UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. 155-CV-2012

and

No. 165-CV-2012

JACQUES BONHOMME

Plaintiff-Appellant.

v.

SHIFTY MALEAU

Defendant-Appellee.

STATE OF PROGRESS

Plaintiff-Appellant.

and

SHIFTY MALEAU

Intervenor-Plaintiff-Appellant

v.

JACQUES BONHOMME

Defendant-Appellant.

BRIEF FOR APPELLANT

QUESTION PRESENTED

Under the Clean Water Act, did the district court err in granting defendant's Motion for Summary Judgment when Mr. Bonhomme is a real party in interest and a "citizen" entitled to file a citizen suit and Mr. Maleau's mining waste piles qualify as point sources of the added pollutants which then flowed into the navigable waters of Reedy Creek through Ditch C-1?

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STANDARD OF REVIEW

The United States Court of Appeals for the Twelfth Circuit review de novo a district court's interpretation of the Clean Water Act and its effect on a foreign national bringing suit for mining waste piles leaching arsenic into a ditch which later flows into a creek. Rapanos v. United States, 547 U.S. 715 (2006).

STATEMENT OF THE ISSUES

Under the Clean Water Act, did the district court err in finding that as a matter of law, Mr. Bonhomme was not a real party in interest or a citizen with the rights to bring the suit, that the mining waste piles were not point sources, that Ditch C-1 was not navigable waters, that Reedy Creek was not navigable waters, and that Mr. Maleau was not a but-for cause for the presence of arsenic in Ditch C-1?

STATUTES INVOLVED

33 U.S.C. §1365(a) provides as follows:

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf.

Federal Rules of Civil Procedure 17 provides as follows:

An action must be prosecuted in the name of the real party in interest

33 U.S.C. §1362(14) provides as follows:

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. §1362(7) provides as follows:

The term "navigable waters" means the waters of the United States, including the territorial seas.

PRELIMINARY STATEMENT

The Plaintiff, Jacques Bonhomme, appeals from a judgment in favor of Appellee

Shifty Maleau. Before trial, Mr. Bonhomme alleged that Mr. Maleau had violated §301

of the Clean Water Act (or "CWA") by allowing arsenic from mining waste piles to leach into Reedy Creek causing Mr. Bonhomme to be unable to enjoy his personal land. R. at 6. The United States District Court incorrectly granted Mr. Maleau's Motion for Summary Judgment finding that Precious Minerals International, Inc. (or PMI) is the real party in interest, not Mr. Bonhomme, and that he was not a citizen as defined by the citizen suit provision and thus had no right to bring the suit. Further, the court found that neither Ditch C-1 nor Reedy Creek were navigable waters and that the mining waste piles were not point sources. Finally, the court did not find that Mr. Maleau was a but-for cause of the arsenic in Reedy Creek. Mr. Bonhomme now appeals to the United States Appeals Court of the Twelfth District seeking reversal of the District Court's granting of the motion for summary judgment.

STATEMENT OF THE FACTS

Jacques Bonhomme, in bringing this suit, is acting as an agent of the United States through the CWA in order to protect the environment and ensure that navigable waters remain pristine for future generations. Mr. Bonhomme personally discovered that Mr. Maleau intentionally piled gold mining overburden and slag, waste rock, and dirt adjacent to Ditch C-1, which is a drainage ditch. R. at 5. As a result of Mr. Maleau's negligence, rain water collected the poisons leached by the mining waste piles and carried them into Ditch C-1 which continued to bring the arsenic into Mr. Bonhomme's culvert and then into Reedy Creek. R. at 9.

The Poisonous Mining Piles Leaching into Ditch C-1

Mr. Maleau is a profitable businessman who operates a gold mining and extraction business adjacent and dangerously close to navigable waters such as Buena

Vista River and Reedy Creek. R. at 5. The mining waste piles leach arsenic and carry the harmful poison by way of runoff rainwater into Ditch C-1. Id. Although referred to as a "ditch," Ditch C-1 maintains a substantial flow of running water, averaging one foot in depth, throughout each day of the year, aside from an annual drought, which can last from mere weeks to three months. Id. Ditch C-1 actually runs for three miles through several agricultural properties before discharging directly into Reedy Creek through a culvert that runs underneath Mr. Bonhomme's property. Id.

Reedy Creek's Pivotal Role in Interstate Commerce

Reedy Creek is a fifty-mile long river, which begins in the State of New Union and then flows through the State of Progress (hereinafter Progress). R. at 5. It supplies water for commercial and agricultural purposes and produces water for farmers to irrigate their crops, which are later sold in interstate commerce. Id. Reedy Creek also supplies water for Bounty Plaza, a service area on Interstate 250, selling gasoline and food to travelers. Id. Reedy Creek comes to an end by flowing directly into Wildman Marsh, which is home to over a million ducks and waterfowl. Id. Much of the wetlands are contained within the Wildman National Wildlife Refuge which is owned and maintained by the United States Fish and Wildlife service. R. at 6. This area attracts duck hunters from the local area, neighboring states and even international countries, which adds over twenty-five million dollars to the local economy. Id.

