Team 25

C.A. No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee

AND

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PROGRESS
NOS. 155-CV-2012 & 165-CV-2012

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Circuit Court of Appeals Cases

United States District Court Cases

Constitutional Provisions

Federal Statutes

Federal Regulations

Rules

Dictionaries

JURISDICTIONAL STATEMENT

Appellant Jacques Bonhomme ("Bonhomme") filed a citizen complaint under the Clean Water Act ("CWA") against Appellant Shifty Maleau ("Maleau") in the United States District Court for the District of Progress. 33 U.S.C. § 1365(a) (2012). The District Court had subject matter jurisdiction for this action because this case involves federal law. 28 U.S.C. § 1331 (2012). The district court dismissed Bonhomme's citizen suit and motion to dismiss. The district court's order is final, and jurisdiction is proper in this Court. 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Whether the District Court properly determined that Bonhomme, a non-resident of the area in question, was not the real party in interest, because Precious Minerals International ("PMI"), a competitor of Maleau, financed all investigative and litigation costs, and chiefly benefitted from the use of Bonhomme's property.

II. Whether the District Court, correctly determined that Bonhomme, a foreign national, is not permitted to bring a citizen suit under the CWA, because the CWA entitles only United States citizens to act as private attorneys general and enforce federal environmental law through direct civil action against public agencies or private violators.

III. Whether jurisdiction waters of the United States under the CWA include:

(a) Ditch C-1, which flows regularly, with only brief seasonal dry periods, into a creek where it joins a large wetland that contains a federal wildlife preserve, and

(b) Reedy Creek, which flows throughout the year across state lines, is used by a rest area for an interstate highway and has a substantial impact on the chemical integrity of a large federal wetland.

IV. Whether storm water runoff from Maleau's mining overburden piles is not a point source under the CWA, when substances only leave the piles through storm water runoff which is not collected or channeled into a pipe.

V. Whether the possibility that the pollutants originated from Maleau's mining overburden piles releases Bonhomme from liability for channeling pollutants into Reedy Creek through his culvert without a permit.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress, dismissing Bonhomme's suit, finding that Bonhomme is not the proper plaintiff in this case. (Record "R." 10).

Bonhomme brought a civil action against Maleau under the CWA citizen suit provision, 33 U.S.C. § 1365, seeking civil penalties and injunctive relief. (R. 4). Bonhomme alleges that storm water runoff from Maleau's mining overburden has eroded channels into Maleau's mining waste piles and leaches arsenic into the runoff that feeds Ditch C-1. (R.4-5). Bonhomme alleges that Ditch C-1 carries water through a culvert under his farm road and discharges arsenic into Reedy Creek, an interstate, navigable water. (R. 5.) Additionally, Bonhomme asserts"the Ditch is a navigable water under EPA regulations because it is a tributary of Reedy Creek, an interstate, navigable water." (R. 5).

Progress filed suit under the 33 U.S.C. section 1365 against Bonhomme, contending that Bonhomme violated the CWA by discharging arsenic through his culvert – a point source – into Reedy Creek. (R. 5). Maleau intervened in Progress's suit under CWA section 1365(b)(1)(B). (R. 5). The District Court granted a motion to consolidate the two cases, because the facts and law are the same. (R. 5). Both defendants, Bonhomme and Maleau filed motions to dismiss. (R. 5).

The District Court dismissed Bonhomme's suit and denied his motion to dismiss Progress's suit. (R. 10). The District Court held that (1) Bonhomme in not a real party in interest and (2) Bonhomme is not permitted to bring a citizen suit because he is not a citizen. (R. 8). In the alternative,

the District Court also said that if Bonhomme was able to maintain his suit, the District Court would have held that (3) Maleau's mining overburden piles are not point sources, (4) Ditch C-1 is not a jurisdictional water under the CWA, (5) Reedy Creek is a jurisdictional water, and (6) Bonhomme's culvert is a point regardless of the origin of pollutants in the ditch water. (R. 9-10). The District Court also denied Bonhomme's motion to dismiss because Progress adequately stated a cognizable cause of action. (R. 10).

STATEMENT OF THE FACTS

This case involves the release of arsenic into a ditch, a creek, and a marsh in the State of Progress. (R. 5-6). Both Maleau and Bonhomme own property along this ditch. (R. 5). Behind both Maleau and Bonhomme loom two large mining operations, Precious Metals International ("PMI") and Maleau's mining operation in Jefferson County. (R. 6).

The Waterways

Ditch C-1 sits entirely in Jefferson County of the State of Progress. (R.4) 4. It is a drainage ditch built in 1913 for agricultural properties in Jefferson County. (R. 5). The property owners who constructed Ditch C-1 have restrictive covenants in their deeds requiring each other to maintain the ditch, because it drains groundwater and storm-water runoff from these properties in order to make them suitable for agriculture. *See* (R. 5). Ditch C-1 begins on other upstream properties, runs through Maleau's and intervening agricultural land, and ends at the culvert on Bonhomme's property where it joins Reedy Creek. (R. 5). Ditch C-1 varies from one to three feet in width and averages one foot in depth. (R. 5). It runs for most of the year, except during annual periods of drought, lasting between several weeks and three months. (R. 5).

Reedy Creek is fifty miles long and runs continuously throughout the year. (R. 5). It begins in the neighboring State of New Union and ends near Bonhomme's property in the State of Progress. (R. 5-6). Reedy Creek drains its contents into Wildman Marsh near Bonhomme's property, which also

fronts part of this Marsh. (R. 5-6). Reedy Creek is used as a water supply for a service area on I-250, a federally funded highway, in New Union. (R. 5). Farmers in both states use water from Reedy Creek to grow crops that they sell in interstate commerce. (R. 5).

Wildman Marsh is an extensive wetland that serves as habitat for over a million migratory waterfowl. (R. 5-6). Much of the Marsh lies in the Wildman National Wildlife Refuge, which is maintained by the United States Fish and Wildlife Service. (R. 6). Duck hunters from the surrounding seven states, including the State of Progress and the State of New Union, generate $25 million in economic activity every year by visiting Wildman Marsh. (R. 6).

