Team No. 23

D.C. No. 155-CV-2012
D.C. No. 165-CV-2012

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Jacques Bonhomme,
Plaintiff-Appellant, Cross-Appellee,
v.
Shifty Maleau,
Defendant-Appellant, Cross-Appellee

D.C. No. 155-CV-2012

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State of Progress,
Plaintiff-Appellant, Cross-Appellee,
and
Shifty Maleau,
Intervenor-Plaintiff-Appellant, Cross-Appellee,
v.
Jacques Bonhomme,
Defendant-Appellant, Cross-Appellee

D.C. No. 165-CV-2012

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF PROGRESS
Brief for JACQUES BONHOMME, Plaintiff-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

Bonhomme sued Maleau in the United States District Court for the District of Progress for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2012) under the jurisdiction of the citizen suit provision of the statute, CWA § 505, 33 U.S.C. § 1365 (2012). Later, the State of Progress filed a suit against Bonhomme in the same court under the same section of the CWA. Because the facts and law were the same, the District Court consolidated the actions.

The District Court dismissed Bonhomme's suit while denying his motion to dismiss. The District Court's Order is a final decision, thus The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction under 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Under Federal Rule of Procedure 17 is Bonhomme is the real party in interest in a citizen suit against Maleau for violating the Clean Water Act 33 U.S.C. §1311(a) (2012) where Bonhomme has standing under 33 U.S.C. § 1365(a) (2012) and consulted a third party with no direct financial stake for testing and expertise?

2. Under the Citizen Suit Provision of the Clean Water Act § 505(a) does Bonhomme have standing to sue where he owns property adjoining Wildman Marsh, enjoys hunting in the marsh for business and pleasure, and Maleau's mining by product piles have contaminated the marsh with arsenic?

3. Under the Clean Water Act, can Maleau's overburden piles be considered point sources under the definition stated in 33 U.S.C. §1362(14)?

4. Under the Clean Water Act § 502(7), 33 U.S.C. § 1362(7), (14), did the District Court err in finding that Ditch C-1 is not a navigable water of the United States where Ditch C-1 is a tributary of Reedy Creek, a navigable water of the United States, where the Ditch is primarily used for agricultural purposes and almost always contains running water?

5. Under the Clean Water Act § 502(7), (12), 33 U.S.C. § 1362(7), (12), did the District Court properly find that Reedy Creek is a navigable water/water of the United States where Reedy Creek affects interstate commerce and where the Creek necessarily flows into Wildman Marsh, a fragile wetland ecosystem, which is also affected by interstate commerce?

6. Under the Clean Water Act, does it matter who is the but-for cause of a pollutant entering a navigable body of water or is the "addition" under 33 U.S.C. §1362(12) simply the transfer of previously contaminated water into an uncontaminated navigable body of water?

STATEMENT OF THE CASE

This is an appeal from the United States District Court for the District of Progress. Jacques Bonhomme (Bonhomme), the State of Progress (Progress), and Shifty Maleau (Maleau) each filed a Notice of Appeal. The District Court ruled against Bonhomme on all issues except the issue regarding Reedy Creek's navigability. The District Court held that because Bonhomme was not a proper plaintiff his suit must be dismissed. Bonhomme appeals the decision of the lower court with respect to its holding that: (1) Bonhomme is not a real party in interest contrary to Federal Rule of Civil Procedure 17 because he is a front for Precious Minerals International; (2) Bonhomme is not a "citizen" entitled to file a citizen suit under Clean Water Act (CWA) § 505, 33 U.S.C. § 1365, because he is a foreign national; (3) Maleau's mining waste piles are not "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1365(12), (14), because piles are not conveyances; (4) Ditch C-1 is not a navigable water because it is a point source; and (5) Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culver – a "point source" –because Maleau first adds the pollutants to navigable water via Ditch C-1. Maleau takes issue with the lower court's holding that Reedy Creek is a water of the United States under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12). The State of Progress has appealed and sided with Bonhomme regarding the issue that Ditch C-1 is not a water of the United States. The order and opinion for the United States District Court for the District of Progress was entered on July 23, 2012, and may be found at R. at 4. The order for the United States Court of Appeals for the Twelfth Circuit was entered on September 14th, 2013, and may be found at R. at 1.

STATEMENT OF FACTS

Shifty Maleau operates an open pit gold mining and extraction operation in Lincoln County, Progress adjacent to the Buena Vista River. R. at 5. These mining operations require Clean Water Act (CWA) permits and there is no evidence that Maleau is in violation of these permits. *Id.* Maleau transports the overburden and slag from the mining operation to his property in Jefferson County, Progress and places it in piles adjacent to Ditch C-1. *Id.* Maleau's property is not used for agricultural purposes. *Id.* When it rains, rainwater flows down the piles and percolates through the piles, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1. *Id.* The rainwater leaches and carries arsenic from the piles into Ditch C-1. *Id.* Ditch C-1 begins before Maleau's property and continues onto Bonhomme's property where it discharges through a culvert into Reedy Creek. *Id.*

Before bringing this suit, Bonhomme tested the water in Ditch C-1 upstream and downstream of Maleau's property as well as the water in Reedy Creek upstream and downstream of the outflow from Ditch C-1. R. at 6. Ditch C-1 had no detectable traces of arsenic upstream of Maleau's property while high concentrations were found downstream of Maleau's property. *Id.* In Reedy Creek, there is no detectable trace of arsenic upstream from the culvert but there are significant concentrations of arsenic below the culvert. *Id.* Arsenic is commonly associated with gold mining and extraction. *Id.* The alleged pattern of arsenic concentration strongly suggests that the arsenic originates from Maleau's mining waste piles. *Id.* The alleged facts are assumed to be true at the motion to dismiss stage. *Id.*

Reedy Creek begins in the State of New Union and is approximately fifty miles long. R. at 5. In the State of New Union, Reedy Creek is utilized as a water supply source for Bounty Plaza, a service area on Interstate 250 ("I-250"), and a federally funded interstate highway where

gasoline and food is sold. *Id.* Farmers in both the State of Progress and New Union depend on Reedy Creek for agricultural purposes. *Id.* Farmers divert the water primarily for irrigation. *Id.* They then sell their agricultural products in interstate commerce. *Id.* Once Reedy Creek enters the State of Progress, it then flows through Bonhomme's property and continues to flow for several miles until it eventually ends in Wildman Marsh. *Id.* Wildman Marsh is an extensive wetland and serves as an essential stopping point for millions of ducks and other waterfowl during their twice annual migrations from the Arctic to the tropics and back. R. at 5-6. This area is a major destination for duck hunters from several neighboring states, including Progress and New Union. R. at 6. Moreover, the area attracts hunters from all over the nation in addition to some foreign countries. *Id.* Hunting in this area adds over $25 million to the local economy as a result of these interstate hunters. *Id.* Bonhomme has a hunting lodge on his property, which he uses both personally and for business. *Id.* Since discovering the arsenic contamination, Bonhomme has had to dramatically curtail both his business use and personal enjoyment of this property, as he fears the birds may also be carrying arsenic. *Id.*

Bonhomme, a French Citizen, is the president of a gold mining company, PMI, which is not a party to the action. *Id.* The majority of PMI's mines are overseas. *Id.* at 7. PMI assisted Bonhomme in water sampling and analysis and in obtaining counsel. *Id.*

STANDARD OF REVIEW

The District Court dismissed Bonhomme's case because he was not the proper plaintiff and lacked standing. R. at 10. A Court reviews the dismissal of a claim for lack of standing *de novo*. *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1262 (11th Cir. 1999); *Smith v. Shook*, 237 F.3d 1322, 1324 (11th Cir. 2001). The Court also denied Bonhomme's motion to dismiss because the State of Progress adequately stated a cause of

action. *Id.* This Court also reviews the dismissal of Bonhomme's claims *de novo*. *Harry v. Marchant*, 237 F.3d 1315, 1317 (11th Cir. 2001).