SUMMARY OF ARGUMENT

The District Court erred in holding that Mr. Bonhomme is not entitled to file a suit under the CWA because he is not a real party in interest nor a citizen, that Mr. Maleau's mining waste piles are not "point sources" under CWA §502(12), that Ditch C-

1 is not a navigable water, and that Mr. Maleau was not a but-for cause of the presence of arsenic and thus in violation of the CWA. The District Court correctly held that Reedy Creek is a water of the United States under CWA § 502(7) and is thus a navigable water. Mr. Bonhomme is a real party in interest who can bring suit. While PMI might also be a real party in interest, Mr. Bonhomme's litigated claims will preclude PMI from later bringing the same claims and thus protects Mr. Maleau from prejudice. Further, Mr. Bonhomme is a citizen who can bring a citizen suit because he has an interest that has been adversely affected; Mr. Bonhomme's property has been polluted with arsenic preventing him from enjoying his land and property. Moreover, Maleau's mining waste piles are point sources, which ultimately discharge pollutants into Wildman Marsh through Ditch C-1 and Reedy Creek, all of which qualify as navigable waters under the CWA. Mr. Maleau is therefore liable for this discharge of pollutants under the CWA because he is the but-for causation of the pollutants that originated in his mining waste piles.

ARGUMENT

I. Mr. Bonhomme Can Sue Mr. Maleau Under the CWA Because he is a Real Party in Interest and Although PMI May Also be a Real Party in Interest, Res Judicata Protects Mr. Maleau by Barring PMI from Bringing the Same Suit, and Despite Being a Foreign National Mr. Bonhomme Can Sue under the Broadly Defined Citizen Suit Provision of the CWA Since Arsenic Has Adversely affected His Land

The trial court erred in granting Progress and Mr. Maleau's motion to dismiss under Federal Rules of Civil Procedure (FRCP) 17 because Mr. Bonhomme is a real party in interest. Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 84 (4th Cir. 1973). A real party in interest is defined as one who actually possesses the substantive right being asserted and has a legal right to enforce the claim. 33 U.S.C. §

1331(a). The law requires that one must be a real party in interest to bring a suit in order to protect the basic principle of separation of powers by preventing people from initiating suits on behalf of entities with whom they have no connection or interest in the suit. In re Signal Int'l, LLC, 579 F.3d 478, 487 (5th Cir. 2009).

The definition has evolved so that it protects a defendant from the danger of multiple parties bringing the same suit and ensures the proper invocation of res judicata. *Id.* The Fifth Circuit indicated that, "we have defined the real party in interest as 'the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.'" Farrell Constr. Co. v. Jefferson Parish, La., 896 F.2d 136, 140 (5th Cir.1990). The purpose of this requirement "is to assure a defendant that a judgment will be final and that res judicata will protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right." *Id.* at 142; *see also* Gogolin & Stelter v. Karn's Auto Imps., Inc., 886 F.2d 100, 102 (5th Cir.1989) ("The purpose of the rule is to prevent multiple or conflicting lawsuits by persons such as assignees, executors, or third-party beneficiaries, who would not be bound by res judicata principles."). The Second Circuit has reiterated that, while the question of *in whose name* a suit must be brought is procedural, that question must be answered with reference to *substantive* state law. *See* Ocean Ships, Inc. v. Stiles, 315 F.3d 111, 116 n. 4 (2d Cir.2002); *see also* Virginia Elec. & Power co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) (holding that whether the plaintiff is entitled to enforce the asserted right is determined according to the substantive law). In this case, it is important to emulate the Forth Circuit in their substantive evaluation with two points: (1) that nonjoinder would not prejudice the

parties, and (2) any danger of double claims against the defendants could be protected. Id. at 82.

The trial court erred in granting the motion to dismiss because Mr. Bonhomme is a real party in interest who has the substantive right to bring a case and neither Mr. Maleau, nor Progress would not be prejudiced by Mr. Bonhomme's suit. Mr. Bonhomme's claims not only replicate PMI's potential claims, but also include more claims that PMI itself would not bring, which actually shields Mr. Maleau and Progress more greatly from any danger of double claims through claim preclusion because: (1) Ditch C-1 discharges through a culvert located directly on Bonhomme's property; (2) Reedy Creek flows through Bonhomme's property; (3) Bonhomme himself personally tested the water for arsenic and has personal knowledge of the toxicity levels; (4) Bonhomme is President of PMI and PMI is paying both the attorneys fees, expert witness fees, and both conducted and paid for the sampling and analyses. Thus, if PMI later decided to bring suit on similar claims it would be precluded since they would have already litigated the same claim with Mr. Bonhomme. Simply because there is another real party in interest does not mean that the current party is not a real party in interest.

Mr. Bonhomme qualifies as a citizen under section 505 of the CWA. Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 152 (4th Cir. 2000). Section 505(a) of the CWA states 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 or limitation under this chapter." 33 U.S.C. § 1365. The exact, plain and broad language of the CWA, modeled after the Clean Air Act, is what courts have effectively and continuously relied upon. Friends of the Earth, 768 F.2d 57 at 63 (2d Cir. 1985) (holding

that "Congress incorporated specific restrictions on citizen suits" and had Congress wished for a broader prohibition it would have said so) Natural Res. Def. Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974) (holding that Congress "took broad steps to facilitate the citizen's role in the enforcement of the Act" and thus should only be limited the way the Act specifies). While a pivotal case indicated that "citizen suits by aliens rest on a slim foundation" the situation was limited to "conduct occurring within the U.S." ARC Ecology v. U.S. Dep't of Air Force, 411 F.3d 1092, 1101 (9th Cir. 2005) (citing U.S.C. § 1365(a)). Section 505(g) of the CWA sets forth the statutory standing requirement for the citizen suit provision and specifically defines "citizen" as "a person or persons having an interest which is or may be adversely affected." Id. § 1365(g). An individual must also satisfy any statutory requirements for standing before bringing suit. The language chosen by Congress confers standing on a "broad category of potential plaintiffs" who "can claim some sort of injury," be it actual or threatened, economic or noneconomic. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 16, 17 (1981). The mere threat of pollution satisfies the requirement that a person has an adversely affected interest to bring a citizen suit. Friends of the Earth, 768 F.2d at 153.