The Release of Arsenic and Ensuing Litigation

Maleau's open-pit mining and extraction operation is located in Lincoln County, Progress, adjacent to Buena Vista River. (R. 5). Maleau trucks overburden from his gold mining operation to a property he owns in Jefferson County, Progress and piles it adjacent to Ditch C-1. (R. 5). When it rains the storm water percolates through the piles, draining into Ditch C-1. (R. 5).

Sampling and analyses of the water in Ditch C-1 showed arsenic downstream, but not upstream, of Maleau's property and mining overburden piles. (R. 6). Further sampling also revealed that Ditch C-1 carries this arsenic into Reedy Creek and throughout Wildman Marsh beyond. (R. 6). The concentration of arsenic in Reedy Creek varies with the intensity of flow from Ditch C-1. (R. 6). The U.S. Fish and Wildlife Service also detected arsenic in three Blue-Winged Teal in the marsh. (R. 6). Because arsenic is a common waste product of gold mining, the pattern of arsenic spread from Maleau's property to Ditch C-1 strongly suggests that arsenic leaches from his mining piles into the ditch. (R. 6).

After this discovery, Bonhomme brought suit against Maleau alleging violations of the CWA. While PMI financed all expert witness and attorneys' fees related to this action, Bonhomme failed to join PMI as a plaintiff. (R. 6-7). Precious Metals International ("PMI") is an international corporation

with five gold-mining operations, two of which are located in the United States. (R. 7). PMI is in direct competition with Maleau's mining operation. (R. 7). Bonhomme is PMI's president and largest shareholder and owns property with a hunting lodge abutting both the ditch and Wildman marsh. (R. 6-7). Bonhomme, a French national, does not live at this property. (R. 7, 8). Instead, the property is used primarily for hunting parties for PMI's business clients and associates. (R. 7-8).

Bonhomme accuses Maleau of being an unfair business competitor, who artificially lowers his cost of production by ignoring environmental protection requirements. (R. 6). More specifically, Bonhomme accuses Maleau of strategically moving his mining wastes in an effort to skirt environmental law. (R. 7).

Bonhomme alleges that the arsenic found in the marsh has made him fearful to continue using it for hunting parties. (R. 6). However, Bonhomme continues to use the property for hunting parties and has only decreased the frequency from eight times to twice yearly. (R. 6). This decrease in use comes at the same time that PMI, for whose benefit the parties were primarily held, has experienced a decline in profits during the recent economic downturn. (R. 6).

STANDARD OF REVIEW

The district court dismissed Bonhomme's complaint and denied Bonhomme's motion to dismiss Progress' complaint under Federal Rules of Civil Procedure 12(b)(6). This Court reviews the district court's dismissal of a complaint de novo. *Gibson v. Office of Atty. Gen., State of California,* 561 F.3d 920, 925 (9th Cir. 2009).

SUMMARY OF THE ARGUMENT

Procedural Issues

The District Court properly dismissed Bonhomme's suit against Maleau because he is not a proper plaintiff. Bonhomme is not the real party in interest, does not have standing, and is not a citizen entitled to bring suit under the CWA's CWAcitizen suit provision. PMI , the real party in interest, is a necessary party, without whose joinder, the case should not proceed.

PMI's financial commitment to this case demonstrates that it is the real party. PMI paid for all investigative, expert witness and attorney fees related to the case. PMI financed this case to hurt Maleau, a business competitor. Bonhomme is less likely to benefit from a successful outcome as the area may remain polluted regardless of what actions Maleau is ordered to take. However, PMI gains as Maleau is compelled to spend money to defend a lawsuit.

Even if this court finds Bonhomme is a real party in interest, he lacks standing, thus his case was properly dismissed. He has not suffered an actual injury. He claims to fear hunting in the area, yet he continues to hunt therein. Maleau did not cause Bonhomme's alleged injury of polluting the marsh. Bonhomme added pollutants to the area through the culvert located on his property. A successful outcome will not redress this alleged injury. Bonhomme continues to channel agricultural and other runoff into the area through his culvert, penalizing his neighbors will not remedy that.

Lastly, Bonhomme, a foreign national, is not entitled to bring a citizen suit under the CWA CWA citizen suit provision. The statute is unambiguous that citizens may bring suits under the Act. Because Bonhomme is not a citizen, his case was properly dismissed.

Substantive Issues

Progress may satisfy either test laid out in the plurality and concurring opinions in *Rapanos,* in order to establish jurisdiction over Reedy Creek and Ditch C-1. This approach most effectively implements the policy of the *Marks* method in a fractured case like *Rapanos*. Both opinions restrict

CWA jurisdiction in inconsistent ways. Allowing the government to satisfy either test for jurisdictional purposes is the most cautious way to proceed under the fractured *Rapanos* opinion. This implements the intent of the *Marks* line of decisions when it is impossible to divine a controlling rule of law from the majority opinions alone.

Both tests support CWA jurisdiction over Reedy Creek and Ditch C-1. The two waters merge near the point where they join with a large wetland that contains a federal wildlife refuge. The arsenic coming from Ditch C-1 is detectable downstream in the Reedy and throughout the marsh. Three sampled Blue-Winged Teal tested positive for arsenic. These close physical and chemical connections establish a "significant nexus" under the concurring *Rapanos* test. The plurality's "relative permanence" test is also satisfied, because both the Reedy and Ditch C-1 flow relatively permanently throughout the year and connect to federal waters. The Reedy flows year round, and Ditch C-1 only has brief dry periods of no more than a few months.

Additionally, Maleau does not violate the CWA as the storm water runoff from Maleau's mining waste piles does not qualify under the CWA's definition of point source discharge. This type of storm water runoff is instead better classified as nonpoint source pollution, which, in turn, is more properly regulated through tracking and targeting methods designed for nonpoint source pollution.

Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property, despite any other potential point of origin. While Bonhomme argues that he is not the but-for cause of the pollution, Bonhomme's discharge of pollutants from a point source, the culvert on his property, is a strict liability offense under the CWA, and he cannot escape liability without proving that the pollutants reached the water on his property through another discrete conveyance.

ARGUMENT

Procedural Issues

Bonhomme is not a proper plaintiff because he is not the real party in interest and lacks standing. In addition, because he is not a citizen, Bonhomme was not entitled to bring a citizen suit under the CWA.