SUMMARY OF THE ARGUMENT

First, the District Court erred in holding that Bonhomme is not the real party in interest, because Bonhomme has a right to action under substantive law that he is exercising within the spirit and substance of Federal Rule of Civil Procedure 17. Federal Rule of Civil Procedure 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." Bonhomme does not invoke the concern underlying the rule, that the defendant could later be subject to suit from another party who had a direct financial stake in the transaction at issue. Bonhomme is simply using his connections at PMI to utilize their considerable expertise in assessing and protecting environmental sanctity of Bonhomme's hunting property. Bonhomme satisfies Fed. R. Civ. P. 17 by having a right to sue under the Clean Water Act.

Second, the District Court erred in determining that Bonhomme lacked standing to maintain his action under the citizen suit provision of the Clean Water Act because he is a foreign citizen. Foreign citizens and corporations are routinely allowed standing in United States Courts. Bonhomme satisfies the controlling test for standing in environmental suits, found in *Lujan v. Defenders of Wildlife,* because Maleau's pilings of mining byproduct have led to arsenic contamination in Wildman Marsh, he has had to curtail his hunting activities on his adjoining property, and because a favorable decision would redress the injury by curtailing the arsenic contamination in the marsh. Bonhomme's cause also falls within the purpose and spirit of the legislation. The Clean Water Act's purpose is to protect the nation's waters and eliminate pollution to the benefit of all. The language of other pieces of environmental legislation also supports a broad reading of the capacity to sue.

Third, the District Court erred in finding the overburden piles did not constitute a point source. The definition of a point source can be found at 33 U.S.C. §1362(14). This definition was intended to be broadly interpreted as the goal of the Clean Water Act (CWA) was to regulate to the fullest extent possible the sources discharging pollutants into navigable waters. *Sierra Club v. Abston* stated that a point source may be present where miners design spoil piles from overburden such that erosion due to rainwater results in a discharge of pollutants into a navigable body of water. The court stated that gravity flow resulting in a discharge may be a point source. It was also concluded that intent is not necessary as long as the result is reasonably likely to occur. The court in *United States v. Earth Sciences* held that as long as the source of the pollutants is identifiable it may be found to be a point source.

A discharge from a point source does not require an affirmative action or an intent to pollute in order to impose liability. All that is required is that the source can be determined, it is owned by the challenged party, and it either channels or collects surface water, even by gravitation forces rather than by design. The definition of a point source excludes unchanneled or uncollected surface waters but this channeling can be due to gravity and erosion rather than an intentional channeling.

Regarding the fourth issue, because the term waters of the United States was intended to be interpreted in the broadest possible sense, the District Court for the District of Progress erred in holding that Ditch C-1 was not a navigable water of the United States. Holding that Ditch C-1 is a navigable water of the United States is consistent with over 200 years of water law precedent as well as Congress' intent in passing the Clean Water Act in 1972.

Not only have traditional waters like rivers been held to be navigable but intermittent streams, tributaries, and drainage ditches have also fallen within the meaning of navigability.

Because precedent regarding navigability is ambiguous, courts, including this one, should defer to the agency in order to more appropriately construe the term in a manner that will remain consistent with the agency's definition. Moreover, when Congress passed the Clean Water Act (CWA) in 1972 intended the definition of navigable to remain as broad as constitutionally possible. The language of Clean Water Act's predecessor, the River and Harbor Appropriation Act ("RHA") lends support to the proposition that Congress intended for non-navigable tributaries, like Ditch C-1, to be included within their definition of navigable waters.

Finally, the Supreme Court's decision in *Rapanos v. U.S.* is an improper analytic framework for determining navigability because it is also inconsistent with the main purposes and goals of the CWA. The main goals of the 1972 CWA ensure that the physical, chemical, and biological integrity of the Nation's waters are maintained. To achieve such a goal, Congress intended the broadest possible definition to apply to navigable waters. Such a goal cannot be achieved under the *Rapanos* analysis because this analysis refuses to recognize the necessary and integrated nature of the hydrological cycle and the need to protect water as a resource at every stage. For these reasons this Court should reverse the holdings of the lower court and find that Ditch C-1 is a navigable water of the United States.

Regarding the fifth issue, the District Court was correct in holding that Reedy Creek is a navigable water of the United States. Reedy Creek is sufficiently affected by interstate commerce for the purposes of the CWA. While the CWA does not define waters of the United States, the EPA and the Corps have done so in subsequent regulations. Their definition includes waters that could be affected by interstate commerce as part of "waters of the United States."

Reedy Creek initially serves as a water supply for the State of New Union along I-250, which already categorizes the Creek as a navigable water because of the function it performs in

interstate commerce along I-250. New Union sells gasoline and food along the interstate highway and utilizes Reedy Creek in the process. Reedy Creek is thus affected by interstate commerce. Also, both New Union and Progress farmers use Reedy Creek as a source of water for irrigation and agricultural purposes after which their agricultural products then are sold in interstate commerce. Reedy Creek is therefore a water of the United States significantly affected by interstate commerce.

Further, the Corps has adopted criteria which includes waters used as habitats for migratory birds in order to constitute a finding of waters having sufficient ties to interstate commerce. The Wildman Marsh, an extensive and fragile ecosystem, serves as the terminus for Reedy Creek, as well as a nationally and internationally recognized hunting destination for thousands of individuals. The Marsh serves as an essential stopover for millions of ducks during their migration route and adds over $25 million dollars to the local economy. Because Reedy Creek is necessarily connected and flows into the Marsh, Reedy Creek is sufficiently affected by interstate commerce for the purposes of the CWA.

Finally, this Court should affirm the finding that Reedy Creek is a navigable water of waterway because such a finding protects downstream states, like Progress, from out-of-state pollution they may not be able to regulate. Since Reedy Creek begins in the State of New Union and then continues to flow down into Progress, it is precisely because of the geographic nature of the Creek's flow that the CWA was enacted. It is crucial that the EPA be able to assert jurisdiction over creeks like Reedy Creek due to downstream pollution controls which the downstream state may be unable to regulate. Moreover, because Reedy Creek then flows into the fragile ecosystem of Wildman Marsh, such regulation over Reedy is imperative to maintain the integrity of the wetland.