Mr. Bonhomme is a citizen under the CWA because he is bringing a suit for an incident occurring in the United States and he is a person having an interest, which is being adversely affected. Mr. Bonhomme satisfies the statutory bar by showing standing for bringing the suit because he has a demonstrable interest that has been adversely affected like the Plaintiff in Middlesex who showed damage based on the pollution leaked from the sewage. In Friends of the Earth, the plaintiffs bringing the citizen suit

were adversely affected by the pollutants discharged into the water based on the potential threat of harm. One of the plaintiffs specified that the pollutants affected his enjoyment because he does not swim in the river as frequently and he does not fish as much as he used to for his family. The other plaintiff also stated that the pollutants decreased his enjoyment because he could not operate his canoe company, of which he had no faith in anymore because of the pollutants. Here, Mr. Bonhomme has surpassed even the lowest bar for his interest being adversely affected. Not only has he experienced the threat of pollutants by having his culvert flooded with arsenic, sufficiently that he is afraid to continue to use the marsh for his hunting parties. Similar to Friends of the Earth, where the plaintiffs had to decrease their fishing, swimming, and canoeing activities resulting in an ultimate loss of enjoyment, Mr. Bonhomme has had to decrease his hunting parties from eight a year to only two a year. It does not matter that this could be an effect of the declining economy as Mr. Maleau claims because Mr. Bonhomme's mere loss of enjoyment of his own personal hunting is enough to bring a citizen suit.

II. Maleau's mining waste piles are "point sources" under CWA § 502(12) because the runoff from the waste piles created by rain form discrete channels which discharge pollutants directly into Ditch C-1

The trial court erred in granting Progress and Mr. Maleau's motion to dismiss because his mining waste piles are "point sources." The term point source, as interpreted by the CWA, means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural

stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. §1365 (12), (14).

Here, Mr. Maleau is not being accused of discharging polluted agricultural stormwater from agriculture irrigation systems into the stream. Instead, Mr. Maleau is accused of dumping toxic mining waste into Ditch C-1. In Parker v. Scrap Metal Processors, Inc., the court found that storm-water runoff originated from a point source when storm-water collects in piles of industrial debris and eventually enters navigable waters. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1009 (11th Cir. 2004) (Citing Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir.1983)). The facts in Parker are very similar to those in our case, wherein the defendant's junkyard operations were found to violate the CWA after soil testing revealed that the defendant's disposal of liquid waste, without a permit, had contaminated the soil with toxic substances such as PCB's and heavy metals which the storm-water then spread from the junkyard, through the plaintiff's property, causing the plaintiff's property to erode and allowing it to flow into the unnamed stream. In light of this, the court held that the plaintiffs adequately proved the defendants violated the CWA and most importantly, the *Parker* court found that the piles of debris collected water, which then flowed into the stream, making the piles point sources.

In comparison, the waste piles in our case are formed when overburden and slag from Mr. Maleau's mining operation is dumped into piles which percolate after it rains and discharge arsenic into Ditch C-1. The waste pile Mr. Maleau creates is even more like a point source than the one found in the Parker court, wherein the court found that an

erosion gully that led downhill to the stream along with debris strewn on the property constituted a point source. Id. at 1009.

Similarly, in *Sierra Club v. Abston Const. Co.* the court noted that while natural rainfall running over polluting material did not constitute a point source by itself, it could become one if the rainfall was channeled or blocked or materials were placed in its path. Sierra Club v. Abston Const. Co., Inc., 620 F.2d 41 (5th Cir. 1980). In this case, pollutants appeared in a creek due to excess rainfall because the rainwater that entered the creek flowed through the defendant's piles of coal that were pushed aside. Because of this, the Fifth Circuit found a material issue of fact did exist with respect to whether surface runoff was collected or channeled in connection with coal mining activities. The Fifth Circuit pointed to an affidavit in the record noting both "gullies and ditches running down the sides of steep spoil piles created by Abston Construction Company" and that "sedimentation and pollutants are carried through these discernible, confined and discrete conveyances to Daniel Creek." Id. at 46.

Furthermore, the Abston court noted that the CWA "…was designed to eliminate "discharge of pollutants into the navigable waters" of the United States by 1985." Id. at 44 (quoting 33 U.S.C. § 1251(a)(1)). This Court even adopts the Abston Court's view that sediment basins constituted point sources when both rainfall and gravity caused the toxic materials to flow into and contaminate other bodies of water. Id. at 45. Even where miners merely collected rocks and other materials in a pile, it is considered a point source if it causes pollutants to discharge into a navigable water by way of "…ditches, gullies and similar conveyances." Id. Thus, although the point source definition "excludes unchanneled and uncollected surface waters," surface runoff from rainfall, when

collected or channeled by coal miners in connection with mining activities, constitutes point source pollution. *See* Consolidation Coal Co., 604 F.2d 250; *see also* Appalachian Power v. Train, 545 F.2d 1351, 1373; *see also* Abston Const., 620 F.2d at 47.