I. THE DISTRICT COURT PROPERLY DISMISSED BONHOMME'S SUIT BECAUSE BONHOMME WAS NOT THE REAL PARTY IN INTEREST, AND HE FAILED TO JOIN PMI, THE REAL PARTY IN INTEREST.

The District Court properly dismissed Bonhomme's suit against Maleau as not properly prosecuted by the real party in interest, as required by Fed. R. Civ. Pro. 17. (R. 8). PMI, a corporation of which Bonhomme is the president, is the real party in interest. (R. 7). Failing to join PMI is impermissible, because it will subject Maleau to a substantial risk of subsequent suits on the same facts and issues and may hinder PMI's ability to protect its interests the future.

The District Court properly concluded that Bonhomme was not the real party in interest. PMI is the real party in interest under Fed. R. Civ. P. 17 and is a necessary party whose joinder was required under Fed. R. Civ. P. 19. Even if this court finds that Bonhomme is a real party, permitting Bonhomme to continue without joining PMI will subject Maleau to the possibility of subsequent suits and may impede PMI's ability to protect its interests. Furthermore, Bonhomme lacks standing to pursue his suit against Maleau, and this leaves the Court without jurisdiction.

A. PMI, Not Bonhomme, Is the Real Party in Interest in This Action.

PMI is the real party in interest in this action. The Federal Rules mandate that "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). The rule leaves federal courts, when applying the relevant substantive law, to determine who is entitled to bring an action. *Va. Elec. & Power Co. v. Westinghouse Elec. Corp*., 485 F.2d 78, 83 (4th Cir. 1973). The CWA entitles a

citizen with an interest "which is or may be adversely affected" to bring suit against a violator or the administrator. 33 U.S.C. §§ 1365(a), 1365(g) (2013).

The purpose of Fed. R. Civ. P. 17 is to protect defendants from subsequent suits and to ensure the judgment will have its proper effect as res judicata. *Va. Elec. & Power Co.*, 485 F.2d at 83. The rule requires the real party in interest ratify, join, or be substituted into the action lest the case be dismissed. Fed. R. Civ. P. 17(a)(3).

PMI's financial commitment to this case demonstrates that PMI, not Bonhomme is the real party in interest. Before Bonhomme filed a complaint against Maleau, PMI tested the waters in Ditch-C1 and Reedy Creek. (R. 6-7). PMI didn't stop there. It paid for all expert witness fees, transforming the test results into an actionable cause. (ER. 7). PMI gave this cause sharper teeth by paying attorneys' fees. (R. 7). Furthermore, this suit also serves PMI's interests, because it will damage Maleau's competitive ability.

Bonhomme's success in this action will further PMI's, rather than Bonhomme's, interests. Even if Bonhomme is successful, it is unclear that the condition of the marsh, the creek, or waterfowl in the area will improve. Bonhomme continues to discharge the contents of Ditch C-1 into Reedy Creek, which flows to the marsh. (R. 5, 6). On the other hand, PMI's competitor, Maleau, may be forced to alter or halt his mining operations or pay penalties to his economic detriment. Thus, prevailing in the suit, while perhaps not likely to greatly improve Bonhomme's property and hunting grounds, is very likely to improve PMI's position, by injuring its business competitor.

B. Even If Bonhomme Is a Real Party in Interest, PMI Is a Necessary Party That Must Be Joined.

Even if this Court finds Bonhomme is a real party in interest, PMI was a necessary party, without whom the case must be dismissed. PMI is necessary because failure to join PMI may impair PMI's ability to protect its interests and subjects Maleau to a potential for subsequent suits on the same facts and issues.

In cases with additional real parties in interest, these parties must be joined, so long as joinder does not deprive the court of jurisdiction. *Va. Elec. & Power Co.*, 485 F.2d at 84 (joinder would destroy diversity). The relevant parts of Rule 19 read:

> …A person… whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if… (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:(i) as a practical matter impair or impede the person's ability to protect the interest; or(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19. If necessary real parties are not joined, the defendant remains vulnerable to multiple suits on the same facts and issues. *Va. Elec. & Power Co. v. Westinghouse Elec. Corp*., 485 F.2d 78, 84 (4th Cir. 1973) (because other real party in interest was precluded from subjecting defendant to additional suits; suit was properly allowed to continue without joinder). Rule 19 joinder serves three sets of interests: those of the present defendant, possible plaintiffs and defendants, and "the social interest in the orderly, expeditious administration of justice." *Tankersley v. Albright*, 514 F.2d 956, 965 (7th Cir. 1975); *O'Leary v. Moyer's Landfill, Inc*., 677 F. Supp. 807 (E.D. Pa. 1988) (held the EPA should be joined in a citizen suit under the CWA and the Resource Conservation and Recovery Act, seeking clean-up of a landfill, because the EPA might impose different cleanup requirements on the receiver of the landfill than the court.)

Even if the Court finds a plaintiff is a real party in interest under Fed. R. Civ. P. 17, the Court must consider Fed. R. Civ. P. 19, which controls joinder of necessary parties. *U-Haul Intern., Inc. v. Jartra*, Inc., 793 F.2d 1034, 1038 (9th Cir. 1986) (plaintiff, corporate owner of U-haul trademark was not the real party in interest for the purpose of allocating damage award and protecting defendant from subsequent suits, thus remand was necessary to permit plaintiff to obtain ratification or joinder of absent members of its system). Both rules 17 and 19 must be satisfied before the case may proceed. *Id.*

1. Proceeding Without PMI May Impair PMI's Ability to Protect Its Interests.

Proceeding without PMI may impair its ability to secure reimbursement for its incurred litigation costs in this case.. Because the court has discretion in awarding litigation costs, there is chance that PMI's total costs will not be reimbursed, regardless of who prevails. *See Davis v. Jackson*, 776 F.Supp.2d 1314, 1317 (M.D. Fl. 2011) (noting"the prevailing party in a CWA suit is not automatically entitled to an award of its litigation costs.") In addition, there is the possibility that PMI will not recover anything from Bonhomme because he, as an improper plaintiff, is not likely to prevail. PMI is a necessary party and not joining PMI may impede its ability to protect its interest.

