Team 24

CA. No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee

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

BRIEF FOR JACQUES BONHOMME
Plaintiff-Appellant

TABLE OF CONTENTS

Section **Page**

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

UNITED STATES SUPREME COURT CASES

UNITED STATES COURTS OF APPEALS CASES

UNITED STATES DISTRICT COURTS CASES

UNITED STATES STATUTES

RULES

LEGISLATIVE HISTORY

OTHER

JURISDICTIONAL STATEMENT

Appellant, Jacques Bonhomme, filed a complaint with the United States District Court for the District of Progress requesting the court's review under the citizen suit provision of 33 U.S.C. § 1365. Separately, Appellee, State of Progress, filed a complaint against Bonhomme alleging virtually the same violations of the Clean Water Act (CWA), and the district court accordingly consolidated the two cases. On July 23, 2012, the district court granted Maleau's motion to dismiss under Federal Rule of Civil Procedure 12b(6). The district court's order is final, and jurisdiction is therefore proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. Whether Bonhomme - a foreign national - is a "citizen" under CWA § 505, 33 U.S.C. § 1365, who may bring suit against Maleau.

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

4. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14).

5. Whether Reedy Creek is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).

6. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for-cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Progress granting Maleau's motion to dismiss Jacques Bonhomme's claim. R. at 1. Bonhomme brought suit in the District of Progress against Shifty Maleau under the citizen suit provision of the CWA, 33 U.S.C. § 1365, seeking all relief available under the Act. R. at 4. Bonhomme

alleged that Maleau's overburden piles continuously discharged toxic arsenic into the shared waterways of Ditch C-1, Reedy Creek, and Wildman Marsh, such that Bonhomme was no longer able to hunt and recreationally enjoy the wetlands as he previously had. R. at 6.

In response to Bonhomme's suit, the State of Progress (Progress) levied its own citizen suit against Bonhomme, alleging that Bonhomme was responsible for the discharge of arsenic into Reedy Creek, because the culvert is located on Bonhomme's property. R. at 5. Maleau promptly intervened in Progress' action against Bonhomme; all parties agreed to consolidate the cases. R. at 5.

Progress and Maleau filed motions to dismiss, claiming first that Bonhomme was not a proper plaintiff because he was (1) not the real party in interest; and (2) that he did not qualify as a "citizen" under Section 1365. R. at 7. Next, Maleau argued that he had not violated the CWA because his overburden piles did not constitute a "point source," and none of the waters involved in the action qualified as "navigable waters" protected by the CWA. R. at 7. Finally, Maleau argued that Bonhomme was liable for the discharge of arsenic even though Maleau himself had collected, transported, and stored the source of the pollution near Ditch C-1. R. at 6-7. Progress and Maleau joined on issues I, II, and VI, and Progress joined with Bonhomme on issue III, asserting that Ditch C-1 does qualify as a "navigable water" under the CWA. R. at 7.

The district court granted Maleau's motions to dismiss on all issues except for issue IV, holding that Reedy Creek is a "navigable water" subject to CWA regulation. R. at 9-10. Bonhomme filed this timely motion of appeal, contesting the district court's holdings on certified issues I, II, III, IV, and VI. R. at 1. At the same time Maleau appealed the district court's decision holding that Reedy Creek is "navigable water," and Progress appealed the court's holding that Ditch C-1 is not a "navigable water." R. at 2.

STATEMENT OF THE FACTS

Arsenic is a carcinogenic poison that often results from the mining and extraction of gold ore. R. at 6. Defendant, Maleau, manages a gold mining operation in Lincoln County, Progress, and deposits the resulting waste from his enterprise off-site, in piles adjacent to Ditch C-1 in Jefferson County, Progress. R. at 5. When the force of rainwater and gravity acts on those exposed piles, arsenic accumulates and discharges through eroded channels between the settled piles into Ditch C-1. R. at 5. Ditch C-1, which begins before Maleau's property line and crosses onto Bonhomme's property, runs for several miles before converging into Reedy Creek. R. at 5.

Reedy Creek is a 50-mile waterway that serves as the water supply for farmers and a service center alongside the nearby federal interstate highway. R. at 5. The creek ends as it feeds into Wildman Marsh, an extensive area of wetlands that is owned and maintained by the United States Fish and Wildlife Service. R. at 5-6. The wetlands are renowned as a stopping point for millions of ducks and waterfowl, and as a result, the area attracts duck hunters from across the nation and across the globe—adding over $25 million to the local economy. R. at 6. Because of the unspoiled splendor of the Wildman Marsh, Bonhomme, a French National and successful entrepreneur, purchased property in Progress that directly fronts part of the wetlands, where he gathers with friends, acquaintances, and business associates for recreational use.

Concerned for the wildlife refuge, Bonhomme tested water in the Ditch C-1, in Reedy Creek, and in Wildman Marsh. R. at 6. These tests showed that arsenic is not present in the shared waterway before Maleau's property; however, just below Maleau's property, arsenic is present in high concentrations. R. at 6. The poison's concentration in the water rises and falls in direct relationship to the proximity of the water sample from Maleau's property—with detectable

arsenic covering an area from the ditch to the creek to the wetlands. R. at 6. The U.S. Fish and Wildlife Service even detected the poison in several ducks from the wetlands. R. at 6.

After conducting the water tests, Bonhomme initiated a citizen suit against Maleau. R. at 4-6. The suit claims that the arsenic from Maleau's waste piles foul the waters of Reedy Creek and Wildman Marsh to the point that hunting parties and recreational use has become increasingly unsafe. R. at 6. In response to the lawsuit, the Attorney General of Progress filed suit against Bonhomme, alleging that the arsenic in the water originated from Bonhomme's culvert. R. at 5. Maleau then intervened in the matter. R. at 5.

The parties agreed to consolidate the cases, and the District Court for the District of Progress granted Progress and Maleau's motion to dismiss. R. at 5, 10. The court held that (1) Bonhomme was not the real party in interest; (2) Bonhomme is not a "citizen" who may sue under the CWA; (3) Maleau's waste piles do not constitute "point sources;" (4) Ditch C-1 is not a navigable water/water of the United States; (5) Reedy Creek is a navigable water/water of the United States; and (6) Bonhomme violates the CWA by adding arsenic to Reedy Creek, even though Maleau is the but-for cause of the presence of arsenic. R. at 7-10. Now, Bonhomme appeals the lower court's decision before the Twelfth Circuit of the United States Court of Appeals.

STANDARD OF REVIEW

The district court granted Maleau and Progress' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). As such, this Court reviews the district court's dismissal *de novo*. *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 307 (4th Cir. 2007).