Regarding the sixth issue, the District Court erred in finding Bonhomme violated the CWA by adding arsenic into Reedy Creek through the culvert on his property. The true point sources are the overburden piles on Maleau's property. The unitary waters theory states that it does not constitute an addition of pollutants to move existing pollutants from one navigable body of water to another. An addition occurs only when the pollutants first enter navigable waters from a point source. Ditch C-1 is a navigable body of water as it is a tributary of Reedy Creek, which has already been found to be navigable by the District Court. Therefore, the point sources here are the overburden piles as they are the initial source of the pollutant and the culvert simply transfers the pollutants from one body of navigable water to another. Nothing is added through the culvert and the water is not exposed to any new pollutants or activity by being carried through the culvert.

While the unitary waters theory has been rejected in most Circuit Courts that have faced it, nearly all of those decisions came before the EPA determination to apply the theory. As such, this is a new issue before the courts and the prior decisions do not supply accurate precedent. *Friends of Everglades v. South Fla. Water Mgmt. Dist.* is a 2009 decision that looks at the EPA regulation and upholds it as valid. The CWA is clearly ambiguous based on the arguments of opposing parties and, therefore, the regulation is given *Chevron* deference. The court found the EPA regulation to be a reasonable construction of an ambiguous statute and as such it will be given deference in the courts.

An alternative argument is that the culvert connecting Ditch C-1 to Reedy Creek should not be considered a point source. There are no binding precedents on this court establishing culverts as point sources. *Dague v. Burlington* is a Second Circuit case that cites a pair of District Courts and the Tenth Circuit's dicta to determine a culvert should fit under the definition of a

point source. Culverts do not have the functional purpose of adding pollutants to the water they carry. They simply transport water from one location to another. At best, they are an indirect medium for transferring pollutants between bodies of water. With the EPA's unitary waters theory in mind, culverts do not appear to be the type of fixture the CWA intended to regulate.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT BONHOMME IS NOT THE REAL PARTY IN INTEREST, BECAUSE BONHOMME HAS A RIGHT UNDER SUBSTANTIVE LAW THAT HE IS EXERCISING WITHIN THE SPIRIT AND SUBSTANCE OF FEDERAL RULE OF CIVIL PROCEDURE RULE 17.

Federal Rule of Civil Procedure 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The real party in interest rule broadens the universe of potential plaintiffs when compared to common law, where pleading requirements often frustrated injured parties suits if the would-be plaintiff did not hold legal title to the right asserted. *See Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 279 (2008). The rule also protects defendants from excess litigation. "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." *Gogolin & Stelter v. Karn's Auto Imports, Inc.*, 886 F.2d 100, 102 (5th Cir. 1989) (cert. denied). However, the application of the rule is straightforward. "The real test is whether the named plaintiffs have a right under the substantive law to maintain the action." *Rackley v. Bd. of Trustees of Orangeburg Reg'l Hosp.*, 35 F.R.D. 516, 517 (E.D.S.C. 1964).

This suit does not contain any of the harms Fed. R. Civ. P. 17 and its jurisprudence were meant to prevent. It is true that PMI could reap an ancillary benefit from a finding for Bonhomme in this action. However, "merely because one may benefit by the result in litigation

does not make him 'a real party in interest.'" *Armour Pharmaceutical Co. v. Home Ins. Co.*, 60 F.R.D. 592, 594 (N.D. Ill. 1973) (holding that the insured was the real party in interest where the insurer had a less than complete subrogation interest). *Sprint* was contested because the petitioners were collections firms who had aggregated claims against long-distance carriers as assignees of over one thousand pay-phone operators. 554 U.S. at 269. Similarly, the defendant bank in *Gogolin & Stelter* argued that the plaintiff was not the proper assignee to the claim where both Gogolin & Stelter and a German firm, Stelter G.m.b.H, were involved in an auto export deal. 886 F.2d at 101. All three of these cases illustrate the concern behind the rule: that the defendant could later be subject to suit from another party who had a direct financial stake in the transaction at issue. In contrast, Bonhomme is not an assignee of PMI, and PMI neither would nor could receive a portion of any damages.

Instead, PMI's role is, most broadly construed, similar to that of the NAACP in *Rackley*. There, the NAACP financed a suit by an African American mother and child who alleged breaches of due process and equal protection. While the defendant argued that the NAACP, "instigated this suit, is financing it and attempting to use claimed constitutional rights of the plaintiffs to carry out its own purpose to integrate the people of the two races," the court held that the named plaintiff was the real party in interest. 35 F.R.D. at 517. Unlike the relationship in *Rackley,* Bonhomme does have preexisting connections to PMI, a competitor to Maleau's concern. But, the majority of PMI's mining activity is overseas. Bonhomme, rather than doing the bidding of PMI, is simply using his connections at PMI because like the NAACP in *Rackley*, PMI has considerable expertise to help the plaintiff's personal concern, here, about the environmental sanctity of his hunting property.

Even if Bonhomme was bringing the action partly on behalf of PMI, precedent still suggests he could rightly refuse to join PMI in the action. *Shumate v. Wahlers*, 19 F.R.D. 173, 176 (D. Mich. 1956) (holding that an employer defendant in a worker's compensation suit could not compel joinder of compensation carrier which had paid employee compensation for same injury, nor obtain order of dismissal for failure of employee to join carrier). But, as stated in *Rackley*, 35 F.R.D. at 517, Bonhomme can only satisfy Fed. R. Civ. P 17 by having a right under substantive law, as he does here under the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 [hereinafter "CWA"] § 505(a), 33 U.S.C. § 1365(a) (2012). Thus, the District Court's holding on Issue 1 should be reversed.

II. THE DISTRICT COURT ERRED IN HOLDING THAT BONHOMME LACKED STANDING TO MAINTAIN HIS ACTION UNDER THE CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT.

The district court held that Bonhomme lacks the capacity to bring a citizen suit under the Clean Water Act because he is a French citizen and not a citizen of the United States. R. at 8. Foreign citizens have the capacity to sue United States citizens in U.S. courts under Article III § 2 of the United States Constitution which extends the judicial power of the national courts to "all Cases … between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art, III. § 2. Federal Courts have diversity jurisdiction over suits between foreign citizens and U.S. citizens under Sections 1332(a)(2) and 1332(a)(3) of the Judicial Code of the United States. 28 U.S.C. § 1332(a)(2-3) (2012). Consequently, foreign citizens and corporations are routinely allowed standing in United States Courts. *Ahcom, Ltd. v. Smeding*, 623 F.3d 1248, 1249 (9th Cir. 2010); *Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 2 (1st Cir. 2012); *MAT Movies & Television Prods. GMBH & Co. Project IV KG v. RHI Entm't Distribution, LLC*, 752 F. Supp. 2d 373, 374 (S.D.N.Y. 2010).