Failing to join PMI will adversely affect PMI's ability to protect its interests in using Wildman Marsh to entertain business associates. PMI uses Bonhomme's property for hunting parties to entertain business clients and associates. (R. 6). PMI may be able to demonstrate that it is adversely affected by the release of pollutants into Wildman Marsh. Therefore, PMI may choose to pursue a citizen suit under the CWA against Bonhomme, Maleau, or both, subjecting Maleau to the potential for subsequent suits on the same facts and issues.

ii. Proceeding Without PMI Leaves Maleau Subject to a Substantial Risk of Subsequent Suits.

Maleau may be susceptible to further claims from PMI because PMI, as a corporation, is allowed to bring suit under the citizen suit provision. 33 U.S.C. §§ 1365 (a), (g), 1362 (5). Bonhomme at no point asserted that he was able to, or was protecting or representing PMI's interests in this suit.

PMI's public denunciation of Maleau's business practices suggests that it is considering bringing a citizen suit against Maleau based on the same facts and issues in this case. Bonhomme, PMI's president, publicly accused Maleau of engaging in unfair competition, artificially lowering his cost of production by ignoring environmental requirements. (R. 6). In calculating CWA penalties, economic benefit is assessed to keep violators from gaining an unfair competitive advantage by

violating the law. *U.S. v. Smithfield Foods, Inc.*, 191 F.3d 516, 529 (4th Cir. 1999). PMI's heavy financial involvement in this case makes it likely that it is aware of the citizen suit remedies of the CWA. PMI's likely knowledge combined with such posturing suggests that PMI may be considering pursuit of a case against Maleau. This litigation, financed by PMI, enables the company to test the waters before committing the corporation to a legal action, while still injuring Maleau, forcing him to defend a CWA suit

C. Bonhomme Lacks Standing, thus His Suit Should Be Dismissed.

Bonhomme does not have standing to pursue this action. The district court dismissed Bonhomme's suit on other grounds but for a federal court to have constitutional authority to settle a dispute, the person invoking the power of the federal court must demonstrate standing. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2660 (2013). Even if the parties do not raise the issue, a federal court must address lack of standing on its own motion even when a case is on appeal. *Judice v. Vail*, 430 U.S. 327, 331 (1977) (examining standing though raised by neither party on appeal). The constitutional minimum of standing requires three elements. The plaintiff must show that "(1) [he] has suffered an" actual or imminent injury "(2) the injury is fairly traceable to the challenged" acts "of the defendant and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181 (2000). Although Bonhomme may be able to establish a causal link, he has not suffered an actual injury, and his alleged injury will not be redressable.

1. Bonhomme Has Not Suffered an Actual Injury.

Bonhomme's less frequent use of the hunting lodge is a result of a decline in PMI's business, not a result of the presence of arsenic in the area. Bonhomme alleges that the presence of arsenic in Wildman Marsh, Reedy Creek, and the wildlife in the area has made him fearful to continue hunting, yet he continues to hunt there. (R. 6). Bonhomme has merely reduced the frequency of his hunting

parties from eight to two per year. (R. 6). This reduction is more logically explained by a decline in PMI's profits during the recent economic downturn. (R. 6). The hunting parties were held primarily for the benefit of PMI's clients and associates. Given with the decline in PMI's business profits, it is logical that fewer hunting parties would be held than before. On the other hand, it is less likely that Bonhomme truly fears the arsenic present in the area and wildlife because he is still willing to hunt there. Wading or walking through marshy area, where exposure to contaminated water is likely, and where capture of contaminated fowl is the goal, hardly speaks to fearfulness of hunting in the area.

2. A Favorable Decision Will Not Redress Bonhomme's Claimed Injury.

Even if this court finds the causal link sufficient, a favorable decision for Bonhomme will not redress his injury. Bonhomme will find no purity in the waters of the creek, nor the marsh, nor the catch of his hunt, until he ceases channeling the waters of Ditch C-1 into Reedy Creek. The agricultural activities that may contribute to pollutant run-off into ditch C-1 will continue to end up in Wildman Marsh and Reedy Creek as long as Bonhomme continues to divert that run-off through his culvert. Furthermore, it is unclear how long arsenic will persist in the ditch. Thus, while the mining operations may stop, if arsenic persists in the area, the discharge of arsenic via Bonhomme's culvert will not stop. Even a court ordered clean-up may fail to eradicate its presence in the ditch. Enjoining, or deterring Maleau through civil penalties, from polluting Ditch C-1 won't stop the degradation of the Marsh by Bonhomme. His injury will not be redressed.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT BONHOMME, A FOREIGN NATIONAL, WAS NOT ENTITLED TO BRING A CITIZEN SUIT UNDER THE CWA.

Bonhomme is not a citizen within the meaning of the CWA's citizen suit provision. As a result, he is not entitled bring a citizen suit under § 1365(a). He does not need, nor is it appropriate for him, as a foreign national, to act as a private attorney general in order to enforce federal environmental law. Bonhomme, can instead look to Progress or the EPA for help with stopping violators of the law.

When the language of a statute is clear and unambiguous, the court's "analysis must end with the statute's plain language." *Hillman v. I.R.S.*, 263 F.3d 338, 342 (4th Cir. 2001) (declined to read past plain meaning of the statute to consider legislative history because a literal interpretation didn't produce absurd results nor did was it at odds with any expressed congressional intent.) When the language is clear, courts are not free to replace that language with legislative intent. *Id*. citing *United States v. Morison*, 844 F.2d 1057, 1064 (4th Cir. 1988).

There are two very narrow exceptions where a court can look beyond unambiguous statutory language. *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir. 2000). First, is when a literal reading produces an absurd outcome that can be characterized as "so gross as to shock the general moral or common sense." *Id*. Next, is "[w]hen a literal reading produces an outcome that demonstrably" conflicts "with clearly expressed congressional intent to the contrary." *Id*.

The citizen suit provision states that "any citizen may commence a civil action on his own behalf" against any violator, including the United States or other governmental body, or against the administrator for a failure to enforce against violators. 33 U.S.C. § 1365. A citizen is defined as "a person or persons having an interest which is or may be adversely affected. 33 U.S.C. § 1365 (g) (2013). A person can include an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (2013).