SUMMARY OF THE ARGUMENT

The district court erred when it dismissed Bonhomme's claims because Bonhomme is a proper plaintiff under the CWA. First, Bonhomme is the real party in interest because he suffered an actual injury due to Maleau's pollutants and Bonhomme retains a significant interest in the instant litigation. Furthermore, Bonhomme satisfies the constitutional requirements for standing found in Article III of the United States Constitution. Second, Bonhomme satisfies the definition of "citizen" as found in the CWA.

Maleau's overburden piles injured Bonhomme by polluting Wildman Marsh and diminishing his ability to use and enjoy the wetlands surrounding his hunting lodge. The CWA allows private individuals to bring a civil action—on their own behalf—against any person who allegedly violates the standards or limitations of the Act's provisions. Bonhomme clearly satisfies the standing requirement found in Article III. Standing has three requirements: (1) injury in fact; (2) a traceable casual connection between the injury and the defendants conduct; and (3) that it is likely that the injury will be remedied by a favorable decision. Bonhomme sufficiently plead that he has suffered an injury, that there is a causal connection between his injury and Maleau's conduct, and that his injury will be remedied by a favorable decision.

Bonhomme demonstrated that he is a "citizen" as defined in 33 U.S.C. § 1365. Congress defined citizen as "a person or persons having an interest which is or may be adversely affected." A person who can establish injury in fact will satisfy the adversely affected requirement. Bonhomme suffered an injury in fact due to the pollution in Wildman Marsh. Parties are not required to be a citizen of any particular geographical region in order to be considered a "citizen" under the CWA, therefore, the district court erred by holding that Bonhomme was not a "citizen" for purposes of bringing suit.

Moreover, the district court erred when it dismissed Bonhomme's claim because Maleau's overburden piles are "point sources" of pollution. In order to violate the CWA, pollution must be discharged from a "point source" into a "navigable water." Maleau's overburden piles are discernable, confined and discrete conveyances, and can be easily identified as the source of the pollution. In addition, it is "reasonably likely" that the overburden piles discharge pollutants into Ditch C-1. Maleau transported the piles near Ditch C-1, and allowed rainwater to percolate through them and create eroded channels from which the arsenic was discharged into navigable water. Maleau's overburden piles are also the cause in fact of the pollution, and without their presence the arsenic would not have been discharged into navigable water.

The district court also improperly dismissed the claim that Ditch C-1 is a navigable water protected under the CWA. Congress intended to protect not only navigable waters, but also their tributaries. Ditch C-1 is a tributary of Reedy Creek and Wildman Marsh because it contributes all of its flow to these interstate waters. The Supreme Courts opinions in *Rapanos* do not preclude Ditch C-1's classification as a navigable water because Ditch C-1 is a relatively permanent body of water, and there is a significant nexus between Ditch C-1 and Reedy Creek. Man-made conveyances can still be considered tributaries of navigable waters if they converge into navigable waters. Ditch C-1 is interconnected with Reedy Creek, and exchanges all its water with the interstate waterway. Finally, navigability in fact is not required to find that Ditch C-1 is a tributary of a navigable water. For these reasons this Court should find that Ditch C-1 is a navigable water protected by the CWA.

The district court correctly classified Reedy Creek as a navigable water because the stream is an interstate waterway, which affects interstate commerce. Rivers that support

interstate commerce may be considered "waters of the United States" despite their non-navigable characteristics. Reedy Creek's water is used in interstate commerce along I-250, and the water is diverted for farmers who later sell their products throughout the United States. Because the water from Reedy Creek is used in interstate commerce, and the pollution in Reedy Creek will ultimately have a negative effect on interstate commerce, this Court should hold that Reedy Creek is a navigable waterway protected by the CWA. Likewise, Reedy Creek is a tributary of Wildman Marsh, a federally protected wetland, and Maleau must not be allowed to pollute the water because such pollution clearly affects interstate commerce.

Bonhomme does not violate the CWA because Ditch C-1 and Reedy Creek are one continuous waterway. The culvert present on Bonhomme's property does not add pollutants—Ditch C-1 is a tributary of Reedy Creek. Ditch C-1 should not be considered the source of the pollution because Maleau's overburden piles are the identifiable source of the arsenic. Conveying pollutants between two parts of the same waterway is not an addition under 40 C.F.R. § 122.3(i). This Court should adopt the "unitary waters theory" and hold that Ditch C-1, Reedy Creek, and Wildman Marsh are all part of the same continuous waterway, and therefore no addition of pollution has occurred at the mouth of Ditch C-1. Bonhomme did nothing more than allow the water to flow through his culvert as mandated in his property deed. Accordingly, this Court should find that Maleau is the cause of the pollution, and the liable party.

ARGUMENT

I. BONHOMME IS THE REAL PARTY IN INTEREST BECAUSE BONHOMME'S INJURY GIVES HIM A SUBSTANTIVE RIGHT THAT IS ENFORCEABLE UNDER THE CWA AND STANDING UNDER CONSTITUTIONAL STANDING UNDER ARTICLE III.

The district court erred in granting Maleau and Progress' motions to dismiss by focusing on Bonhomme's relationship with Precious Minerals International (PMI), and PMI's alleged

interest in the action, rather than properly considering Bonhomme's individual claim. As such, this Court should find that Bonhomme is in fact the real party in interest.

Rule 17 of the Federal Rules of Civil Procedure provides in relevant part that every lawsuit "must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). The phrase "real party in interest" is a term of art that denotes an individual who: (1) possesses a substantive right that can be represented in litigation; and (2) who has a serious interest in the claim. *United States ex rel Eisenstein v. City of N.Y.,* 556 U.S. 928, 934 (2009); *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) (*Westinghouse*); *See Black's Law Dictionary* (9th ed. 2009), *available at* Westlaw BLACKS (defining "real party in interest" as "a person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome").

But status as a the real party in interest alone will not invoke federal jurisdiction—a plaintiff must also satisfy the case-or-controversy requirement of Article III of the United States Constitution to levy a suit in federal court. U.S. Const. Art. III. To pass constitutional muster and establish standing, a plaintiff must demonstrate: (1) an injury in fact; (2) "a causal connection between the injury and the conduct complained of;" and (3) that it is likely that the injury will be remedied by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (*Defenders of Wildlife*). Issues regarding standing and the real party in interest invariably overlap, as each of the doctrines examine whether the plaintiff has a personal interest in the controversy and its outcome. *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992).

Bonhomme has a substantive right to recovery per Section 505 of the CWA, a significant interest in the claim for which he is suing, and standing, per Article III of the United States Constitution. The instant action directly relates to Bonhomme's diminished ability to use and

enjoy the wetlands surrounding his hunting lodge. Accordingly, this Court should find that Bonhomme is the real party in interest.

1. The CWA expressly provides injured persons with the right and the means to bring a civil action against those who violate the statute.