Suits by foreign citizens invoke specific concerns. For example, there is a presumption that federal legislation is not intended to have an extraterritorial effect. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010) (invoking a "canon or presumption that federal law is not meant to have extraterritorial effect is applicable in all cases, whenever party seeks to give any federal legislation extraterritorial effect," where plaintiffs were suing regarding activities on foreign exchanges). Furthermore, the Supreme Court has expressed concern about international forum shopping.

> "If possibility of change in law were given substantial weight in deciding whether to dismiss case on ground of forum non conveniens, great practical problems could result in that American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive, increasing flow into American courts of litigation by foreign plaintiffs against American manufacturers." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251-252 (1981).

In contrast, Bonhomme's suit not only avoids those concerns, but satisfies the legislative purpose of the Clean Water Act.

A. Bonhomme has standing under the Clean Water Act citizen suit provision because his cause falls within the purpose and spirit of the legislation.

The purpose of the Clean Water Act is plain.

> "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter-- (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." CWA § 101, 33 U.S.C. § 1251(a) (2012).

To further that purpose, the CWA, like many other pieces of environmental legislation, authorizes suits by "any citizen." CWA § 505(a), 33 U.S.C. § 1365(a) (2012). The CWA defines a "citizen" as "a person or persons having an interest which is or may be adversely affected." CWA § 505(g), 33 U.S.C. § 1365(g) (2012).

Yet, the District Court held that while the term "citizen" in the CWA is broad enough to include entities that are not individuals, such as states like Progress, or presumably, common types of plaintiffs such as environmental groups and trade organizations, the term is not broad enough to include foreign persons or entities. R. 8 at 2. This reading contravenes the purpose of the Clean Water Act. The purpose is clearly to protect the nation's waters and eliminate pollution to the benefit of all, present and future. That purpose is not limited to redressing harms to discrete individuals, like many common torts. While the issue was not a foreign plaintiff, the Supreme Court has endorsed a broad conception of standing under the CWA based on the Senate Conference Report. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) (holding that the Senate Conference Report indicates that Congress intended a broad category of plaintiffs).

The language of other pieces of environmental legislation also supports this broad reading of the capacity to sue. The Clean Air Act authorizes "any person" to bring a civil action. 42 U.S.C. § 7604(a) (2012). The Solid Waste Disposal Act, 42 U.S.C. § 6972(a) (2012), Toxic Substance Control Act, 15 U.S.C. § 2619(a) (2012), Noise Control Act, 42 U.S.C. § 4911 (2012), and Endangered Species Act, 16 U.S.C. § 1540 (g) (2012), all use the language "any person" rather "any citizen" when defining who may bring suit. Furthermore, not all of this legislation shares the CWA's strict mandate to "eliminate" a harm. For example, the Clean Air Act has a softer mandate, listing foremost among its purposes, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). But like the CWA, all of these bills are intended to broadly protect people and the environment.

Rather than textually parsing each environmental statute, the Court has instituted tests to determine standing in environmental suits. At the time *Middlesex* was decided, *Sierra Club v. Morton* 405 U.S. 727 (1972) was controlling. 453 U.S. at 16. Now, however, the *Lujan* rule is the applicable standard. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

B. Bonhomme has standing under the Clean Water Act citizen suit provision because he satisfies the Lujan test, the controlling test for standing in environmental suits.

Lujan held that Article III, Section I of the United States Constitution requires that for a plaintiff to have standing in an environmental suit, they must show: 1) an injury-in-fact, 2) a causal connection, and 3) redressability. *Id.* at 561. While these three constitutional standing requirements significantly pre-date the decision, Lujan elaborated on the injury-in-fact and redressability factors by requiring a showing of: present and continuing adverse effects, concrete and particularized injury, actual or imminent injury, and concrete future intentions to use the area or matter involved. *See id*. In *Lujan*, plaintiffs challenged regulations under the Endangered Species Act after they had previously and separately traveled to Egypt and Sri Lanka hoping to view endangered animals. *Id*. at 563-564. One plaintiff had not seen the endangered animal, and another did not have concrete plans to return to the areas. *Id.* The Court held that the plaintiffs did not have standing and their alleged injuries were not redressible. *Id.* at 555-56. In contrast, Bonhomme easily meets the *Lujan* test for standing.

Bonhomme has sustained a current, concrete, and particularized injury-in-fact, that injury is caused by Maleau's actions, and a favorable decision would redress the injury. Bonhomme's property sits along the contaminated Wildman Marsh. Before the arsenic contamination, he enjoyed hunting for ducks several times a year, but has since had to significantly curtail this activity as he fears the birds may be carrying the deadly poison. In addition to hunting for

pleasure, Bonhomme has also used the property to entertain business partners and clients. Arsenic is a common byproduct of gold mining. It is not present in Ditch C-1 upstream of Maleau's byproduct piles, but it is present immediately downstream from where it flows into Wildman Marsh. Without court action, the piles will continue to erode, and arsenic will continue to flow through the ditch and into the marsh. Thus, Bonhomme has standing under the *Lujan* rule, and the meaning and spirit of the Clean Water Act and the District Court's holding to the contrary should be reversed.

III. THE OVERBURDEN PILES ON MALEAU'S PROPERTY CONSTITUTE A POINT SOURCE UNDER THE DEFINITIONS OF THE CLEAN WATER ACT. GRAVITATIONAL CHANNELS MAY BE FOUND TO BE DISCRETE CONVEYANCES.

The District Court erred in finding that the overburden piles constructed by Maleau did not constitute a point source under the Clean Water Act (CWA). The cases cited by Maleau that the court used in this finding do not apply to the facts at hand. The rule for liability under the CWA has five elements: that the violator (1) discharged, (2) a pollutant, (3) into navigable waters, (4) from a point source, (5) without a permit. *Sierra Club v. El Paso Gold Mines, Inc.*, No. Civ.A.01 PC 2163 OES, 2002 WL 33932715, at *7 (D. Colo. Nov. 15, 2002). The elements being contested here are that Reedy Creek, and Ditch C-1, are navigable waters as defined in 33. U.S.C. §1362(7), and that the overburden piles are point sources as defined in 33 U.S.C. §1362(14).

The first element in question is if the overburden piles should be considered a point source. The CWA definition of a point is:

> 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(14). The interpretation that should be applied to the facts here was handed down in *Sierra Club v. Abston Const. Co., Inc*. Here, a group of miners operated coal mines near Daniel Creek. *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 43 (5th Cir. 1980). The miners built up overburden piles in the process of mining coal and occasionally constructed "sediment basins" to catch the runoff from these piles. *Id*. However, these basins overflowed due to rainfall and the sediment and pollutants ended up in Daniel Creek. *Id*. The parties stipulated that it would be a violation if the miners had directly pumped the sediment into the creek but the dispute is over whether the overburden piles could be a point source without that direct action to pollute. The Fifth Circuit stated in this case that:

> A point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches... even if the miners have done nothing beyond the mere collection of rock and other materials.