The purpose "of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act." *Lockett v. E.P.A.*, 319 F.3d 678, 684 (5th Cir. 2003), and *Saboe v. State of Or.*, F.Supp. 914, 916 (D. Or. 1993) (purpose is to fill in federal, state, and local enforcement gaps) citing *Gwalty of Smithfield, LTD. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). The clear language of the provision supports Congress's purpose, to entitle citizens to aid in local, state, and federal law enforcement.

A. The Meaning of "Citizen" in the Citizen Suit Provision Is Unambiguous.

The word "citizen" is clear and unambiguous thus this court should not entertain anything other than the literal meaning of the word. The Oxford dictionary defines "citizen" as "a legally recognized subject or national of a state or commonwealth, either native or naturalized." Oxford Dictionaries, http://www.oxforddictionaries.com/us/definition/american_english/citizen (last visited December 2, 2013). The legal definition is equally unequivocal: "a person who by either birth or naturalization is a member of a political community owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of a civil state, entitled to all its privileges." Black's Law Dictionary 278 (9th ed. 2009).

The statute is clear that only citizens may bring a citizen suit. 33 U.S.C. § 1365(a) (2013). Tthe statute defines citizen to emphasize that the person must have an interest that is adversely affected. 33 U.S.C. § 1365(g). The definition of person merely clarifies that it covers both natural people and legal entities. *Id.* § 1362(5). Congress took the time to further clarify both the word citizen and person, yet chose not to identify foreign nationals in either clarification. Congress chose the word, "citizen," to unambiguously convey that section 1365 suits are restricted to citizens of the United States.

B. A Literal Reading Does Not Produce Absurd Results.

A literal reading of "citizen" in the citizen suit provision does not produce an outcome so "gross as to shock the general moral or common sense." *Sigmon Coal Co., Inc. v. Apfel*, 226 F.3d 291 (4th Cir. 2000). To the contrary, the outcome is logical, that Congress did not want foreign nationals to step in as private enforcers of federal laws. Foreign nationals are excluded from the political process; it is not so gross and shocking to moral and common sense that Congress sought to exclude foreign nationals from direct involvement in the exercise of federal commerce clause powers.

C. A Literal Meaning Is Not at Odds with Any Clearly Expressed Congressional Intent.

A literal reading of citizen in the citizen suit provision does not conflict with any clearly expressed congressional intent. Nowhere in the citizen suit provision does Congress expressly indicate that foreign nationals are entitled to bring citizens suits. 33 U.S.C. §§ 1362, 1365. Therefore, a literal reading of the citizen suit provision as entitling only "citizens" to enforce the Act is not at odds with a "clearly expressed congressional intent to the contrary." Accordingly, this court should employ a literal reading of "citizen" within the citizen suit provision.

There is no desperate need to empower Bonhomme, a foreign national, with enforcement power against potential violators. He can report violations to the state and the EPA. If they choose not to pursue his claims, he can contact environmental interest groups, which often through both political and legal means assert pressure over unwilling authorities. In this particular case, there is a vast group of potential plaintiffs that could pursue a citizen suit, because the Marsh is a major destination for hunters within in Progress and six neighboring states. (R. 6). There is hardly a need to confer upon a foreign national such great power to prosecute our nations people, authorities, and institutions.

Because Bonhomme is not the real party in interest, lacks standing, and is not a citizen within the meaning of the CWA citizen suit provision, he is not a proper plaintiff, and the district court properly dismissed his suit against Maleau.

Substantive Issues

Even if Bonhomme is a proper plaintiff, he, rather than Maleau, violates the CWA, because his culvert, not Maleau's waste piles, is the point source that discharges pollutants into navigable waters. Among the CWA's goals is to eliminate "the discharge of pollutants into the navigable waters" of the United States. 33 U.S.C. § 1251(a)(1) (2012). To that end, "[t]he CWA generally prohibits the 'discharge of any pollutant,' ... from a 'point source' into the navigable waters of the United States." *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir.1999). Although both Reedy Creek and

Ditch C-1 are navigable waters for purposes of the statute, runoff from Maleau's waste piles is nonpoint source pollution, outside the reach of the CWA.

III. BOTH REEDY CREEK AND DITCH C-1 ARE JURISDICTIONAL WATERS OF THE UNITED STATES UNDER THE CWA, BECAUSE BOTH HAVE A SIGNIFICANT NEXUS WITH NAVIGABLE WATERS.

Reedy Creek and Ditch C-1 are "navigable waters" for purposes of the CWA. The government may use either test laid out in *Rapanos v. United States* to establish jurisdiction. *Rapanos v. United States*, 547 U.S. 715 (2006). Under either of these tests, Reedy Creek and Ditch C-1 meet the standard required for CWA regulation.

A. Water Is Jurisdictional If It Satisfies Either the Relatively Permanent Flow Test or the Significant Nexus Standard.

Either test laid out in *Rapanos* may be used to establish federal jurisdiction. Ordinarily, a court applying a fragmented Supreme Court decision should apply the narrowest concurring opinion. *Marks v. U.S.* 430 U.S. 188, 193 (1977). However, when neither opinion is a complete subset of the other's change in the law, courts should look at the entire opinion to implement the goal of the *Marks* mandate, to narrowly construe Supreme Court judgments that rest on inconsistent grounds. *See King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991).

1. Neither Opinion Can Definitively Control the Result in *Rapanos*, Because Neither Legal Test Is a Complete Subset of the Other's Restriction on CWA Jurisdiction.

The classic *Marks* approach cannot be effectively applied to the *Rapanos* majority opinions. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . ..' " *Marks*, 430 U.S. at 193. The "narrowest grounds" is the smallest change in existing law. *See id.* at 193-94 (governing plurality reversed conviction by changing obscenity standard and concurring opinions abandoned obscenity regulation altogether.) Because both standards in the competing opinions would withdraw CWA jurisdiction

inconsistently, neither standard can control on its own. Furthermore, the *Rapanos* dissent's guidance is instructive; because the dissent would uphold jurisdiction if either test was met, this Court should follow the First and Third Circuits and allow jurisdiction if either test is satisfied. *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting); *United States v. Johnson*, 467 F.3d 56, 62-64 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 2409 (U.S. 2012).

i. The Relatively Permanent Flow Test Is an Overinclusive and Underinclusive Subset of the Significant Nexus Test.