Moreover, the court's holding in *Abston* qualifies the holding in Consolidated Coal. Specifically, the petitioners in that case were concerned that "this regulation could be interpreted to apply to surface runoff that does not fit within the statutory definition of a point source." Consolidation Coal, 604 F.2d at 250. The court does not share this same concern because the regulation only applies to point sources. This means that the court is implying that stormwater runoff is not a point source. However, as the courts in Abston Const., Parker, and *Avoyelles* all established, it can be a point course when it is collected and channeled. Thus, Mr. Maleau's argument fails because, not only is it distinguished by other cases, the court in Consolidated Coal chose not to find that these particular coal waste regulations to be prohibited.

Importantly, the term point source is construed broadly in Parker, which, in holding that the waste piles were point sources, looked to Dague v. City of Burlington to interpret the term point source broadly. Parker, 386 F.3d at 1009. The court in Dague stated that "[t]he concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." Dague v. City of Burlington, 935 F.2d 1343, 1354 (2d Cir.1991), *rev'd in part on other grounds*, 505 U.S. 557, 404 U.S. 557 (1992). In Parker the court also referenced the fact that, as seen in Avoyelles Sportsman League, industrial waste piles are different from mere storm water runoff because runoff from piles collects into channels and become a point source. Parker, 386

F.3d at 1009 (citing Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

It is important to note that even the trucks bringing in the mining waste could be construed as point sources, which is effectively the same argument as the piles being point sources since they actually create the piles which ultimately end up in the waters. Avoyelles, 715 F.2d at 922. Further, even the court in Abston held that "mining scrap piles may be point sources even though material may not be carried directly to waters from the piles." Id. Thus, Mr. Maleau's waste piles are point sources and the continued disposal of the mining waste near Ditch C-1 is a direct violation of the CWA.

III. The Federal Government Has Jurisdiction to Regulate Ditch C-1 Under the Clean Water Act Because the Act Allows the Government to Regulate Pollutants in Navigable Waters

The CWA allows the government to regulate the discharge of any pollutant (including dirt or sand) into "navigable waters," which the act defines as "the waters of the United States." Under regulations issued by the United States Army Corps of Engineers (or "Army Corps"), wetlands have traditionally been covered by the CWA as long as they are adjacent to traditionally navigable waters or tributaries of such waters. Rapanos v. United States, 547 U.S. 715, 792 (2006).

Although the Court's overall definition of what constitutes a "navigable water" is not unanimous, each justice's working definition of a navigable water is satisfied within our factual framework depending on which body of water is construed as a "navigable water." Thus, the following sections represent how each Justice's holding in Rapanos, when applied to our case facts, comports with our assertion that Ditch C-1 cannot only be regulated legally, but must be regulated for policy purposes by the CWA.

- **A. The Waters and Wetlands in Wildman Marsh National Wildlife Refuge Are Navigable Waters Because, as A National Refuge, the Waters Are Federally Owned and Thus Considered Territorial Water that is Under the Federal Government's Jurisdiction**

The waters and wetlands within Wildman Marsh are considered navigable waters under federal jurisdiction because Wildman Marsh is a federal land since it is owned and maintained by the United States Fish and Wildlife Service. The United States Government maintains title to all lands deemed to be "federal land," or "public land," and based on the meaning of the term "land," this includes all actual lands, waters, and interests therein. Further, the definition of "Waters of the United States," incorporates "territorial waters," which are defined as "part of the ocean adjacent to the coast of a state that is considered to be part of the territory of that state and subject to its sovereignty." The state possesses both the jurisdictional right to regulate, police, and adjudicate the territorial waters and the proprietary right to control and exploit natural resources in those waters and exclude others from them. (http://legal-dictionary.thefreedictionary.com/Territorial+sea.). Given that Wildman National Wildlife Refuge is both owned and maintained by the United States Fish and Wildlife Service and that much of the wetland is contained in Wildman Marsh, it follows that Wildman Marsh is a federal land making it a water of the United States of which is a navigable water.

In order to better understand what types of rights the United States retains in public land, it may help to look to the Reserved Water Rights Doctrine. Under the reserved water rights doctrine, when the United States exerts control over public lands and reserves them for a federal purpose they have implicitly reserved appurtenant waters

then unappropriated to the extent needed to accomplish the overall purpose of the reservation. Cappaert v. United States, 426 U.S. 128, 138 (1976). The United States' authority to reserve unappropriated waters derives from both the Commerce Clause and the Property Clause. Id. at 138. This power is limited to extending over "only that amount of water necessary to fulfill the purpose of the reservation." Id. at 141.

Whether the reserved water rights doctrine applies to appurtenant waters not explicitly reserved depends upon the United States' overall intent and the court in U. S. v. New Mexico, held that in assessing whether the United States' intended to extend its express reservation to those waters that were both appurtenant and unappropriated, intent is inferred so long as those waters are deemed necessary to accomplish the purposes for which the land was reserved because without the power to regulate those waters the purpose of the overall reservation becomes moot. U. S. v. New Mexico, 438 U.S. 696, 702 (1978). Furthermore, the court in Akiak Native Cmty. V. U.S. E.P.A. extended the reserved water rights doctrine to apply to Indian reservations, as well as other federal enclaves including national parks, forests, monuments, military bases, and wildlife preserves, bases, and wildlife preserves. Akiak Native Cmty. v. U.S. E.P.A., 625 F.3d 1162, 1173 (9th Cir. 2010).