Id. at 45. The court states that gravity flow resulting in a discharge into a navigable body of water may be a point source. *Id*. The court also states that, "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id*. In the facts of our case, Maleau has collected and piled overburden from his gold mining operations. When it rains, the precipitation, by gravitational forces, erodes paths into the piles and picks up pollutants, channeling them into Ditch C-1. The discharge of a pollutant into navigable waters in this situation is reasonably likely to occur. Applying the Fifth Circuit's interpretation makes it clear these piles can be considered a point source.

Another case supporting this holding comes from the Tenth Circuit in *United States v. Earth Sciences, Inc*. In this case, Earth Sciences, Inc. operated a gold leaching facility. *United*

States v. Earth Sciences, Inc., 599 F.2d 368, 370 (10th Cir. 1979). Due to unexpectedly fast snow melt, the primary and reserve sumps at the facility filled to capacity, and this led to a discharge of the processing solution, containing cyanide, into the Rito Seco Creek. *Id*. The court reviewed the legislative histories of the water pollution laws in question and found that the laws were, "designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." *Id*. at 373. The court also found that the 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 the waters of the United States." *Id*. The court held that it would go against the intent and structure of the Federal Water Pollution Control Act (FWPCA) to exempt any activity that discharges pollution from an identifiable point. *Id*. It also held that, "[t]he regulatory provisions of the FWPCA were written without regard to intentionality, however, making the person responsible for the discharge of any pollutant strictly liable." *Id*. at 374. These holdings and findings under the legislative history of the Act demonstrate that the intent was to stop pollution as much as possible and avoid loopholes. Whether Maleau was intentionally trying to pollute the water or not, he should be held strictly liable as the owner and responsible party for the identifiable source of the pollution.

Friends of Santa Fe County v. LAC Minerals, Inc. is a case from the District Court of New Mexico which involves mining overburden piles and their relation to the CWA and point sources. The court, in one of many holdings on summary judgment, determined the overburden piles of the defendant's mining operations to be point sources. *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1359 (D.N.M. 1995). The court states, "…the overburden pile, as a human-made 'discernible, confined, and discrete conveyance,'… readily constitute[s] [a] point source...." *Id.*

Sierra Club v. El Paso Gold Mines, Inc. comes from the District Court of Colorado and also has useful language on this issue. In this case, the defendant owned an inactive mine that had drainage shafts connected to a tunnel which released the runoff into navigable water. *Sierra Club v. El Paso Gold Mines, Inc.*, No. Civ.A.01 PC 2163 OES, 2002 WL 33932715, at *8 (D. Colo. Nov. 15, 2002). The court concluded that the tunnel is clearly a point source as "tunnel" is expressly included in the definition of a point source. *Id.* The court then concluded that the shaft and mine workings are also point sources as they are man-made conveyances which carry pollutants into the tunnel. *Id.* El Paso argued that ownership of a point source alone is not enough and an affirmative act by the owner is required. *Id.* at *10. Agreeing with *Sierra Club v. Abston*, discussed above, this court held that ownership of a point source was enough to trigger liability if that point source is the means by which pollutants enter waters of the United States. *Id.* at *11. Ditch C-1 is a tributary of Reedy Creek which has been found to be a navigable body of water under the Act and the court here states that the water receiving the pollutants does not need to be navigable in fact as long as it is hydrologically connected to a body of water that is navigable in fact. *Id.* at *9. Maleau owns these piles of overburden which cause the pollution in both Ditch C-1 and Reedy Creek. No affirmative action is required for liability and these piles fit within the definition of a point source as discussed above.

Consolidated Coal Co. v. Costle is a case provided by Maleau and cited by the trial court that combined twenty-seven actions seeking review of water pollution control regulations for existing facilities in the coal industry being applied by the Environmental Protection Agency (EPA). *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 242 (4th Cir. 1979). The page cited by the court simply states the definition of a point source, as found in 33 U.S.C. §1362(14). In fact, *Consolidated* concerns a regulation put forward to control discharges from both coal preparation

plants and coal preparation plant associated areas. *Consolidated Coal Co*., 604 F.2d at 249. The definition for coal preparation plant associated areas was said to be, "coal preparation plant yards, immediate access roads, slurry ponds, drainage ponds, coal refuse piles, and coal storage piles and facilities." *Id*. at 249-50 (emphasis added). The court determined that this regulation was not impermissibly vague and that there were no defects in the regulation. *Id*. at 250. A coal refuse pile is very similar to the mining overburden piles constructed by Maleau and the Fourth Circuit found that this regulation on the discharge of pollutants applied to discharges from a refuse pile.

The second case provided by Maleau and cited by the court is *Appalachian Power Co. v. Train*. In relevant part, this case has members of the coal industry contesting the EPA's regulation of rainfall runoff from material storage sites rather than coal storage sites. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). The court stated that, "[i]ndustry agreed throughout the rulemaking that contaminated runoff discharges from coal storage and chemical handling areas fell within this definition and should be subject to reasonable controls." *Id*. The argument being put forward was not about those areas but is instead directed towards, "areas such as those used to store construction material." *Id*. The court concluded that, though the definition of a point source is broad, it does not include unchanneled and uncollected surface waters, such as those that would run through material storage sites. *Id*. The overburden piles on Maleau's property are much more similar to the coal storage piles, however, than the construction materials. The industry group in this case specifically stated that coal storage and chemical handling areas should be subject to reasonable controls and treated to remove pollutants. *Id*. The Fifth Circuit in *Sierra Club v. Abston* responds to the Fourth Circuit in this case saying, "[a]lthough 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."

In conclusion, the overburden piles owned by Maleau are point sources as defined in the CWA. An overburden pile that discharges pollutants into navigable waters due to rainfall and stormwater through gravitational forces eroding paths in the walls of the pile are considered a discernible conveyance. The definition of a point source was intended to be as broad as possible to cover all possible sources of pollution into navigable waters and should be read in this expansive light.

IV. THE DISTRICT COURT ERRED IN FINDING DITCH C-1 TO BE A NON-NAVIGABLE WATER OF THE UNITED STATES.

The term "waters of the United States" includes [a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce[] . . . . 33 C.F.R. § 328.3(a)(1). Moreover, waters [w]hich are or could be used by interstate commerce or foreign travelers for recreational or other purposes[] . . . are also deemed waters of the United States. *Id.* at (a)(3)(i). These interstate waters include wetlands and tributaries. *Id.* at (a)(2); *Id.* at (a)(5). Modern day courts have held nearby ditches to constitute a "tributary" and thus a "water of the United States" under 33 C.F.R. § 328(a)(5). *Rapanos v. United States*, 547 U.S. 715, 739 (2006).