Congress passed the CWA in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Absent a permit, the CWA forbids adding pollutants to any navigable water from any point source. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12). To empower private individuals with the authority to enforce the heightened standards of environmental protection, the legislature specifically added a citizen suit provision, which allows any person with an interest that is or may be adversely affected to bring a civil action—on his own behalf— against any person who allegedly violates the standards or limitations of the Act. 33 U.S.C. § 1365(a)(1); 33 U.S.C. § 1365(g). This provision operates as a failsafe, providing the public with the means to vigorously enforce the CWA if governmental agencies fail to exercise their responsibility to enforce it. S. Rep. No. 92-414, 92nd Cong., 1st Sess. (1972).

But the real party in interest must be the one to bring the suit; that is, the person who brings the suit must have the "right to enforce the claim and . . . a significant interest in the litigation." *Westinghouse*, 485 F.2d at 83. A citizen suit under the CWA may be maintained only when a citizen-plaintiff alleges, in good faith, a "continuous or intermittent violation of the Act," that occurred before filing the complaint. *Natural Res. Def. Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 812 (N.D. Ill. 1988). Bonhomme has sufficiently alleged that Maleau's overburden piles produce arsenic that enters Ditch C-1 and spreads to Wildman Marsh, and that these violations occurred before he sued Maleau.

2. Bonhomme satisfies the standing requirement of Article III.

Article III of the United States Constitution limits the jurisdiction of federal courts to "cases and controversies." U.S. Const. Art. III. To invoke federal jurisdiction, one must have the requisite standing to sue. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). For plaintiffs to establish standing, they must prove three critical elements: (1) an injury in fact; (2) "a causal connection between the injury and the conduct complained of;" and (3) that it is likely that the injury will be remedied by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-61. Bonhomme has standing under Article III because: (1) Bonhomme suffered an injury in fact; (2) there is a traceable causal connection between Bonhomme's injury and Maleau's conduct; and (3) it is highly likely that Bonhomme's injury will be redressed by a favorable decision.

A. Bonhomme suffered an injury in fact.

An injury in fact, sufficient to establish standing must be "concrete and particularized," and "actual or imminent," rather than a conjectural or speculative injury. *Id*. When environmental plaintiffs allege that "they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" they adequately allege injury in fact. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) (*Laidlaw*) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

Bonhomme suffered a quantifiable reduction in his ability to duck hunt in the waterways surrounding his lodge because of Maleau's pollution. R. at 6. Bonhomme's water tests proved substantial levels of toxic arsenic that caused him to fear using Wildman Marsh, and the U.S. Fish and Wildlife Service confirmed Bonhomme's fears—arsenic was found in several ducks from the wetlands surrounding Bonhomme's lodge. R. at 6. Maleau's behavior that caused the arsenic continues to this day. R. at 5-6. As such, Bonhomme suffered an injury in fact.

B. There is a traceable causal connection between Bonhomme's injury and Maleau's conduct.

The second constitutional requirement to establish standing, the causal connection requirement, demands that the injury can be traced to a defendant's illegal actions rather than some third party absent from the proceedings. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Bonhomme's injury, that he can no longer hunt in Wildman Marsh as he used to, is directly attributable to Maleau's pollution.

The record indicates that arsenic is not present in Ditch C-1 prior to Maleau's property. R. at 6. Arsenic is detectable below Maleau's property for the remainder of Ditch C-1, Reedy Creek, and Wildman Marsh. R. at 5-6. Concentrations of arsenic decrease as the distance from Maleau's land increases. R. at 6. It is clear that the presence of arsenic in Wildman Marsh prevents Bonhomme from enjoying and using the wetlands for hunting with friends, associates, and acquaintances and is directly connected to Maleau's waste piles. As such, there exists a causal connection between the injury and the conduct.

C. It is highly likely that Bonhomme's injury will be redressed by a favorable decision.

The final requirement for constitutional standing under Article III is that the injury will likely be remedied by a positive outcome at trial. *Defenders of Wildlife*, 504 U.S. at 560-61. In discussing the probability that sanctions or civil penalties under the CWA would redress injuries, the Supreme Court noted:

> It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

Laidlaw, 528 U.S. at 185-86 (2000).

Bonhomme requested all of the available relief under 33 U.S.C. § 1365, and, as the Supreme Court observed, a sanction against the offending party would provide an apt form of redress. R. at 4. If Maleau is ordered to relocate his waste piles, it is almost certain that arsenic levels will dissipate in the wetlands and Bonhomme will be able to resume his hunting activities.

Because Bonhomme suffered actual injury, has a significant interest in the outcome of the litigation, and has standing under Article III, this Court should find that Bonhomme is the real party in interest.

II. BONHOMME MAY BRING SUIT AGAINST MALEAU BECAUSE BONHOMME EMBODIES THE DESCRIPTION OF "CITIZEN" AS DEFINED IN 33 U.S.C. § 1365(g).

The district court erred in holding that Bonhomme is not a citizen under 33 U.S.C. § 1365, by dismissing the definition of "citizen" that Congress provided in the statute and by disregarding the fact that Bonhomme suffered injury in fact. This Court should therefore rule that Bonhomme is a citizen under the CWA with standing to sue Maleau.

As discussed above, Congress included a provision in the CWA that allows injured citizens to levy a civil action against persons who violate the effluent standards set forth in the Act. 33 U.S.C. § 1365(a)(1). To alleviate confusion regarding who may sue under this provision, Congress defined "Citizen" in 33 U.S.C. § 1365(g) as "a person or persons having an interest which is or may be adversely affected." A person with an adversely affected interest refers to an individual who can demonstrate injury in fact. *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2nd Cir. 1984) (*SCM*).

Bonhomme personally suffered a cognizable noneconomic injury to his ability to use and enjoy the pristine wetlands surrounding his lodge because of Maleau's arsenic. Accordingly, this Court should hold that Bonhomme is a citizen who may sue Maleau.

1. Congress intended that any person who suffers an injury in fact have standing to sue under the CWA.

In order to adequately protect navigable waterways and the environment, the CWA "is entitled to a broad construction." *United States v. Aluminum Co. of Am.*, 824 F. Supp. 640, 645 (E.D. Tex. 1993). The language and definitions that Congress used in the CWA as well as the legislative history of the Act demonstrates a congressional policy of providing more protection to the environment and less restriction regarding those who may file citizen suits. *SCM*, 747 F.2d at 105.

The original definition that Congress' Conference Committee supplied to the term "citizen" when drafting Section 505 of the CWA was "a citizen of the geographic area having a direct interest which is or may be affected." *Id*. The conferees deemed that definition too restrictive and instead supplied the term "citizen" as used in Section 505 with its current definition, "a person or persons having an interest which is or may be adversely affected." *Id*.; 33 U.S.C. § 1365(g). In the resulting Senate Conference Report, the conferees defended the conference substitute, explaining that the changed "definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*." S. Conf. Rep. No. 92-1236, 92nd Cong. 2d Sess. (1972).