The waters and wetlands in Wildman Marsh are navigable waters because they are appurtenant to the federal refuge. Without the power to regulate waters that directly flow into the refuge and affect its safety the ability to protect the wildlife within Wildman Marsh is gone. Regulation of Ditch C-1 is imperative to the maintenance of the overall purpose of the regulation, which is to protect the wildlife that are being affected because of the arsenic flowing from Ditch C-1. Therefore, not only must the waters and wetlands

inside Wildman Marsh be regulated under the CWA, any and all appurtenant waters needed to accomplish the purpose of the regulation are also implicitly reserved. Thus, the CWA has authority to regulate the processes affecting Ditch C-1 because its waters directly flow into Reedy Creek, which then flow into Wildman Marsh. Given Reedy Creek's both appurtenant stature and actual physical connection with Wildman Marsh and Ditch C-1, CWA jurisdiction is extended to apply to Ditch C-1.

- **B. Even if the Waters and Wetlands in Wildman Marsh National Wildlife Refuge are Not Considered Navigable Waters, Reedy Creek is a Navigable Water because of the Reserved Water Rights Doctrine and because of the Commerce Clause**

Reedy Creek can be seen as a navigable water because of its appurtenant proximity to Wildman Marsh under the reserved water rights doctrine. In such, Reedy Creek and Ditch C-1 can be regulated by the CWA under the "significant nexus test." Furthermore, Reedy Creek can also be regulated as a navigable water under the commerce clause because of its effect upon interstate commerce.

- **i. Reedy Creek is a Navigable water because of its Close Proximity to and Physical Connection with Wildman Marsh National Wildlife Refuge**

Reedy Creek is not only appurtenant to Wildman Marsh in regards to its proximity, but it is also physically connected to Wildman Marsh. Thus, under the reserved water rights doctrine Reedy Creek is a navigable water. Since Reedy Creek effects Wildman Marsh it can be regulated by the CWA based upon the "significant nexus test." Justice Kennedy's concurrence in Rapanos, expounds upon the "significant nexus test," which was first coined in Solid Waste Agency of N. Cook Cnty. v. Army Corp of Engineers, wherein, even though the court found that the water could not be

regulated because it was isolated from the wetlands and had no effect on the protected land at issue, the court stated that a tributary of a navigable water would have a significant nexus with that water, and could be regulated. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 167 (2001). Pulling in the Army Corp's rational, Justice Kennedy's concurrence in Rapanos held that wetlands must have a significant nexus with a traditionally navigable water if they are not adjacent to the water. Rapanos, 547 U.S. at 786. The significant nexus requirement is satisfied if the wetland has a significant effect on the water quality of the navigable waters. Id. at 785, 786. Furthermore, the prevailing case law both just before and after Rapanos indicates that tributaries are navigable waters because they have enough of a connection with and an effect on larger bodies of water that the federal government has jurisdiction over these waters under the CWA.

In our case, Reedy Creek is a tributary of Wildman Marsh because its fifty miles of flowing water feed directly into and come to an end at Wildman Marsh. Furthermore, the water in Reedy Creek has a direct effect upon the water in Wildman Marsh because arsenic enters Wildman Marsh through Reedy Creek's waters. The arsenic that enters Wildman Marsh has affected the wildlife because the U.S. Fish and Wildlife Service have already detected arsenic in three Blue-winged Teal in Wildman Marsh. Thus, Reedy Creek, as a tributary that has substantial effects upon Wildman Marsh, can properly be seen as a navigable water falling under the CWA jurisdiction.

ii. Ditch C-1 is a Navigable Water Because it is a Tributary of Reedy Creek Based Upon its Actual Physical Connection with Reedy Creek

Similarly, Ditch C-1 can even be construed as a tributary of Reedy Creek because of its proximal and direct physical connection with Reedy Creek and Ditch C-1 has a substantial effect on Reedy Creek as well as Wildman Marsh because Ditch C-1's waters pollute these waters with arsenic. Thus, from Justice Kennedy's perspective, since Ditch C-1 has an effect on the water in Reedy Creek through its significant nexus it must be regulated by the CWA.

Moreover, case law also supports the notion that Ditch C-1 can correctly be construed as a tributary. In United States v. Hubenka the court found that a man made dike created to divert water from a river constituted a canal and was therefore considered to be a tributary of that river because there was a potential for pollutants to migrate from the tributary to navigable waters downstream there was a "significant nexus" between those waters and therefore the Army Corps' tributary rule was permissible. United States v. Hubenka, 438 F.3d 1026, 1034 (10th Cir. 2006). Furthermore, the court noted that congressional authority is not limited to navigable-in-fact waters but that it can apply to watersheds and can encompass actions on nonnavigable, intrastate tributaries. Id. at 1032. (citing Riverside, 474 U.S. at 133, 106 S.Ct. 4555; Oklahoma ex rel. Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 523, 525-26, 61 S. Ct. 1050, 85 L.Ed. 1487 (1941)." United States v. Hubenka, 438 F.3d 1026, 1032 (10th Cir. 2006)). *See also* United States v. Texas Pipe Line Co., 611 F.2d 345 (10th Cir. 1979) (holding that waters of unnamed tributary, which was contaminated by spill from oil pipeline, which was flowing small amount at time of spill, and which flowed, at least during times of significant rainfall, into major river, were "navigable waters" within meaning of Federal Water Pollution Control Act even if the stream, at time of the spill, was not discharging water

continuously into a river navigable in traditional sense, and thus the discharge violated the Act).

