA's goals, Congress utilized a permitting system setting effluent limitations, which created a direct link between the government and the source of pollution. S. Rep. 92-414, at 8 (1971). Maleau's mining piles are discrete sources of arsenic that discharge into a water of the United States prior to flowing through the culvert on Bonhomme's property; these piles are the type of source that Congress targeted when enacting the CWA. The district court contravened the CWA's permitting system by allowing Maleau to escape liability, passing it on to an otherwise innocent and passive downstream property owner.

A. The plain meaning of the Clean Water Act's definition of "discharge of a pollutant" requires action on the part of the polluter.

The CWA defines "discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A) (emphasis added). When reading legislation, "[t]he plain meaning . . . should be conclusive." *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989). Webster's International Dictionary defines "addition" as "the act or process of adding: the joining or uniting of one thing to another." Webster's Third New

International Dictionary of the English Language Unabridged 24 (Philip Babcock Gove et al. eds., 3d. ed. 1961). The plain meaning of "addition" requires that the polluter take some action. This meaning is in line with Congress's intent to stop water pollution at its source, and to stop the polluters who were using the nation's waters as their dump. S. Rep. 92-414, at 42 (1971). Bonhomme did not violate the CWA because he was merely a passive landowner, and not a polluter who actively added a pollutant to the waters of the United States.

The Seventh Circuit interpreted the plain meaning of Section 404, 33 U.S.C. § 1344, which establishes the permitting for discharges of fill or dredged material, to require the active addition of dredged material. *Froebel v. Meyer*, 217 F.3d 928, 937–38 (7th Cir. 2000). In *Froebel*, plaintiff Froebel sued Waukesha County under the CWA, alleging that the removal of a dam and the attendant backup of silt that flowed through the former dam site was an unlawful discharge of pollutants. *Id.* at 932. While Waukesha County was the owner of the dam property, it was not involved in the removal of the dam. *Id.* The court found that, "there is nothing in either the regulations or the case law interpreting Section 404 that indicates that a landowner can fall within the permit requirement for a 'discharge' by doing absolutely nothing at all." *Id* at 938. The associated regulation defines "discharge of dredged material" as "'any *addition* of dredged material'" into waters of the United States. *Id.* at 938 (emphasis added) (citation omitted). The Court explained that the inclusion of the word "addition" "strongly suggest[s] that a Section 404 permit is required only when the party allegedly needing a permit *takes some action*, rather than doing nothing whatsoever." *Id.* at 938 (emphasis added). The court held that because Waukesha County had done nothing except "continue to own the land," it was not liable for a discharge. *Id.* at 939.

Like Waukesha County, Bonhomme has done nothing but own the land through which

polluted water flows. Because the plain meaning of the CWA requires the active addition of pollutants, Bonhomme, who did not add a pollutant to the water, cannot be held liable for a "discharge of a pollutant" through his culvert.

B. Bonhomme is not liable for Maleau's discharges.

Those who discharge through someone else's conveyance, knowing that their discharge will enter a water of the United States, are liable under the CWA. *United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976). In *Velsicol Chemical*, the court held, "The fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from the scope of [the CWA]. Defendant knows or should have known that the city sewers lead directly . . . into [a] 'water of the United States.'" *Id.* The court held defendant Veliscol, the original source of the pollution, liable. *Id.* at 498.

In the present case, Maleau is attempting to hide behind Bonhomme, arguing that he cannot be liable because it was Bonhomme's culvert that ultimately discharged the polluted water into Reedy Creek. However, Maleau knew or should have known that Ditch C-1, into which his mining waste piles discharged arsenic, flows into Reedy Creek. Following *Velsicol*, this knowledge is sufficient to hold Maleau—not Bonhomme—liable under the CWA.

C. Transferring pollutants from one contaminated water of the United States to another is not a discharge from a point source.

Maleau's mining waste piles discharged arsenic into Ditch C-1, a water of the United States, before the ditch even reached Bonhomme's culvert. Bonhomme did not violate the CWA by passively allowing this water, previously polluted by a point source, to flow through his culvert. Allowing Maleau to use Ditch C-1 as his dump by holding Bonhomme responsible for Maleau's arsenic is contrary to the purpose of the CWA.