In *Sierra Club v. Morton*, the plaintiff, Sierra Club, sought to prevent part of the Sequoia National Forest from being converted into a ski resort, alleging, "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country." *Morton*, 405 U.S. at 729-30. The Supreme Court recognized that aesthetic beauty and environmental well-being are important interests, but because the members of Sierra Club did not allege that its or any of its members' activities in the park would be directly affected by the new development, Sierra Club had not suffered any actual injury. *Id*. at 734-35. The Court

applied the "injury in fact" test in determining that the plaintiff had not sustained an actual "injury to a cognizable interest," and as such, lacked standing. *Id*. at 741.

In *Morton*, the plaintiff had only a general interest in protecting federal land from commercial development. *Id*. at 734. Conversely, Bonhomme has a direct interest in preventing arsenic from fouling the waterways next to his hunting lodge. The *Morton* plaintiff did not allege that its activities would be lessened by the proposed construction, nor did it even claim to use the land in question for any purpose. *Morton*, 405 U.S. at 735. Bonhomme, however, was quite specific; he uses Wildman Marsh for hunting parties with friends, acquaintances, and associates. As a result of Maleau's arsenic, Bonhomme has decreased his duck hunting by 75 percent. R. at 6.

The court in *Chesapeake Bay Foundation v. American Recovery Co., Inc.* held that the plaintiff conservation group did have the standing to sue that the *Morton* plaintiff lacked for two reasons: (1) the plaintiffs lived in close proximity to the affected waters and they "recreate in, on or near, or otherwise use and enjoy" those waterways; and (2) plaintiffs alleged "that their members' 'health, recreational, aesthetic and environmental interests ... have been, are being and will be adversely affected by' the defendant's illegal pollution discharges." 769 F.2d 207, 209 (4th Cir. 1985). Bonhomme owns a lodge that directly fronts the wetlands, and he uses those lands for recreation. R. at 6. The fact that Bonhomme is only alleging a reduction in his ability to participate in leisurely activities does not preclude actual injury. An injury that will support standing may be economic in nature, or noneconomic, affecting the plaintiff's "health, recreational, aesthetic, and environmental interests." *Chesapeake Bay*, 769 F.2d at 209. Bonhomme's desire to protect the lands upon which he is now, due to Maleau, unable to fully enjoy is a tangible injury to a cognizable interest that supports standing under the CWA.

Nor does Bonhomme's status as a French national preclude Bonhomme from being a citizen for purposes of the CWA. Congress expressly rejected the original definition of "citizen" that required the claimant to be a citizen of the particular geographic area affected, instead choosing a definition that recognizes "any person" who is or who may be adversely affected. S. Conf. Rep. No. 92-1236, 92nd Cong. 2d Sess. (1972). The term "persons," as used in the definition of "citizen" refers to an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). Moreover, courts have held that the citizen suit provision of the CWA and the nearly identical provision in the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6972, allows Native American tribes—entities normally granted sovereign immunity—to bring and be subject to citizen suits for violations of environmental standards. *Atl. States Leg. Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608 (D. Ariz. 1993); *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

Bonhomme is not a citizen of Progress or the United States; he is an individual who personally suffered actual injury to a cognizable noneconomic interest, thus satisfying the plain language of the CWA. Accordingly, this Court should hold that Bonhomme is a citizen under the CWA who may sue Maleau.

III. MALEAU'S OVERBURDEN PILES ARE DISCERNABLE, CONFINED AND DISCRETE CONVEYANCES, AND THEREFORE CONSTITUTE A POINT SOURCE.

The district court erred in granting Maleau's and Progress' motions to dismiss, and this Court should find that Maleau's overburden piles constitute a "point source." Under the CWA, point sources are "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel . . . from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14). When evaluating a motion to dismiss, courts must draw all

reasonable inferences in favor of the non-movant, and only dismiss the complaint if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *United States E.P.A. ex rel. McKeown v. Port Auth. of N.Y. & N.J.*, 162 F. Supp. 2d 173, 182 (S.D.N.Y. 2001) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The EPA has expressed the desire to embrace the broadest possible definition of "point source" consistent with legislative intent of the CWA. *Wash. Wilderness Coal. v. Hecla Mining, Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994).

Bonhomme presented evidence that by means of eroded channels, Maleau's overburden piles discharged pollutants into a navigable waterway. R. at 5-6. Moreover, Bonhomme's evidence demonstrated that the overburden piles were easily identifiable as the direct cause of the arsenic pollution. R. at 5-6.

A. Mining activities constitute a "point source" when the source is readily identifiable as a facility from which pollutants escape.

Maleau's overburden piles are an identifiable source from which pollutants are discharged, and the district court therefore erred by dismissing Bonhomme's claim. In a letter from the EPA Region VII, a "point source" is defined as "any seeps coming from identifiable sources of pollution (i.e., mine workings, ponds, pits)." *Id.* at 988. The question of whether a particular source of pollution is a "point source" is a fact-laden inquiry, and the court must consider the precise nature of the facility. *Id.* at 989.

In *Washington Wilderness Coalition,* the Eastern District of Washington held that discharged rainwater from a refuse pile constituted a point source because the pile acted to channel the water and the pile could be easily identified as the source. *Id.* at 988. The defendants (Hecla Mining, Co.) were in the business of placer mining for gold and silver ore. *Id.* at 985. During the process of extracting the ore the raw material was processed in liquid

containing cyanide and other chemicals. *Id.* Wastewater from the process was then dumped into a tailing pond, and then allegedly seeped through the pond into "waters of the United States." *Id.* The court held that the tailing ponds were point sources because they acted to collect or channel contaminated water. *Id.* at 991. In making its decision the court relied on the broad definition of "point source" adopted by the EPA, and determined that the touchstone finding of "point source" is the ability to identify a discrete facility from which the pollutants have escaped. *Id.* at 988.

The list of potential point sources found in the CWA is a broad non-exclusive list, and the EPA has adopted a broad interpretation when applying the word "point source." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). In order to further this interpretation, any identifiable conveyance from which pollutants might enter the "waters of the United States" must be considered a "point source." *Id.* Mining may involve discharges from both point and non-point sources, and those from identifiable point sources must be regulated. *Id.* at 373.

Maleau's overburden piles are "point sources" because they are easily identifiable as the source of the pollutant. In *Washington Wilderness Coalition*, the court held that the ability to identify a discrete facility from which the pollution has escaped is of high importance. 870 F. Supp. at 988. Maleau's overburden piles are easily identified as the source of the pollution. Bonhomme tested the water both above and below the overburden piles, conclusively determining the pollutants' source. R. at 6. Maleau, not Bonhomme, collected the rock, transported it to the location, and allowed the piles to drain arsenic into "waters of the United States." R. at 5. The CWA's purpose is to regulate pollutants that enter into "waters of the United States." In accordance with this broad interpretation, and the fact that the source of the pollution can be easily identified, the district court erred in granting Maleau & Progress' motions

to dismiss. Maleau's overburden piles constitute a point source because they are readily identifiable as a discrete conveyance of pollution into navigable waters.