Thus, it seems clear that based on this definition Ditch C-1 could certainly count as a tributary and thus properly regulated as a navigable water under the CWA. If that is not enough, even Justice Scalia's language in response to Justice Stevens' dissent in Rapanos supports this assertion because Scalia acknowledged that a stream, which runs 290 days per year, could certainly be considered a navigable water. Rapanos, 547 U.S. at 812 n. 5. Here Ditch C-1 runs approximately three hundred to three hundred and twenty days per year, which clearly fits within Stevens' hypothetical. Furthermore, the court in Parker supported this notion that a ditch can be regulated as a navigable water when they held that, so long as they are tributaries of larger water bodies, "ditches and canals, as well as streams and creeks" are navigable waters. Parker Scrap Metal Processors, Inc., 386 F.3d 993, 1009 (11th Cir. 2004). Even Congressman Dingell stated that the CWA should apply to "all water bodies, including main streams and their tributaries." Parker, 386 F.3d at 1009 (quoting United States v. Ashland Oil & Transp. Co., 504 F.2d 1317, 1325 (6th Cir.1974)).

Ditch C-1 can be construed as a navigable water falling under the jurisdiction of the CWA because it is a tributary of Reedy Creek and its connection constitutes a significant nexus through its significant effects on Reedy Creek. Policy also compels regulation because Wildman Marsh's wetlands are home to migratory birds whom have been found to have arsenic in their system because of Ditch C-1.

- **ii. Reedy Creek is a Navigable Water Under the Commerce Clause because of its Effects Upon Interstate Commerce**

Reedy Creek can even be construed as a navigable water because it is an interstate water and effects interstate commerce. Even the Environmental Protection Agency's (or "EPA") own regulations include interstate waters within definition of the "waters of the United States." 40 CFR 122.2. Although this assertion breaks with Justice Scalia's opinion in Rapanos, it does not violate the holding of the court because the Rapanos holding came from a "plurality" opinion, and was thus not a majority opinion. This means Scalia's holding in Rapanos is not overtly controlling because, as the court held in Marks, when a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ." Marks v. United States, 430 U.S. 188, 193 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)). Justice Kennedy's concurrence must be followed because it narrowly tailored the plurality's holding. Furthermore, in Printz v. United States, it was established that the rule in a plurality opinion comes from narrowest ground upon which five judges agree. *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). Working on a case-by-case basis, Justice Kennedy's concurrence in Rapanos is the holding the plurality must follow because, as a functionalist approach, it is the most narrow.

Further, the court in Rapanos did not consider nor did they reject the arguments from both Mr. Bonhomme and Progress, that instead of just being applicable under the first prong of the analysis undertaken by the court in United States v. Lopez analysis, a waterway can also fall within Commerce Clause jurisdiction under either the second or third prong of the Lopez analysis because the regulated activity is economic in nature.

United States v. Lopez, 514 U.S. 549 (1995). In United States v. Lopez, the court held that Congress exceeded its power to regulate because possessing a gun at school is not an economic activity that might have substantial effects on interstate commerce. Id. From this holding, the court in Lopez recognized that Congress could assert jurisdiction over commerce in any of three ways. First, Congress has the power to "regulate the use of the channels of interstate commerce." Id. at 558. Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." Id. Third, Congress can regulate activities that have a "substantial relation to interstate commerce" if they "substantially affect interstate commerce." Id. at 558, 559. In Lopez, the court felt that upholding this law where the underlying activity regulated had no effect on interstate commerce would put them down the slippery slope towards inevitable federal regulation in an area where states have historically been sovereign. Id. at 577. Moreover, the Supreme Court continued to follow its Lopez rational and in United States v. Morrison, struck down a portion of the Violence Against Women Act of 1994, which provided a federal civil remedy for the victims of gender-motivated violence as applied to a university student who filed a civil suit for rape, because the underlying activity the act sought to regulate was not economic in nature. United States v. Morrison, 529 U.S. 598, 627 (2000).

In comparison with the facts from Lopez and Morrison, regulation of interstate waters is economic in nature. Such regulation by definition is going to affect other states, including their resources, which means the power to regulate within this area is not a traditionally held State power. This historically important division between State and

Federal power is at the heart of our argument and it is not violated because, as the court in Hubenka pointed out, unlike the Migratory Bird Rule in *SWANCC* the tributary rule does not invoke the outer limits of Congress' power, nor does it raise constitutional questions. Hubenka, 438 F.3d at 1032. Here we are not invoking the outer limits of Congress' power, instead we are merely requesting that the proper division between the State and Federal government be honored, and in this light, the court must apply the tributary rule. In our case, the water use constitutes an economic activity because Ditch C-1 not only supplies water to the truck stop but selling water to profit off of customers is an economic activity that is part of a broad economic regulatory scheme because Americans spend thirty eight billion four hundred fifty eight million dollars on water each year.[1]

Therefore, the underlying activity sought to be regulated in this case is different from Lopez and Morrison because it is an economic activity that is not only an instrumentality of interstate commerce, but relates to and effects interstate commerce. Further, even a non-economic activity can constitute interstate commerce under the Commerce Clause if it is a component of a broad economic regulatory scheme. *See* Gonzales v. Raich, 545 U.S. 1, 43 (2005) (holding that producing and consuming marijuana is an economic activity which can be regulated by the commerce clause). Regardless of whether water in Reedy Creek is actually commerce in and of itself, it can still be regulated under the CWA because the federal government has broad regulatory

[1] *See* Blake Ellis, *Water Bills Expected to Triple in Some Parts of U.S.*, CNN Money (Feb. 28, 2012, 8:11 AM), http://money.cnn.com/2012/02/27/pf/water_bills/ (stating that average American household's water bill costs $335 per year); *see also* U.S. Statistics 2013, http://nlihc.org/sites/default/files/oor/2013_OOR_US_Statistics.pdf (stating that the number of U.S. households is 114,761,359). Total amount spent on water in the United States calculated by multiplying U.S. households by $335.