The Army Corps of Engineers ("the Corps") has asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. *Id.* at 722. The Corps includes within its jurisdiction "ephemeral streams" and "drainage ditches" as "tributaries" that are part of the "waters of the United States." *See* 33 C.F.R. § 328.3(a)(5). Furthermore, the Supreme Court has held wetlands which were adjacent to

a ditch that served as a tributary to a navigable waterway to be within the jurisdiction of the Corps in regulating waters of the United States. *Rapanos*, 547 U.S. at 791-92.

A. This Court should find that Ditch C-1 is a navigable water of the United States because such a holding is consistent with both 200 years of water law precedent as well as Congress' intent in passing the Clean Water Act in 1972.

"Navigable waters" has been held to take on different meanings depending on the context in which it is used. *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (a pond dredged and connected to the Pacific Ocean was found navigable for purposes of the federal government's regulatory authority). In its holding, the *Kaiser* Court rejected the government's claim that the term navigability has a "fixed meaning":

> The Government's position . . . presumes that the concept of "navigable waters of the US" has a fixed meaning that remains unchanged in whatever context it is being applied . . . . [C]ases dealing with the authority of Congress to regulate navigation . . . cannot simply be lumped into one basket. "[A]ny reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case."

Id. at 170-71 (emphasis in original). Moreover, "[n]avigability . . . [cannot be] destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 122 (1921). Courts have also held waters to be navigable if the evidence illustrates that a body of water is only capable of being traveled by a canoe, even if it has never actually been traveled by a canoe or ever been used for commercial or even recreational purposes in the past. *See FPL Energy Main Hydro LLC v. Fed. Energy Reg. Comm'n*, 287 F.3d 1151 (D.C. Cir. 2002). Under this analysis, a ditch, like Ditch C-1, which carries more than a mere seasonal water supply and contains running water for the majority of the year, can be held to be "navigable".

It is clear that the historical precedent regarding the terms "navigability" and "navigable waters of the United States" has created inherently conflicting and ambiguous terminology. Because of such ambiguity, this Court should give broad deference to the agency in order to more appropriately interpret such terms in a manner which has been found to be consistent with both the agency's definition as well as congressional intent.[1] In deferring to the agency, Ditch C-1 appropriately constitutes a navigable water of the United States because adopting this definition more neatly aligns with the agency's interpretation as well as Congress' intent.

Moreover, the historical predecessor of the Clean Water Act, the River and Harbor Appropriation Act of 1902 ("RHA") gives further support that Congress did in-fact intend for non-navigable tributaries, like Ditch C-1, to be included within the phrase "navigable waters." 33 U.S.C § 407 (2000). Therefore, in remaining with Congress' intent of ensuring a broad purpose prevails under the CWA, it is inconsistent to conclude that in adopting an even more stringent pollution control program in passing the CWA, that Congress intended the new law to apply to a smaller percentage of waters initially covered under the RHA.

The District Court for the District of Progress erred in finding that Ditch C-1 was a non-navigable waterway of the United States. Because Ditch C-1 is necessarily connected to Reedy Creek and contains running water at all times except for a few weeks out of the year, Ditch C-1 falls within the regulatory jurisdiction of the Corps as a tributary to a navigable water of the United States, Reedy Creek. Additionally, Congress' objective in establishing the CWA and in defining "navigable waters" was to give the broadest interpretations constitutionally possible.

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[1]Under the *Chevron* test for reviewing an agency's construction of a particular statute, a court must first ask whether the statute is clear. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984). If the statute is found to be clear, then the court must enforce the statute. *Id.* at 843-45. However, if the statute is found to be ambiguous, the court will then defer to the agency's reasonable interpretation of the statute as announced. *Id.*

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) (quoting S. Conf. Rep. No. 92-1236, p. 144 (1972), reprinted in 1 Leg. Hist. 327). Therefore, this Court should reverse the findings of the District Court and hold Ditch C-1 to be a navigable tributary of the United States. In keeping with the these views, Congress defined "the waters" covered by the Act as broadly as the Commerce Clause would permit, and holding that Ditch C-1 is a navigable water of the United States would further the purpose and intent of Congress in passing such a comprehensive and sweeping statute. *See U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

B. The *Rapanos* analysis is an improper analysis for determining navigability because it is inconsistent with precedent as well as the main purposes and goals of the Clean Water Act.

The Supreme Court's decision in *Rapanos* should not control because it goes against centuries of water law precedent in determining which waters have been held to be "navigable waters of the United States." *Rapanos* stands for the proposition that "['waters of the United States'] includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in the ordinary parlance as 'streams[,] oceans, rivers, [and] lakes." 547 U.S. at 739. The majority's test makes clear that "relatively permanent" may encompass "seasonal rivers which contain continuous flow during some months of the year, but no flow during dry months." *Id.* at 221 n.5. However, streams that intermittently come and go are plainly not covered under this analysis. *Id.* at 732-33. The record here indicates that Ditch C-1 contains running water except during annual periods of drought lasting from several weeks to three months. Under this analysis, because Ditch C-1 is necessarily connected with Reedy Creek, it falls under the category of "tributary" covered under the Corps jurisdiction

of waters of the United States; and because there is almost always running water flowing through Ditch C-1, it still constitutes a water of the United States under the modern *Rapanos* test.

Furthermore, more compelling evidence suggests that *Rapanos* is inconsistent with the goals of the 1972 CWA, which has nothing to do with navigation but with "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *Solid Waste Agency of Northern Cook County*, 531 U.S. at 180 (2001) (Stevens, J., dissenting); 22 U.S.C. § 1251(a) (2000). This purpose cannot be achieved, especially going forward with the *Rapanos* holding, without recognizing the connected character of the hydrologic cycle. It therefore follows that in refusing to find that Ditch C-1 is navigable—which is in-fact fully integrated with Reedy Creek, serves as an essential agricultural function to Reedy Creek, contains water at almost all times during the year, and has done so since 1913—neglects to recognize this integrated nature inherent within the hydrological cycle. Moreover, in its neglect to recognize this vital connection, the *Rapanos* majority ignores the broad purpose underlying Congress's intended meaning of "navigable waters." Congress was cognizant of the importance of the connectivity of water and its hydrological cycle when it chose to address pollution control, and therefore recognized the need to include tributaries, like Ditch C-1, within the CWA. S. Rep. No. 95-370 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4400. Therefore, refusing to recognize Ditch C-1 as a tributary to Reedy Creek under the CWA strains rather than advances the goals of the CWA.

Finally, the *Rapanos* Court speaks to the opinions of *Daniel Ball* and *Appalachian Power* in bolstering its analysis. 547 U.S. at 723. However, these two opinions only further the previous arguments regarding the historically differing contexts where waters have been found to be navigable. *Rapanos* fails to establish that these two cases are fundamentally at odds with each

other with regard to the meaning of navigability. *Appalachian Power* serves as a modification of *Daniel Ball* by eliminating the requirement that waters are only navigable if "in their ordinary condition." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). A waterway may still not be eliminated from the navigability classification merely because artificial improvements have been made to make the path more suitable for use before commercial navigation may be undertaken. *Appalachian Power*, 311 U.S. at 404-08. Therefore, *Rapanos* weakens its own proposition in relying on historical precedent that actually favors Ditch C-1 being classified as a navigable water of the United States. Such cases illustrate the historically expansive view courts have taken on what constitutes "navigability," in their efforts to remain aligned with the broad congressional intent of the CWA. For these reasons, this Court should reverse the finding of the District Court and hold that Ditch C-1 is a navigable water of the United States.