Even if Ditch C-1 is not considered navigable water under the CWA, Maleau is still liable because the addition of pollutants need not occur "directly" to navigable waters, simply "to" "waters of the United States." *Rapanos v. U.S.*, 547 U.S. 715, 743 (2006). In *Rapanos,* the Supreme Court held that discharges from a point source that do not emit directly into covered waters, but that naturally wash downstream nevertheless violate the CWA even if the pollutants pass through a conveyance before reaching a "water of the United States." *Id.* Therefore, the district court erred by dismissing Bonhomme's claim because the overburden piles constitute a point source of pollution under *Rapanos*, *Earth Sciences*, and *Washington Wilderness Coalition*. Viewing the facts in the light most favorable to the non-movant (Bonhomme), the district court should have denied Maleau and Progress' motions to dismiss because the overburden piles are identifiable sources of pollution that act to channel arsenic into "waters of the United States."

B. The district court erred by dismissing Bonhomme's claim because it was "reasonably likely" that the overburden piles would discharge pollutants through the eroded channels.

Maleau's storage of overburden piles near Ditch C-1 resulted in a "reasonable likelihood" that the arsenic contained within could escape, and ultimately affect navigable water. The Fifth Circuit held in a factually similar decision that even when the means of conveyance are the result of natural erosion the defendant will be liable so long as those conveyances are "reasonably likely" to be the means by which pollutants are discharged. *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980) (*Abston*). Maleau transported the overburden piles to the location near Ditch C-1 and should have known that it was "reasonably likely" that the ground erosion would channel runoff from the piles into Ditch C-1.

In *Abston,* the Fifth Circuit held that a "point source" was present when miners collected disregarded overburden, and by means of ditches, gullies and similar conveyances, discharged pollutants into navigable bodies of water. *Id*. (*see also Trs. for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) (holding when mining activities release pollutants from a discernible conveyance, they are subject to NPDES regulation, as are all point sources). The court determined that the miners were liable under the CWA even if they had done nothing beyond the mere collection of rock and other fill material. *Id.* The court held that the ultimate question is whether pollutants were discharged from a "discernible, confined, and discrete conveyance," and that the miners were not relieved from liability simply because they did not construct the means by which the pollutants were discharged. *Id.* Polluters are liable even if the conveyances are the result of natural erosion, so long as those conveyances are "reasonably likely" to be the means by which pollutants are discharged. *Id.*

Maleau should have known that by storing his overburden piles near Ditch C-1, it was "reasonably likely" that arsenic could escape into Reedy Creek. Congress stated that the definition of "point source" included "surface runoff which is collected or channeled by man . . ." 40 C.F.R. §122.2. Like the *Abston* defendant, Maleau collected overburden from his mining operation in Progress and transported the waste to his property adjacent to Ditch C-1. R. at 5. When rainwater flowed down the overburden piles and percolated through them, water was then channeled by gravity through eroded channels into Ditch C-1. R. at 5. Maleau's overburden piles are point sources even though Maleau did not construct the eroded channels from which the water flowed. In *Abston*, the Fifth Circuit held that even when channels are created by nature, polluters are liable if it was "reasonably likely" that the water would be routed through the channels into navigable waters. Maleau should have known that rain water was "reasonably

likely" to flow through the overburden piles into Ditch C-1. The water running from Maleau's piles was collected or channeled by man, and as such is sufficient to constitute a point source under the CWA. Therefore, in accordance with the definition found in the Code of Federal Regulations, and in *Abston*, the overburden piles are a point source.

Maleau is still liable even if this Court finds that it is not "reasonably likely" that the overburden piles would discharge pollutants into "waters of the United States." The Supreme Court held that the relevant inquiry as to whether a source of pollution is a "point source" is "whether-but for the point source the pollutants would have been added to the receiving body of water." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 103 (2004). Reedy Creek and Wildman Marsh were polluted because the overburden piles were stored near Ditch C-1. The overburden piles created eroded channels from which the arsenic was discharged into Ditch C-1, and the overburden piles are the cause-in-fact or "but for" cause of the pollution. The district court should have found that the overburden piles were a point source because but for their presence, the pollution would not have occurred.

IV. DITCH C-1 IS "WATER OF THE UNITED STATES" UNDER 33 U.S.C. § 1362(7).

The district court improperly held that Ditch C-1 is not a "water of the United States" under 33 U.S.C. § 1362(7). This Court should reverse and find that Ditch C-1 is a "water of the United States" because Congress intended to protect not only navigable waters, but also their tributaries. Code of Federal Regulations § 122.2(e) states that tributaries of interstate waters are to be considered "waters of the United States" for purposes of the CWA. 40 C.F.R. § 122.2(e). Reedy Creek is an interstate water river system, and as will be explained below, is a "water of the United States."[1] As a tributary of Reedy Creek, Ditch C-1 is navigable water protected under the act. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *United*

[1] *See* Section V p. 25-28

States v. Vierstra, 803 F. Supp. 2d 1166, 1168 (D. ID. 2011). Ditch C-1 substantially connects with Reedy Creek, and contributes all of its water to the interstate stream. R. at 6. Ditch C-1 is also a permanent body of water with a continuous flow most of the year. R. at 6. Additionally, the fact that Ditch C-1 is man-made and non-navigable has no bearing on its status as a tributary.

A. Because Ditch C-1 is a tributary of Reedy Creek and Wildman Marsh, this Court retains jurisdiction under the CWA.

Ditch C-1, as a tributary of Reedy Creek, should be considered a protected water under the CWA. As found in the Code of Federal Regulations, Congress envisioned a broad application of the word "navigable waters" and intended to include tributaries of interstate waters as one of many areas covered by the Act. 40 C.F.R. § 122.2(e). Tributaries are generally defined as a "stream which contributes its flow to a larger stream or other body of water." *Headwaters, Inc.*, 243 F.3d at 533.

In *Headwaters, Inc.*, the Ninth Circuit held that irrigation canals that exchange water with natural streams are "waters of the United States." *Id.* As tributaries of "waters of the United States" such canals are also subject to the CWA. *Id.* (*see United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997)) (holding tributaries are "waters of the United States," and manmade ditches and canals that flow intermittently into creeks may be tributaries.) The irrigation canals in *Headwaters* were not isolated because of their exchange with other "waters of the United States." *Id.* The court noted that the pollution of a tributary in essence resulted in the pollution of the navigable waterway, obviously requiring jurisdiction to reach tributaries feeding "waters of the United States." *Id.* at 534. (citing *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974)).