Justice Scalia's relatively permanent body of water and surface connection test would withdraw jurisdiction from waterways purely on surface connection and permanence bases. *See Rapanos*, 547 U.S. at 732-33 (test discussed more fully below.) That test would likely withdraw jurisdiction over short channels that are dry most of the year and by extension wetlands that only connect to navigable waters through such channels. *See id.* at 732-33, 742. The test, however, could continue to allow jurisdiction over very distant, tiny springs, as long as the open water connection is continuous toward a large navigable river, even though such tiny flows may have a negligible effect on the large river downstream.

ii. The Significant Nexus Standard Is Also Overinclusive and Underinclusive.

Justice Kennedy's "significant nexus" standard would likely withdraw federal jurisdiction from fewer cases, but it still withdraws jurisdiction from cases where Justice Scalia's test would allow CWA coverage. *Rapanos*, 547 U.S. at 810, n.14 (Stevens, J., dissenting.) The example above, involving the distant small spring, would likely be a case where the supposedly more sweeping change might still allow federal jurisdiction and Justice Kennedy's rationale would not, because the spring's distance and small effects on downstream water quality would probably fail the significant nexus standard. *Rapanos*, 547 U.S. at 780-81 (standard discussed more fully below.)

Neither rationale is a complete subset of the other, and *Marks* cannot be applied straightforwardly to the opinion.

2. Using Both Legal Tests, Applied Disjunctively, Gives More Complete Guidance to Federal Courts in Implementing *Rapanos*.

Marks and its predecessors attempted to guide federal courts in implementing fractured opinions in a way that develops the law cautiously. *See King*, 950 F.2d at 782. In multiple cases where concurring majorities decided to expand constitutional rights, the "narrow" opinions could be easily identified, because those opinions decided a question of constitutional law on an as applied basis or under a slightly more protective test. In contrast, the differing concurring rationales in those cases involved sweeping change. *See Marks*, 430 U.S. at 193-94 (citing *Gregg v. Georgia*, 428 U.S. 153, 169, n. 15 (1976) (controlling opinion invalidating death penalty as applied rather than abolishing altogether); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Com. of Mass.*, 383 U.S. 413, 420 (1966) (controlling opinion narrowed *Roth* speech regulation rather than abolishing obscenity regulation completely.)) Other Circuits' decisions to divine a "narrower" rationale in *Rapanos* without looking to all the justices fail, because the relationships between the concurrences and the dissent, here, are markedly different. Here, the dissent explicitly states it would uphold jurisdiction under either test, and both tests differ substantially from each other in both narrow and broad ways.

Because both tests differ in both directions, allowing jurisdiction when either is met more effectively implements the *Marks* mandate to change the law as narrowly as possible, when a majority opinion differs in rationale. *See Johnson*, 467 F.3d at 62-64.

B. Both Reedy Creek and Ditch C-1 Are Jurisdictional Waters, Because They Have Relatively Permanent Connections to and Significant Nexi With Navigable Waters.

Both Reedy Creek and Ditch C-1 are jurisdictional "navigable waters." The CWA defines "navigable waters" as "the waters of the United States. . ." 33 U.S.C. § 1362(7) (2012). This broadly covers traditional waters as well as areas of land that are either saturated or often covered with water. *See* 33 C.F.R. § 328.3(a)(1)-(8) (2013). The Supreme Court trimmed the edges of this expansive

interpretation with the requirement that the government show either that a waterway is a "relatively permanent, standing or continuously flowing bod[y] of water" or has "a significant nexus" with navigable waters. *Rapanos*, 547 U.S. at 739, 67; *see also Johnson*, 467 F.3d at 62-64. Reedy Creek and Ditch C-1 satisfy either requirement and are jurisdictional waters for purposes of the CWA.

1. Both Reedy Creek and Ditch C-1 Have Significant Nexi with Navigable Waters.

Reedy Creek and Ditch C-1 both have a "significant nexus" with regulated waters. *Rapanos*, 547 U.S. at 767. When deciding whether a particular waterway has a significant nexus with navigable waters, a court should consider two factors: (1) whether the waterway "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable" and (2) how close the waterway is to navigable waters. *Rapanos*, 547 U.S. at 780 (internal quotations omitted); *see id.* at 781. The nexus may also be established in reference to regulated waters that may not be navigable in fact. *See id.* at 782 (criticizing an agency standard for tributaries based solely on flow, because other factors are important in assessing that tributary's "significant nexus with other regulated waters.") Fundamentally, the "significant nexus" standard is focused on implementing the statute's goals of protecting downstream water quality. *See id.* at 776.

Both waterways have significant effects on downstream water quality and directly feed into national wildlife preserve wetlands, and, thus, are jurisdictional waters. (R. 5-6).

i. Reedy Creek and Ditch C-1 Are Adjacent to Navigable Waters, Which Supports a Significant Nexus.

Reedy Creek and Ditch C-1 feed directly into Wildman Marsh, which is a regulated federal wetlands. (R. 6). Ditch C-1 joins Reedy Creek shortly before it enters Wildman Marsh. *See* (R. 5-6). Each are equally close to Wildman Marsh, which contains a federal National Wildlife Refuge. *See* (R. 5-6). The physically close connection to this marsh weighs in favor of a significant nexus with navigable waters. *Rapanos*, 547 U.S. at 781. Aerial photographs that merely showed an eventual physical connection between the waters at issue and navigable waters supported jurisdiction over

wetlands more distant than the waters at issue, here. *See United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008).

ii. Reedy Creek's and Ditch C-1's Intimate Hydrological Connections with Other Navigable Waters Supports a Significant Nexus.