V. THE DISTRICT COURT PROPERLY HELD REEDY CREEK TO BE A NAVIGABLE WATER OF THE UNITED STATES.

A. The District Court properly found that Reedy Creek is a navigable water of the United States because the Creek is affected by interstate commerce and falls adjacent to a wetland, which serves as an interstate migration for millions of birds.

"The CWA . . . does not define the term 'waters of the United States.'" *Hoffman Homes, Inc. v. Administrator, U.S. E.P.A.*, 999 F.2d 256, 260 (7th Cir. 1993). However, [t]he EPA and the Corps have done so in two identically worded subsequent regulations. *Id.* "According to the EPA and the Corps, 'waters of the United States' includes, among other things, bodies of water wholly within a state whose use or misuse could affect interstate commerce[.]" *Id.* Additionally, "waters of the United States" includes "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), . . . [and] wetlands [in which] the use, degradation or destruction . . . could affect interstate or foreign commerce . . . [w]hich are or could be used by

interstate or foreign travelers for recreational or other purposes." 40 C.F.R. § 230.3(s)(3) (EPA's definition); 33 C.F.R. § 328.3(a)(3) (Corps's definition). Moreover, in using the word "could," the EPA need not show an actual effect on interstate commerce, "[s]howing a potential effect will suffice." *Hoffman Homes*, 999 F.2d at 260 (the EPA's Chief Judicial Officer ruled that because the word "could" was used, only a potential showing of effect was necessary). It is clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce. Every court to discuss the issue has used a commerce power approach and agreed upon that interpretation. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374-75 (10th Cir. 1979) (it was stipulated by the parties that the stream supported trout and some beaver; the water collected in the reservoir was used for agricultural irrigation, and the resulting products were then sold in interstate commerce).

Because Reedy Creek serves as a water supply for interstate travelers on Interstate 250 (I-250), it is unquestionably affected by interstate commerce, and arguably directly affected by interstate commerce. Moreover, many farmers in both the State of Progress and New Union depend on diverting the water from Reedy Creek for agricultural purposes, like irrigation. R. at 5. The end product resulting from their agricultural production may then be inserted into the stream of interstate commerce, just like the resulting products from *Earth Sciences*, thus affecting Reedy Creek's overall role it in interstate commerce. But because there only needs to be a potential effect on interstate commerce, not an actual effect, Reedy Creek succeeds as being sufficiently affected by commerce. As the *Earth Sciences* Court indicated, the factual scenario necessary only needs to indicate that at least some interstate impact from the stream occurred in order to be held navigable under the Act. 599 F.2d at 374-75. Therefore, the District Court for

the District of Progress was correct in holding Reedy Creek to be a navigable waterway of the United States.

The Corps has adopted the following EPA criteria to determine when waters have sufficient ties to interstate commerce: waters "[w]hich are or would be used as habitat by birds . . . or other migratory birds which cross state lines[.] *Leslie Salt Co. v. U.S.*, 896 F.2d 354, 360 (9th Cir. 1990) (quoting 51 Fed. Reg. 41206, 41217). It is a sufficient interpretation to allow migratory birds to be the necessary connection between a wetland and interstate commerce. *Hoffman Homes*, 999 F.2d at 261. "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." *Id.* Like *Hoffman Homes*, Wildman Marsh serves as a terminus to Reedy Creek, necessarily positioning the wetland adjacent to an interstate waterway. Wildman Marsh is necessary for the interstate migration of birds. Both the EPA and the Corps consider wetlands to affect interstate commerce if the wetland serves as a habitat for migratory birds, which Wildman Marsh undoubtedly does. Reedy Creek provides the necessary waters as a feeder into the Marsh and is consequently affected by the interstate commerce that occurs as a result of the migratory birds who utilize Wildman Marsh for their habitats. Furthermore, Wildman Marsh provides the necessary support for interstate commerce by supporting the sport of duck hunting. *Id.* This area attracts hunters from around the nation as well as few foreign nations, bringing in over $25 million to Progress' local economy from such interstate hunters. *Id.* Reedy Creek directly contributes to the interstate commerce that occurs in this area and sustaining that it is a navigable water of the United States stays in line with the intent of Congress in passing the CWA. Not allowing the agency to have proper jurisdiction over Reedy Creek frustrates the purpose of the CWA. *See, e.g.*, Act of Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903 (1965) (the interstate nature of water pollution was the reason

why Congress enacted water pollution control legislation in the first place). Recognizing that the Reedy Creek is affected by interstate commerce allows the agency to control pollution in interstate waters and ensure that both Reedy Creek and the Wildman Marsh remain free of toxic pollutants.

B. Finding that Reedy Creek is a navigable waterway protects downstream States, like the State of Progress, from out-of-state pollution that they may not be able to regulate.

Holding that Reedy Creek is a non-navigable water of the United States goes against the CWA as well as a particular state's own water policies. As Justice Kennedy noted, the Clean Water Act serves the important purpose of protecting downstream States, like the State of Progress, from out-of-state water pollution that they themselves are unable to regulate. *Rapanos*, 547 U.S. at 777 (Kennedy, J., concurring). Reedy Creek flows for a total of 50 miles. The Creek begins in the State of New Union, where it is used as a water supply for Bounty Plaza, a service area on I-250 selling gasoline and food. It is precisely because of the geographic nature of water formations like Reedy Creek, that the CWA was enacted. Because Reedy Creek flows down from another state, New Union, and into the State of Progress, it is even more crucial that the EPA is able to assert jurisdiction over such a creek due to concerns expressed by Justice Kennedy in *Rapanos.* Moreover, because Reedy Creek eventually flows into Wildman Marsh, a wetland that not only serves as a refuge and protective habitat for millions of migratory birds, but also performs an essential role to aquatic ecosystems, it is critical that the agency asserts jurisdiction over this navigable waterway. "Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff." *Rapanos*, 547 U.S. at 777. It is plausible to conceive a scenario where some type of pollutant is inserted to Reedy Creek at some point upstream in New Union, and flows down into Progress and eventually into Wildman Marsh,

contaminating essential and fragile ecosystems. Under such a scenario, Progress would have no legal recourse and it is clear to see how the District Court of the District of Progress correctly held Reedy Creek to be a navigable waterway of the United States. This holding is not only consistent with the EPA's definitions regarding waters affected by interstate commerce, but it is also aligned with the CWA's overarching purposes. For these reasons, this Court should uphold the finding of the District Court.