Ditch C-1 exchanges water with Reedy Creek and Wildman Marsh, both "waters of the United States" under the CWA. Like the constructs in *Headwaters* and *Eidson*, Ditch C-1 is a

tributary of navigable waters, compelling this Court to retain jurisdiction over Maleau's pollution. Ditch C-1 is not "isolated water" because it drains directly into Reedy Creek, and Wildman Marsh, a federally protected wetland. Since the CWA is concerned not only with protecting "navigable waters" but also their tributaries, Maleau must stop polluting Ditch C-1. Bonhomme tested the water upstream and downstream from Maleau's property, and found that arsenic was present in the waters downstream from Maleau's property. R. at 6. This addition of pollutants fouls Wildman Marsh and traces of arsenic have been detected in several indigenous ducks. R. at 6.

The EPA intends to regulate not only interstate waters but also their tributaries, and this decision should be given appropriate deference as long as it complies with the intent of Congress. *Headwaters, Inc.*, 243 F.3d at 532. As shown above, Congress also intended to regulate tributaries of interstates waters, and intends for a broad application of the terms. 40 C.F.R. § 122.2(e). Ditch C-1 is a tributary because it contributes all of its flow to Reedy Creek and Wildman Marsh. Tributaries, as well as the navigable waters into which they flow, must be protected; Maleau must not be allowed to pollute Ditch C-1 because it will ultimately affect an interstate waterway, interstate commerce, and a federal protected wetland.

B. *Rapanos* does not preclude Ditch C-1 from CWA protection as a tributary of interstate waters.

Because water flows through Ditch C-1 most months out of the year it should be considered a relatively permanent body of water. Justice Scalia's plurality opinion in *Rapanos* defined the phrase "waters of the United States" to include only those relatively permanent, standing, or continuously flowing bodies of water. *Rapanos*, 547 U.S. at 739. This definition excludes channels containing merely intermittent or ephemeral flow, and requires that at a bare minimum, there must be an ordinary presence of water. *Id.* at 734. Ditch C-1 has been in

continuous use by landowners for over one hundred years. R. at 5. The ditch contains running water measuring 3' across and 1' deep most months of the year, except during annual periods of draught. R. at 5. Ditch C-1 therefore meets Justice Scalia's "continuous flow" requirement; the fact that periodic droughts affect Ditch C-1's water levels does not fun afoul of *Rapanos* because water levels return upon passage of drought conditions. *Rapanos*, 547 U.S. at 798 n.5.

Justice Kennedy concurring in the judgment stated that the proper test to determine "navigable waters" is whether the water or wetland possesses a "significant nexus" to waters covered under the CWA. *Id.* at 759. Ditch C-1 and Reedy Creek (which is an interstate water) clearly possess a "significant nexus." The two waterways are intertwined and Ditch C-1 drains directly into Reedy Creek. R. at 6. The relationship between the two is of great significance, and if Maleau is allowed to pollute Ditch C-1 then it will ultimately lead to the pollution of Reedy Creek and Wildman Marsh, eventually affecting interstate commerce.

The district court held that *Rapanos* requires that rivers be "highways of interstate commerce" to fall within the definition of "navigable waters" under the CWA. R. 9-10. While the plurality decision in *Rapanos* may be persuasive it is not binding law. Therefore, because the EPA intends to regulate not only interstate waters but also their tributaries, this Court should hold that Ditch C-1 is water protected under the CWA.

C. Man-made conveyances can still be tributaries of "waters of the United States."

The fact that Ditch C-1 is a man-made conveyance should not preclude its classification as a tributary of Reedy Creek and Wildman Marsh. The Ninth Circuit held that "the fact that [a] Drain is man-made does not preclude the finding that it is a tributary. . . ." *ONRC Action v. United States Bureau of Reclamation*, No. 97-3090-CL, 2012 WL 3526833, at *23 (D. Or. Jan. 17, 2012). In *ONRC*, the Ninth Circuit evaluated *Rapanos* and found that it did not alter the

validity of the court's analysis. *Id.* The ditch in *ONRC* was a man-made drainage ditch that ultimately flowed into the Klamath River, water covered under the CWA. *Id.* The court found that it was irrelevant whether the water reached the river as a result of human engineering. *Id.*

Ditch C-1 should also be considered a tributary because it connects with Reedy Creek, an interstate waterway, and Wildman Marsh—a federally protected wetland. R. at 6. Like *ONRC*, it does not matter whether the Ditch is man-made or naturally occurring; the important factor is that it exchanges water with a "water of the United States." Ditch C-1 should be protected under the CWA in order to effectuate the purposes of the Act, and keep the "waters of the United States" free from pollution.

D. Navigability in fact is not required to find that Ditch C-1 is a tributary of Reedy Creek and Wildman Marsh.

Maleau argues that Ditch C-1 cannot be considered a navigable waterway because it has never floated a boat and cannot do so in the future. R. at 9. In *United States v. Oxford Royal Mushroom*, the Eastern District of Pennsylvania rejected a similar argument and held that navigability in fact is not required under the CWA. 487 F. Supp. 852, 854-855 (E.D. Pa. 1980); (see also *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 175 (2001)) (*SWANCC*) (holding that the definition "waters of the United States" requires neither actual nor potential navigability). The *Oxford Royal* court evaluated the intent of Congress and held that legislative history makes it clear that the term "navigable" should "be given the broadest possible constitutional interpretation" *Id.* (citing Sen. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. (1972)). Therefore, in accordance with the agency definition, and the intent of Congress to adopt the broadest possible definition of "navigability," it is of no import that Ditch C-1 cannot support a naval vessel.

Unlike the disputed water in *SWANCC,* Ditch C-1 maintains direct interconnectivity with Reedy Creek and Wildman Marsh, both "waters of the United States" under the CWA. Arsenic pollution has a detrimental effect on the migratory birds and other animals in Wildman Marsh. The pollutants also affect interstate commerce because the water in Reedy Creek is used for agricultural products that are ultimately sold in the interstate market. R. at 5. Therefore, Ditch C-1 must be protected under the CWA because of its continual exchange of water with Reedy Creek. Interpretation of the term “navigable waters” and this decision should be given deference.

V. REEDY CREEK IS A "WATER OF THE UNITED STATES" UNDER 33 U.S.C. § 1362 BECAUSE REEDY CREEK AFFECTS INTERSTATE COMMERCE AND IS A TRIBUTARY OF WILDMAN MARSH.

The district court correctly held that Reedy Creek is a "water of the United States" under 33 U.S.C. § 1362(7) & (12). R. at 9-10. This Court should affirm and further rule that Reedy Creek, Wildman Marsh, and Ditch C-1 are all part of one continuous waterway, and are therefore "waters of the United States" for the purposes of determining federal jurisdiction. *Headwaters*, 243 F.3d at 533; *Eidson*, 108 F.3d at 1341-42. Rivers that support interstate commerce may be considered "waters of the United States" despite their non-navigable characteristics. *Earth Sciences, Inc.*, 599 F.2d at 375. Reedy Creek affects interstate commerce though its use as a water supply for travelers along I-250 and as an agricultural irrigation source for farmers. R. at 5. Alternatively, Reedy Creek, as a tributary of Wildman Marsh, is a "navigable waterway" because Wildman Marsh is a "water of the United States" through a plain meaning interpretation of 33 U.S.C. § 1362 and 40 CFR § 122.2.