Reedy Creek and Ditch C-1 have intimate hydrological connections to navigable waters. Hydrological connections need to be substantial; mere existence is not enough. *Rapanos*, 547 U.S. at 784. Evidence that pollution leaks through the groundwater table from an adjacent pool to a regulated river forms a substantial nexus between the pool and the regulated river. *N. California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

Here, the evidence shows that Reedy Creek has substantial effects on Wildman Marsh. Arsenic that enters the creek from Ditch C-1 flows into the marsh, affecting water quality on a chemical level. (R. 6). This arsenic is detectable *throughout* the marsh. (R. 6). Arsenic flowing from Ditch C-1 through Reedy Creek has even been detected in three Blue-Winged Teal[1] that inhabit the marsh. *See* (R. 6). The physical and chemical effects of Reedy Creek on federal wetlands are substantial, and its effects on Wildman Marsh's biological integrity are conclusively demonstrated in the record.

Likewise, arsenic from Ditch C-1 is detectable in Reedy Creek and beyond. (R. 6). The concentration detected in Reedy Creek even varies with the rate of flow from Ditch C-1, tying the chemical integrity of Reedy Creek even more closely to Ditch C-1. (R. 6).

The chemical effects that these tributaries have on federal wetlands weigh conclusively in favor of a significant nexus.

iii. Reedy Creek Is Itself a Regulated Water of the United States, Because It Is an Interstate Water, Is Important to Interstate Commerce, and Affects Downstream Navigable Water Quality.

Reedy Creek is itself, an interstate water, and this fact, on its own, confers federal jurisdiction under the CWA. *United States v. Cooper*, 482 F.3d 658, 660 (4th Cir. 2007). Effective regulation of

1 The harm to wildlife is likely greater in magnitude, because it is impractical to test *every* bird. Progress must rely on limited testing to show chemical effects on the marsh and its wild inhabitants.

pollution in interstate waters depends upon federal jurisdiction under the CWA. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489-91 (1987). Reedy Creek is important to interstate commerce through the many ways both Progress and Union use the creek: both states use Reedy Creek as a water source to grow agricultural products that are sold in interstate commerce, Reedy Creek is also used as a water source for a rest area on a federal highway in Union. (R. 5). The specter of *Lopez* limits on interstate commerce clause power dissipates here: because the uses of Reedy Creek are entirely economic, and the decision to pollute at issue is a classic economic decision to externalize the cost pollution. *See United States v. Lopez*, 514 U.S. 549, 567 (1995) (noneconomic activity, as opposed to economic activity, may not be considered in interstate commerce clause review); (R. 5-6). Furthermore, because Reedy Creek is itself regulated, Ditch C-1's intimate connection to the Creek, discussed above, provides an alternative basis for jurisdiction.

2. Both Reedy Creek and Ditch C-1 Have Relatively Permanent Connections to Navigable Waters.

Justice Scalia's relative permanence test requires that a body of water exist with relative permanence and connect to other waters over the surface. *Rapanos*, 547 U.S. at 732-33. The body of water must be a set fixture of the area's geography although it may dry up regularly during a dry season. *Id.* at 732, n. 5. The test excludes areas of occasional flood drainage like washes and arroyos "in the middle of the desert." *Id.* at 727.

Both Reedy Creek and Ditch C-1 meet the relative permanence test laid out in the *Rapanos* plurality. Reedy Creek flows year round into Wildman Marsh. (R. 5). It is a fifty mile long geographic fixture of the surrounding area from Union to Progress. (R. 5). Likewise, Ditch C-1 flows into Reedy Creek for most of the year, only running dry for three weeks to a few months during annual droughts. (R. 5). Portions of creeks that only regularly flow for two months of the year also meet this relative permanence test. *United States v. Moses*, 496 F.3d 984, 985, 91 (9th Cir. 2007).

In sum, both Reedy Creek and Ditch C-1 are regulated, navigable waters for purposes of the

CWA. Both constant bodies of water have significant effects on federal wetlands and perform important functions for interstate commerce and water quality.

IV. STORM WATER RUNOFF FROM MALEAU'S MINING WASTE PILES, NOR THE WASTE PILES THEMSELVES, ARE NOT A POINT SOURCES UNDER THE CWA, BECAUSE DISCHARGES NOT COLLECTED OR CHANNELED INTO A DISCRETE CONVEYANCE FALL UNDER THE PURVIEW OF NONPOINT SOURCES.

Storm water runoff from Maleau's mining waste piles is not a point source under the CWA, as storm water runoff is considered a nonpoint source under the CWA. Among the CWA's goals is to eliminate "the discharge of pollutants into the navigable waters" of the United States. 33 U.S.C. § 1251(a). To that end, "[t]he CWA generally prohibits the 'discharge of any pollutant,' ... from a 'point source' into the navigable waters of the United States." *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1163 (9th Cir.1999). CWA section 1362(14) defines the term "point source" as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2012). While EPA regulations include some surface runoff, only that runoff which is collected by pipes and other means before being discharged is included in the definition. 33 U.S.C. § 1362(14). Consequently, Maleau's mining overburden and slag cannot be categorized as point sources, as any storm water runoff that passed over the piles was not channeled by pipes or other similar means.

A. Uncollected Storm Water Runoff Does Not Become a Point Source When It Percolates Through Maleau's Mining Waste Piles.

Storm water runoff from Maleau's mining waste piles is not a point source under the CWA, because piles are not conveyances. *See* 33 U.S.C. § 1362(12), (14) (2012). In order to establish a violation of the CWA's National Pollutant Discharge Elimination System (NPDES) requirements, plaintiffs must prove that a defendant 1) discharged, i.e., added, 2) a pollutant 3) to navigable waters 4) from 5) a point source. 33 U.S.C. § 1342(a) (2012); 40 C.F.R. § 122.41(a) (2013); *Idaho Conservation*

League v. Atlanta Gold Corp., 844 F. Supp. 2d 1116, 1126 (D. Idaho 2012). As part of Maleau's gold mining and extraction operation, Maleau piles overburden and slag in piles in Jefferson County. (R. 5). When it rains, rainwater runoff flows down the piles and percolates through them, eventually discharging into Ditch C-1. (R. 5).

Case law defines storm water runoff as that which "is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner."*Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC,* 940 F. Supp. 2d 1005, 1023 (D. Alaska 2013). Consequently, storm water runoff "is not a discharge from a point source." *Id.* Stormwater that runs off and dissipates in a natural and unimpeded manner is not discharge from point source. *Ecological Rights Found. v. Pac. Gas & Elec. Co.,* 803 F. Supp. 2d 1056, 1063 (N.D. Cal. 2011) (holding that rainwater used to treat utility poles and then carried by storm water runoff to the San Francisco Bay, its tributaries, and adjacent wetlands, was not point source discharge actionable under the CWA.)