VI. MALEAU'S OVERBURDEN PILES INTRODUCE POLLUTANTS INTO DITCH C-1, A NAVIGABLE BODY OF WATER, AND UNDER THE UNITARY WATERS THEORY BONHOMME'S CULVERT DOES NOT ADD A POLLUTANT TO NAVIGABLE WATERS AS IT WAS ALREADY IN NAVIGABLE WATERS BEFORE REACHING THE CULVERT.

The lower court erred in finding that Bonhomme violated the CWA by adding arsenic into Reedy Creek through a culvert on his property. The true point sources in this case are the overburden piles owned by Maleau which discharge arsenic into Ditch C-1. A recent decision by the Eleventh Circuit upholding the unitary waters theory states, "that it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source. . . ." *Friends of Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). The arsenic was first introduced into navigable waters by the overburden piles on Maleau's property and as such it would not be an addition of pollutants to navigable water through the culvert on Bonhomme's property.

In *Friends of Everglades*, the South Florida Water Management District (District) operated a series of pumps which transported contaminated water from agricultural canals uphill into Lake Okeechobee. *Id.* at 1214. The pumps did not add anything to the canal water, they simply transported it from the lower canals to the lake. *Id.* The dispute was whether this

transportation of contaminated water from one navigable body of water to another constituted an addition of a pollutant under the CWA. *Id.* at 1216. The lower court found that it was an addition but between the time of that decision and the appellate hearing, the EPA adopted a final rule utilizing the unitary waters theory and the Eleventh Circuit reviewed the case *de novo*. *Id.* at 1217. Prior to that case, the unitary waters theory had been rejected by all courts presented with it, including the First, Second, and Ninth Circuits. *Id.* at 1217-1218. However, all of those cases were decided before the EPA accepted the unitary waters theory as a part of their regulatory scheme, so whether or not to allow and follow the EPA regulation had not yet been put before the courts. *Id*. at 1218. Those prior decision were not considered precedent by the Eleventh Circuit because this was a case of first impression. *Id*. The lower court cited the Supreme Court case *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians* as precedent stating that owners of point sources do not need to have initially added the pollutants to be found liable. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). This decision is not binding on our action, however, because the case was vacated for further factfinding to determine if the two bodies of water were meaningfully distinct. *Id.* at 112. The Supreme Court specifically stated that the unitary waters argument would be available on remand. *Id.* Because there was no binding precedent for this action, the Eleventh Circuit was reviewing the EPA regulation under *Chevron* deference rather than case law regarding the unitary waters theory. *Friends of Everglades*, 570 F.3d at 1218. The regulation states:

Discharges from a water transfer. Water transfer means 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 to the water being transferred.

40 C.F.R. §122.3(i). To fit under *Chevron*, the regulation must be a reasonable construction of an ambiguous statute. *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The defendants, District, argue that the statute means '"any addition... to navigable waters [as a whole]"' rather than the plaintiffs argument that it means '"any addition... to [any] navigable waters."' *Friends of Everglades*, 570 F.3d at 1227. The court stated that because there are two reasonable interpretations of the statute, it is clearly ambiguous. *Id.* Once it is determined that the statute is ambigous the court must decide if the EPA regulation is reasonable and then give the agency deference to perform its job. *Id.* The Eleventh Circuit concluded that the unitary waters theory fit within one of the two reasonable interpretations given by the parties and was permissible. *Id.* at 1228. As discussed above, both Reedy Creek and Ditch C-1 should be recognized as navigable waters and under the unitary waters theory the point sources of the pollution are the overburden piles and not the culvert.

As further evidence of the unitary waters theory being the EPA's desired system and the correct one going forward, an earlier case from the District of Columbia Circuit gave the EPA deference to a similar stance. In *National Wildlife Federation v. Gorsuch*, a reservoir was being polluted by water passing through a dam and this water subsequently ended up in a river below. *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 174-75 (D.C.Cir. 1982). The EPA stated in this action that the addition from a point source only occurs if the point source physically introduces a pollutant into the water. *Id.* at 175. The EPA's stance was that it was only an addition when the pollutant was introduced to the water rather and not when the polluted water later passes to another navigable body. *Id.* The court concluded that though Congress did not specifically grant the EPA discretion to define the term "addition," it did grant the agency

discretion to define "point source" and "pollutant" which would imply Congress would likely allow similar discretion over "addition." The court used this logic to support the EPA's decision.

As stated above, the lower court cited *South Fla. Water Mgmt. Dist.* as the primary basis for liability. In that case, the South Florida Water Management District (District) operated a series of pumps that took water from a canal that collects groundwater and rainwater for 136,000 people and transports it to a large wetland area sixty feet away. 541 U.S. at 100. The pumps transported phosphorus-laden water from the canal into the wetlands. *Id.* at 102. As in *Friends of Everglades*, the dispute was whether it was considered an addition of a pollutant when contaminated water was transported from one navigable body of water to another. *Id.* at 104-05. The Supreme Court determined that a point source did not have to be the original source of the pollutant to fit within the definition. *Id.* at 105. However, the Supreme Court also stated that the unitary waters theory will be available on remand. *Id.* at 112. As this case is the only Supreme Court decision that contemplates the unitary waters theory, it would have been the only binding authority in the action at the bar. The Eleventh Circuit stated that, "[p]arts of decisions that are vacated and have not been reinstated 'have no legal effect whatever. They are void.'" *Friends of Everglades*, 570 F.2d at 1218. The Supreme Court vacated the action and remanded it to the District court, taking away its value as precedent. *South Fla. Water Mgmt. Dist.*, 541 U.S. at 112. This case took place before the EPA regulations were adopted and, therefore, they were not considered. The decision was entirely based upon case law interpretation, not applying the *Chevron* test to the EPA's rule.

While it has been established that a point source does not have to be the original source of the pollutant, that does not determine the outcome of this case. *Id.* at 105. *Dague v. Burlington* was a Second Circuit decision that found a culvert to be a point source. *Dague v. Burlington*, 935

F.2d 1343, 1355 (2nd Cir. 1991). In that case, a landfill discharged pollutants into a lake and the contaminated water was then transported through a railroad culvert into a marsh area. *Id.* at 1347. The court held that a culvert was a point source as it conveyed pollutants to a navigable body of water despite not being the source of the pollutant. *Id.* at 1355. As the basis for their decision, the Second Circuit cited two District court cases and otherwise based their decision on the language from *United States v. Earth Sciences* that states that the concept of a point source was to be broadly defined and applied. *Id.* at 1354-55. As an alternative argument to the unitary waters theory we argue that a culvert is not a point source. There is no binding precedent on this court that has made this determination and, therefore, it can be reviewed. The lower court dismissed the case without prejudice allowing for a *de novo* review of this issue. A culvert does not add anything to the water it only carries the water to a new location. At best it is an indirect addition of pollutants to navigable water.

CONCLUSION

For all the foregoing reasons, this Court should reverse the District Court's holdings on issues 1-4 and 6, and affirm its holding on issue 5, and the case should be remanded for trial.