authority and can regulate anything that is rationally related to commerce. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012), wherein the court stated that the government has the power to regulate anything under the commerce clause that is rationally related to regulating commerce and upheld a universal healthcare mandate requiring all citizens to purchase healthcare because it was a valid use of Congress' power to enforce as a tax under the commerce clause. Moreover, the principal purpose for the creation of the CWA was to protect navigable waters and the water from Ditch C-1 flows directly into a navigable water and is inherently involved in and affects interstate commerce. Thus, under the CWA Congress has the full power to regulate Reedy Creek as well as other waters adjacent in proximity that affect its overall water quality.

o C. Ditch C-1 is a Navigable Water Under the Commerce Clause because of its Effects Upon Interstate Commerce

Similarly, following the constitutional analysis in the preceding section, Ditch C-1 can be considered a navigable water because of its effects upon interstate commerce. Ditch C-1 is a component of a broad economic regulatory scheme because it was originally constructed for agricultural purposes and is still used for agricultural purposes to date. *See* Raich, 545 U.S. 1 at 43 (2005) (holding that producing and consuming marijuana is an economic activity which can be regulated by the commerce clause). Regulation of Ditch C-1 is fully within the Congress's power under the commerce clause because it has an effect on interstate commerce and it doesn't exceed Congress power to regulate something that would typically fall under the States' regulatory power.

i. The Effects Ditch C-1 has upon Interstate Commerce are Even More Apparent when Construed as a Canal Instead of a Mere Ditch

The Army Corp's guidance, which came after Rapanos suggests that if there is a permanent flow of water then it is not just a ditch. Thus, even if we do follow Justice Scalia's opinion in Rapanos, that a ditch can not also be a navigable water, then Ditch C-1 can accurately be construed as a canal. A similar situation was seen in S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, where the court construed the mere collection of water flowing from ground sources of urban, agricultural, and residential runoff to be a canal. S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 100, 124 S. Ct. 1537, 1539, 158 L. Ed. 2d 264 (2004). Similarly, the court in Hubenka found that a dike was a tributary because of its potential to contaminate the water in the river down stream. Hubenka, 438 F.3d at 1034.

In comparison with our facts, Ditch C-1 is three miles long and has water most of the year averaging one foot in depth. Additionally, in Rapanos, the plurality states, "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from "navigable waters," by including them in the definition of 'point source.'" Rapanos, 547 U.S. at 735. 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." 33 U.S.C. § 1362(14). It also defines "'discharge of a pollutant'" as "any addition of any pollutant *to* navigable waters *from* any point source." § 1362(12)(A) (emphasis added).

The definitions thus conceive of point sources and navigable waters as separate and distinct categories. This gives weight to our contention that Ditch C-1 is actually a

canal. Based both on the definition that point sources are generally intermittent, and Justica Scalia's definition in Rapanos, that ditches are more like point sources, as well as his definition of navigable waters as "relatively permanent, standing or flowing bodies of water" 547 U.S. 733., Ditch C-1 qualifies under Scalia's most stringent test while still allowing for the possibility of it being a moving stream only two hundred and ninety days of the year. Furthermore, the court in United States v. Eidson, stated that if ditches, canals, streams and creeks are tributaries of a larger water body then they are themselves navigable waters. United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir.1997).

Although the goal of the CWA is to prevent pollution in totality, the CWA's permit system was created because Congress realized that the CWA could not eliminate every bit of pollution for the waters because such would threaten important industries. However, the permit system is an important check on pollution and allows Congress the ability to at least keep track of companies pollution while still allowing very important industries like the coal industry to keep operating. A permit must be obtained where activities create pollution. The CWA's small allowance of pollution where economic needs require such must be viewed together with the CWA's national goal of eliminating the discharge of pollutants into navigable waters by 1985. 33 U.S.C § 1251. Thus, Mr. Maleau must obtain a permit if he continues polluting Ditch C-1.

Even acknowledging the fact that the CWA made explicit provisions for the States to retain some power, acknowledging Mr. Maleau's illegal polluting would not violate any of these provisions, nor would it violate the historical separation of power between the State and Federal government. *See* 33 U.S.C. § 1251. Our general request that Mr. Maleau's polluting be regulated doesn't fancy Federal action over State action or

the alternative. It is our position that the State should retain control of these waters and allow Mr. Maleau to apply for a permit to continue his economic activities that cause the pollution of these waters.

o D. Alternatively, Ditch C-1 Can be Seen as a Point Source Because it Discharges Arsenic into Reedy Creek

In the event that the above arguments fail, then Ditch C-1 must be construed as a point source. Such upstream, intermittently flowing streams or channels constitute point sources under the CWA and the Definition of a point source includes any ditch, stream, channel, or conduit. The plurality in Rapanos expressly endorsed the CWA's jurisdiction extending to cover intermittent streams wherein they stated such "stream channel's" were a point source. Rapanos, 547 U.S. at 743 (recognizing that the CWA prohibits even indirect point source discharges and citing favorably to cases in which found that upstream, intermittently flowing channels themselves constitute point sources' under the Act.).