1. Reedy Creek is a "water of the United States" because it affects interstate commerce. Further, even if Wildman Marsh is not a "water of the United States," it is an adjacent wetland, and along with Ditch C-1, part of the "waters of the United States" due to its interconnectivity with Reedy Creek.

While the district court was correct in determining that the "traditional" definition of "waters of the United States" turned on the navigability of specific water systems, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 403-05 (1940), "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce" are appropriately considered "waters of the United States" for the purposes of 33 U.S.C. § 1362(7) jurisdiction. 40 CFR § 122.2. Reedy Creek continuously flows through the State of New Union to the State of Progress; interstate commerce is correspondingly affected by both water use on I-250 and water diversion for farmers who later sell their products throughout the United States. R. at 5.

A. *Rapanos* did not overrule *Earth Sciences* and remove federal jurisdiction from rivers that affect interstate commerce.

Despite properly determining that Reedy Creek and Wildman Marsh are "waters of the United States" for CWA jurisdiction, the district court erred when it held that the United States Supreme Court implicitly rejected Bonhomme's claim that jurisdiction may be solely found upon Reedy Creek's classification as an interstate waterway through the EPA's interpretation of 33 U.S.C. § 1362(7). R. at 9; 40 CFR § 122.2. The United States Supreme Court cases of *Rapanos*, 547 U.S. 715 and *United States v. Lopez*, 514 U.S. 549 (1995) do not overrule the Tenth Circuit's well reasoned decision in *Earth Sciences, Inc.*, 599 F.2d at 368.

In consideration of permit requirements for gold mine operations, the *Earth Sciences'* court held that the "[CWA] was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes." 599 F.2d at 373. Given such Congressional

intent, the court additionally cited the House conference committee decision to eliminate "navigable" from the "waters of the United States" language of the CWA upon its passage. *Id.* 375. The court found that the "stream" at issue supported interstate commerce via agricultural irrigation, and the plaintiff need only show "some interstate impact" to establish jurisdiction. *Id.* Reedy Creek easily satisfies the "some interstate impact" requirement because farmers irrigate crops with river water to develop products sold in interstate commerce and travelers along I-250 buy products from businesses that utilize Reedy Creek as their water supply. R. at 5.

Rapanos and *Lopez* do not alter the analysis found in *Earth Sciences* because *Rapanos* inherently addressed isolated wetlands with only a minimal connection to interstate commerce. *Rapanos*, 547 U.S. at 742. Though Justice Scalia's plurality opinion in *Rapanos* stated that the "[Army Corps of Engineers'] interpretation [of adjacent wetlands jurisdiction] stretches the outer limits of Congress's commerce power and raises difficult questions about the ultimate scope of that power[,]" Reedy Creek is an *interstate* river with significant commercial impact on multiple industries. R. 5.

Moreover, in *Lopez*, the Supreme Court outlined three "areas" of Congress' power under the Commerce Clause: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-59. Reedy Creek clearly satisfies prongs (2) and (3), as the river directly serves businesses that trade in interstate commerce. But even if this Court holds that Bonhomme must satisfy prong (1), which is not supported by the rulings in *Rapanos* or *Lopez*, Reedy Creek is a "channel" of interstate commerce because Reedy Creek transports a good used in interstate commerce: the water required for irrigation and commercial businesses along I-250.

B. Wildman Marsh is an "adjacent" wetland and therefore part of the "waters" of Reedy Creek.

Even if this Court does not hold that Wildman Marsh is separately "waters of the United States," Wildman Marsh is part of the Reedy Creek waterway because it is an "adjacent" wetland according to the EPA's interpretation of 33 U.S.C. § 1362. *Rapanos*, 547 U.S. at 742; 40 CFR § 122.2. The Supreme Court's decisions in *Rapanos* resulted in two different "tests" for determining "adjacent wetlands" included within Congress' commerce clause power. *Id.* at 742, 779. Regardless of which test is applied, Wildman Marsh is an "adjacent wetland" because it maintains a "significant nexus" to Reedy Creek and has a continuous surface connection with "waters of the United States."

Under the plurality test presented by Justice Scalia, adjacent wetlands must support a "continuous surface connection" with the navigable water body that "make[s] it difficult to determine where the 'waters' end and the 'wetlands' begin." *Id.* at 742. Further, Justice Scalia wrote that "waters" must be "relatively permanent" and form distinct "geographical features." *Id.* at 732. Wildman Marsh is a "distinct" geographic feature as the marsh is part of the larger Wildman National Wildlife Refuge, and is observably large enough to support "over a million ducks[.]" R. at 5-6. Additionally, Reedy Creek flows into Wildman Marsh throughout the year, and no facts indicate that this connection is intermittent or artificially altered. *Id.* Therefore, if this Court applies Justice Scalia's plurality opinion, Wildman Marsh is an "adjacent wetland" under 40 CFR § 122.2. The second test, written by Justice Kennedy in his concurrence,[2] requires that the "adjacent wetland" show a "significant nexus" to the identified navigable water. *Id.* at 767. A "significant nexus" will be found when a party can show an actual relationship between the two waters that rises above mere proximity. *Id.* The instant case plainly meets the

[2]Justice Kennedy concurred only with the judgment, not with Justice Scalia's reasoning.

"significant nexus" test, as Reedy Creek flows into Wildman Marsh and is interconnected insomuch as there is not true delineation between the two waterways.

2. Wildman Marsh, a federally operated wetland, is a "water of the United States" under a plain meaning interpretation of 33 U.S.C. § 1362.

Should this Court find that Reedy Creek is not independently a "water of the United States," Reedy Creek is still a tributary of Wildman Marsh. R. at 5. Wildman Marsh is a "water of the United States" through a plain meaning interpretation of 33 U.S.C. § 1362 and 40 CFR § 122.2; as such, this Court should give the EPA's construction appropriate regulatory deference. Because tributaries are included within the purview of a navigable waterway, NPDES permits are required to add pollutants to any portion of Ditch C-1, Reedy Creek, and Wildman Marsh. *Headwaters, Inc.*, 243 F.3d at 533; *Eidson*, 108 F.3d at 1341-42; 33 U.S.C. § 1342. Wildman Marsh is part of the larger federally owned and maintained Wildman National Wildlife Refuge, and hunters travel to the reservation from over five states. R. at 5-6. Such interstate impact compels this Court to intervene and prevent further destruction by Maleau's gold mining operations.