Culvert owners whose culverts are used to transport polluted water from one water of the

United States to another are not liable under the CWA when the pollutant originated from a prior point source. *See Dague*, 935 F.2d at 1343. In *Dague*, the City of Burlington operated a landfill, which discharged toxic waste directly into a pond that then flowed through a culvert into a marsh. *Id.* at 1354. Because both the marsh and the pond were waters of the United States, "any pollutants in water flowing through the culvert [had] already entered waters of the United States before they flow[ed] through the culvert." *Id.* The Second Circuit held that the culvert was a point source, but held the city as the landfill owner liable for violations of the CWA. *Id.* at 1355.

The EPA codified the principle that an otherwise innocent, non-discharger, should not be subject to liability under the CWA just because a previously contaminated water of the United States flowed through his/her culvert to meet another water of the United States. 40 C.F.R. § 122.3(i) (2013) (exempting "[d]ischarges from a water transfer" from national pollutant discharge elimination system (NPDES) permits). The Code defines "water transfer" as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself." *Id.* The EPA exempts water transfers from NPDES permits "because such water transfers 'do not result in the 'addition' of a pollutant.'" *ONRC Action v. U.S. Bureau of Reclamation*, No. 97-3090-CL, 2012 U.S. Dist. LEXIS 118153, at *24 (Dist. Or. Jan. 17, 2012) (citing NPDES Water Transfer Rule, 73 Fed. Reg. 33,699 (2008)). The EPA's construction of the CWA's NPDES provisions as excluding water transfers warrants deference. *See Chevron*, 467 U.S. at 842–44.

The present case is analogous to *Dague*, and falls under the water transfer exception. Maleau discharged arsenic from his waste piles (point sources) into Ditch C-1 (a water of the United States). R. at 5. Waters from the Ditch then flowed through Bonhomme's culvert into

Reedy Creek, R. at 5, another water of the United States. Just as the culvert owner in *Dague* was not held liable because its culvert, admittedly a point source, transferred polluted water into a marsh, Bonhomme should not be held liable merely because his culvert transfers previously polluted water into Reedy Creek. Because Bonhomme's culvert falls under the Water Transfer exception, he is not in violation of the CWA.

D. Because Bonhomme was completely passive, the present case is distinguishable from cases that held owners of point sources who do not add pollutants liable under the CWA.

The district court improperly relied on *South Florida Water Management District*, 541 U.S. 95 (2004), to determine that Bonhomme would have been liable under the CWA for discharges from his culvert. In *South Florida*, the South Florida Water Management District (SFWMD) operated a pumping facility that pumped water—polluted by urban, residential, and agricultural activities—from a canal into an undeveloped wetland area. *Id.* at 100. Determining whether pumping polluted water qualifies as a point source discharge, the Court held that "the definition of 'discharge of a pollutant' . . . includes within its reach point sources that do not themselves generate pollutants." *Id.* at 105.

South Florida is distinguishable from the present case because the SFWMD was *actively* using the pump station to discharge a pollutant. Unlike Bonhomme, the SFWMD actively moved polluted water through the point source pumping station. *Id.* at 101. In addition, in *South Florida* the pollution came from a multitude of nonpoint sources that were collected in the canal. *Id.* In the present case, there is an identifiable point source where the discharge of pollutants is first entering the water—Maleau's mining waste piles. It would defeat the purpose of the CWA to allow an identifiable specific polluter—like Maleau—to escape liability by passing on the liability to an otherwise innocent party downstream. Finally, the district court was wrong to rely

on *South Florida* because it does not reflect the EPA's current water transfer rule, 40 C.F.R. 122.3(i). *See id.* at 107. In holding that Bonhomme was liable under the CWA, the district court failed to take into account that the present case is easily distinguishable from *South Florida*, or the EPA's evolving perspective on what constitutes a discharge of pollutants.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Bonhomme's claims. Bonhomme has suffered a distinct injury in fact, and therefore qualifies as a citizen under the CWA who is able to bring this action as the real party in interest. Both Reedy Creek and Ditch C-1 have an important impact on interstate commerce. Ditch C-1 also qualifies as a tributary to a water of the United States. As such, this court should affirm the lower court's decision that Reedy Creek is a water of the United States, and reverse the lower court's holding that Ditch C-1 is not. Maleau's mining waste piles are discrete and identifiable point sources that discharge arsenic into a water of the United States. Because Maleau's waste piles are identifiable point sources, Bonhomme, an innocent and passive bystander, should not be held liable under the CWA for the presence of arsenic in Reedy Creek. To dismiss Bonhomme's citizen suit would be to undermine the safeguards that ensure our waters remain free from pollutants like arsenic.

Respectfully submitted,

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Counsel for Jacques Bonhomme