The Parker court even found that a mere erosion gully which led downhill to the stream constituted a point source in and of itself. Parker, 386 F.3d at 1009. Further, the Rapanos plurality cited approvingly to a number of cases that applied this theory of intermittent streams as point sources. Rapanos, 547 U.S. at 743, 744 (citing United States v. Ortiz *427 F.3d 1278, 1281 (10th Cir. 2005)* (where the court found that a storm drain which carried flushed chemicals from a toilet to the Colorado river was a point source*);* Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (2d Cir. 1991), rev'd on other grounds, 505 U.S. 557(1992)* (finding that a culvert connecting two bodies of navigable water was a point source)).

IV. Mr. Maleau is the But-For Cause of the Poisons Ultimately Flowing Into Reedy Creek because His Mining Piles are the Point Source and He is Responsible for Releasing Arsenic Into Navigable Waters and is Liable for the Damages to Reedy Creek

Mr. Maleau is the but-for cause for the arsenic being introduced to the environment and has thus violated the CWA. Mr. Maleau is liable for damaging Reedy Creek so long as it is reasonably likely that Mr. Maleau's actions caused the pollutants to discharge into navigable waters. Abston, 620 F.2d at 44 (holding that when rock and other materials were collected and then rainwater caused discharge to leak into a creek, the company was liable for the ultimate deposit into navigable waters). Even if there is "natural" discharge caused by rain or runoff water, if the person reasonable for collecting the materials and placing it in a position that eventually causes the pollution of navigable waters is liable. Id. There is a strong distinction between the aiding of pollutants reaching navigable waters and causing the discharge of pollutants. United States v. Lucas, 516 F.3d 316, 337 (5th Cir. 2008) (holding that while it was not defendant's "personal septic waste" that entered federal wetlands nor was it defendant who directly used the system and discharge the pollutants, defendant was still ultimately liable for the causing the pollutants). The owner of the land from where the pollutants originated violates the CWA and is liable. Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 626 (D.R.I. 1990) (granting summary judgment against the corporate owner of the land from where the failed sewage treatment was and where the pollutants were originally released eventually making its way to navigable waters). The water of the United States is one large body and adding polluted waters to pristine water without any addition of pollutants is the legal basis of the Unitary Waters Theory. Friends of Everglades v. S. Florida Water Mgmt. Dist., 570 F.3d 1210, 1217 (11th Cir. 2009) (holding that it was

unnecessary to obtain a pollution discharge permit before pumping polluted canal water into Lake Okeechobee because it was not adding any pollutants and the canal water and the water in the lake were considered the same body of water as a navigable water of the United States).

Mr. Maleau is the but-for cause of the pollutants that eventually entered Reedy Creek and as a result is in violation of the CWA. In Abston, the court found liability based on the simple fact that the mining companies actions caused the piles creation which were the source of the pollution to begin with. Abston, 620 F.2d at 44. This case is exactly on point with what has occurred in this matter. Mr. Maleau's mining operation created the mining waste piles where arsenic accumulated. Although Mr. Maleau may argue that he can not control the runoff that is formed by rainwater which channeled the mining pollutants into Ditch C-1 and eventually into Reedy Creek, such argument will fail because the Abston court has effectively addressed this by indicating that a defendant is liable for depositing waste eventually causes pollution. Thus, but for Mr. Maleau's pile of mining waste that allowed the accumulation of pollution to eventually leach out and drain into Ditch C-1 there would be no violation.

While Mr. Bonhomme owns the culvert that directly channels the pollutants into Reedy Creek, he is likened to the innocent bystanders in *Lucas* who only had a connection to the pollution because that pollution flowed through the land they owned. In *Lucas*, the lot owners used the septic system and actively used the system, which flowed through their lot and ultimately brought the pollution into navigable waters. Lucas, 516 F.3d at 322. Similarly, Mr. Bonhomme did nothing except own the culvert through which the water flowed. Thus, not only has this Court found liability on the part

of the party whom created the source of the pollution, but in Lucas, has gone so far as to emphasize the importance of the creation of the pollution in Abston. The Unitary Waters Theory supported in the 2009 decision in Friends of Everglades supports that even if Mr. Bonhomme actively took polluted water from his culvert and placed it into the pristine waters of Reedy Creek, this action would still be legal. Like Friends of Everglades, Mr. Bonhomme is simply moving polluted waters from Ditch C-1, a navigable water, to Reedy Creek. He is not adding pollutants and thus cannot be liable for violation of the CWA.

Conclusion

We respectfully request this court find Mr. Maleau's dumping of mining waste without a permit to be a direct violation of the CWA. The arsenic that Mr. Maleau has created has not only entered Ditch C-1 and Reedy Creek, but has infiltrated Wildman Marsh where it has already been found within the protected reserve's wildlife. The CWA asserts a right under its citizen suit provision for those vigilant people such as Mr. Bonhomme to act as an enforcer of the CWA in order to better protect the environment. Not only does Mr. Bonhomme have the right to bring suit under the citizen suit provision, but he is also a valid party in interest. Furthermore, the CWA confers jurisdiction over the government to regulate the discharge of pollutants into navigable waters and from our facts, depending on which body of water is construed as a navigable water, Ditch C-1 must be regulated in order to uphold the law and policy behind the overall creation of the CWA. Moreover, even if Mr. Maleau is found to be the but-for-cause of the pollution entering the navigable waters but is not in violation of the CWA, Mr. Bonhomme cannot be held liable for any tortious conduct in relation to the pollution

of navigable waters by the simple fact that he has not added anything to the hypothetical pot. Mr. Bonhomme has done nothing but sit by and watch his beloved waters and reserve become polluted with a toxic substance. In conclusion, we only ask that Mr. Maleau be properly held accountable for his tortious conduct and be prevented from discharging toxic pollutants into Ditch C-1.