A. Wildman Marsh is a "water of the United states" because the Marsh is an interstate wetland under 40 CFR § 122.2.

Courts are required to give "considerable weight" to an "executive department's construction of a statutory scheme[.]" *Chevron U.S.A., Inc. v. Nat'l Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984). If Congress explicitly or implicitly leaves questions as to the administration of its programs, courts must not overrule a "reasonable interpretation" of the statute. *Id.* at 843-44. While the Supreme Court also held in *SWANCC* that "[when] an administrative interpretation of a statute invokes the outer limits of Congress' power, [the Court] expect[s] a clear indication that Congress intended that result[,]" *SWANCC*, 531 U.S. at 172, a

clear indication is found in the CWA's definition of "navigable waters." Congress passed the CWA not only to regulate ecological pollutants, but also to protect interstate commerce on the nation's waterways. Wildman Marsh significantly impacts interstate commerce through commercial and recreational hunting. Additionally, the marsh is a migratory stopover for "millions" of birds each year. R. at 5-6. Maleau's illegal dumping of pollutants in the Ditch C-1, Reedy Creek, and Wildman Marsh waterway is precisely the activities Congress intended to prevent upon passage of the Act.

B. Alternatively, Wildman Marsh is a "water of the United States" because the wetland affects interstate commerce.

As shown above in section V(1)(A) of this brief, "waters of the United States" can include rivers, lakes, streams, or wetlands that affect interstate commerce. 40 CFR § 122.2; *Earth Sciences*, 599 F.2d at 375. While Justice Scalia's opinion in *Rapanos* concluded that an isolated wetland with no discernable interstate impact would fall outside of Congress' Commerce Clause power, Wildman Marsh is a commercially supportive *interstate* wetland. R. at 5-6. Wildman Marsh's water derives from Reedy Creek, and hunters travel from five states to hunt in the Wildman National Refuge. R. at 5-6. Furthermore, Bonhomme maintains a hunting lodge from which he conducts hunting expeditions each year. R. at 6. Such interstate impact is highly distinguishable from *Rapanos* or *SWAANC*, precisely because of Wildman Marsh's interconnectivity with interstate waterways.

VI. BONHOMME DOES NOT "ADD" POLLUTANTS TO REEDY CREEK BECAUSE DITCH C-1 AND REEDY CREEK ARE ONE CONTINOUS WATERWAY.

The district court incorrectly ruled that Bonhomme violated the CWA by operating a "point source" between Ditch C-1 and Reedy Creek. R. at 9. While Bonhomme would not deny that the culvert in question is a point source, the culvert simply *conveys* pollutants. For liability

to arise under the CWA, "point sources" must actually "add" pollutants to a separate navigable waterway. *See* 33 U.S.C. §§ 1311(a), 1362(12); *Nat'l Pork Producers Council v. U.S.E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011). Bonhomme does not "add" pollutants because Ditch C-1 is a tributary of Reedy Creek, and is therefore part of the same "waters of the United States." *Headwaters, Inc.*, 243 F.3d at 533; *Eidson*, 108 F.3d at 1341-42; 33 U.S.C. § 1342. Pollutants passed between two parts of the same waterway do not violate the CWA's NPDES permit process. *See* 40 CFR § 122.3(i); *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 200). Further, even if this Court does not hold that Ditch C-1 is a part of the Reedy Creek waterway, the Court should adopt the "unitary waters" theory enunciated by the Eleventh Circuit in *Friends of the Everglades*, 570 F.3d at 1217, and rule that only parties who actually introduce pollutants violate the Act.

1. Conveying pollutants between two parts of the same waterway is not "addition" under 40 CFR § 122.3(i).

As established in part IV, Ditch C-1 is a navigable waterway due to its connectivity with Reedy Creek. In 2009, the EPA issued a clarification to the question of what constitutes an "addition" of pollutants: consistent with a logical interpretation of "addition" and the intent of the CWA to prevent "actual" pollution, those who simply "convey" pollutants within the same waterway do not violate CWA permit regulations. 33 U.S.C. §§ 1311(a), 1362(12); *Nat'l Pork Producers Council v. U.S.E.P.A.*, 635 F.3d 738, 751 (5th Cir. 2011). Therefore, Bonhomme is not liable because Maleau is the true "point source" polluter of Ditch C-1.

A. 40 CFR § 122.3(i) specifically exempts Bonhomme's culvert from NPDES permits.

Under the EPA's regulatory interpretation of Section 404 of the CWA, water transfers are activities that "convey[] or connect[] 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 CFR § 122.3(i). The EPA's definition inherently addresses "point sources" that only "convey" pollutants but do not actually "add" the pollutant to navigable waters. Bonhomme did not "add" pollutants by simply allowing Ditch C-1 to feed Reedy Creek; Ditch C-1 is a tributary of Reedy Creek and therefore one single waterway for purposes of applying 40 CFR § 122.3(i). Maleau is the party who actually "added" the pollutant by permitting runoff to travel from his "point sources" into Ditch C-1. R. at 5. Therefore, this Court should reverse and hold that Bonhomme did not violate 33 U.S.C. § 1342 and instead find Maleau liable under the same statute.

B. Under the "unitary waters theory," Reedy Creek, Wildman Marsh, and Ditch C-1 are "waters of the United States" regardless of Ditch C-1's status.

Irrespective of Ditch C-1's status, this Court should follow the example of the Eleventh Circuit and adopt a "unitary waters theory" regarding "additions" of pollutants under 33 U.S.C. § 1342. The "unitary waters theory" holds that no "addition" to a navigable body occurs if the "point source" merely moves "existing pollutants from one navigable water to another." *Friends of the Everglades*, 570 F.3d at 1217. The Eleventh Circuit held in *Friends of the Everglades* that 40 CFR § 122.3(i) was a "reasonable construction" of an ambiguous statute and therefore due deference under *Chevron's* framework. *Id.* at 1227-78.

While the Untied States Supreme Court has not directly addressed the "unitary waters theory," the ambiguity of NPDES statutes will likely lead to the same result, as the "conveyance" versus "addition" distinction is logically sound and consistent with legislative intent. The facts of the instant case do not support a conclusion that Bonhomme should be liable for Maleau's pollution of Ditch C-1, Reedy Creek, and Wildman Marsh. Bonhomme has done nothing more than allow water to flow through his culvert as mandated by covenants in his property deed. R.

at 5-6. If this Court holds otherwise, it will inevitably encourage offenders to discharge pollutants in areas in which the blame can be shifted to innocent landowners.

CONCLUSION

For the forgoing reasons, this Court should REVERSE the district court's dismissal of Appellant Bonhomme's claims and hold that Bonhomme has standing under the citizen's suit provisions of the CWA, that Maleau's waste piles are in fact "point sources," that Ditch C-1, Reedy Creek, and Wildman Marsh are part of one continuous "water of the United States," and that Maleau is the actual polluter of Reedy Creek.

Respectfully submitted,

_____

Counsel for Jacques Bonhomme