Conversely, when runoff is "collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a discernible, confined and discrete conveyance of pollutants, and there is, therefore, a discharge from a point source." *Alaska Cmty.* at 1023. Gravity flow, which may result in the discharge of pollutants, may only be part of a point source discharge if the mining operation at least initially collected or channeled the water. *Sierra Club v. Abston Const Co Inc*. 620 F.2d 41, 45 (5th Cir. 1980). In this instance, there was no collection or channeling of the storm water in question. *See* (R. 5). As such, while storm water eventually discharges through channels eroded by gravity, this gravity flow cannot be part of a point source discharge because it was not collected through Maleau's affirmative efforts.

The court in *Abston Const*. emphasized the importance distinguishing between runoff that was purposefully collected through a system of conveyances, and that which fell freely, noting in that case that the mining

> operation [was] a closed circulating system, designed to serve the gold extraction process with no discharge. When it fails because of flaws in the construction or inadequate size to handle the fluids utilized, with resulting discharge, whether from a fissure in the dirt berm or overflow of a wall, the escape of liquid from the confined system is from a point source. Although the source of the excess liquid is rainfall or snow melt, this is not the kind of general runoff considered to be from nonpoint sources under the CWA.

Id. at 46 (quoting *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979)). Additionally, storm water runoff from mining operations which is collected in a system of conveyances and which is not contaminated by overburden does not require a permit. 33 U.S.C. § 1342(l)(2). Here, the storm water runoff was not associated with any sort of operation designed by Maleau, nor did Maleau set up any conveyances beside Ditch C-1 that could be construed as a discrete conveyance. The storm water runoff flowed freely, much like the general runoff distinguished in *Abston Const*.

Without some sort of positive effort by Maleau, surface water runoff guided only by gravity does not transform these waste piles into point sources under the CWA.

B. Nonpoint Source Pollution Is More Properly Regulated Through Tracking and Targeting Methods.

In seeking to better regulate, potential causes of water pollution in the state, storm water runoff from sources such as Maleau's mining byproducts are better categorized as a type of "nonpoint" source pollution. The CWA does not define nonpoint source pollution within the four corners of the statute. *See* 33 U.S.C. § 1362. Congress has instead left this task to the EPA, which has published guidelines explaining that:

> [nonpoint source pollution] is caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silvicultural, urban runoff, runoff from construction activities, etc. Such pollution results in human-made or human-induced alteration of the chemical, physical, biological, and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

Alaska Cmty. Action on Toxics, 940 F. Supp. 2d at 1023 (quoting EPA Office of Water, Nonpoint Source Guidance 3 (1987)).

As such, storm water runoff from Maleau's mining piles, and the pollutants that may originate in these piles are better regulated as a nonpoint source. The storm water runoff in this case is not first collected or channeled into a particular, specific conveyance. Consequently, the storm runoff cannot be adequately monitored or regulated by an NPDES permit, as would be required for point source discharges. 33 U.S.C. §1342. In order to address pollutants that cannot be categorized directly monitored, the CWA outlines a regulatory scheme designed to address pollutants that cannot be adequately monitored and regulated through an NPDES permit. These nonpoint source pollutants, are instead better regulated through a system designed to monitor discharges such as road, municipal, or storm water runoff. 33 U.S.C. §1329. In this situation, the storm water runoff naturally flows over the land and waste piles into Ditch C-1, rather than being discharged by a particular, specific conveyance. (R. 5). Thusly, rather than being subject to the rules and regulations of a NPDES permit, this storm water runoff is better classified as a nonpoint source discharge.

States are better positioned to regulate nonpoint source effluents within their borders. Nonpoint sources of pollution have not generally been targeted by the CWA; instead they are generally excluded, except to the extent that states are encouraged to promote their own methods of tracking and targeting nonpoint source pollution. *Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008). The reason the CWA focuses on point sources rather than on nonpoint sources is due to geographical differences that make nationwide uniformity in controlling non-point source pollution difficult, if not virtually impossible. *Id.*

Further, the control of non-point source pollution often depends on land use controls, which are traditionally state or local in nature. *Id.* Progress, like many other states, seeks to maintain local land use control over nonpoint source pollution and to prevent federal intrusion into areas of regulation that might implicate land and water uses in individual states. Defining this type of runoff as a point source would undermine the State's prerogative and negatively impact the State's ability to regulate pollutants.

V. BONHOMME VIOLATES THE CWA BY ADDING ARSENIC TO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY REGARDLESS OF ITS ORIGIN.

Under the CWA, pollutants are anything introduced into the water that alter the physical, chemical, or biological integrity. A discharge is "any addition of any pollutant to navigable waters from any point source [or to] waters of the contiguous zone of the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). Section 1311 of the CWA establishes a broad prohibition against the discharge of any pollutant by any person except as in compliance with the act's permit requirements, effluent limitations, and other enumerated provisions. 33 U.S.C. § 1311(a).

The EPA and the courts have interpreted the term "addition" broadly. Generally, almost any introduction of pollutant into a body of water is an addition. The scope of the term has been limited only by the requirement that there must be an addition of a new material into an area or an increase in the amount or type of material that is already present. EPA's regulations make an exception for pollutants that are present only by reason of their presence in the discharger's intake water, if the intake water is drawn from the same body of water as the one into which the discharge is made, and if the pollutants are not removed by the discharger as part of its normal operations.

Further, as courts has previously noted, a point source is a conveyance. "A conveyance is defined by both ordinary and legal dictionaries as a "means of transport" or the act of taking or carrying something from one place to another." "To find otherwise would require the Court to ignore clear statutory language." *Alaska Cmty. Action on Toxics*, 940 F. Supp. 2d 1005, 1024 (D. Alaska 2013).

A. Bonhomme's Culvert is a Point Source Which Discharges Pollutants into a Navigable Waterway.

Under the CWA, a NPDES permit is required for a discharge of a pollutant from a point source, even if those point sources do not themselves generate pollutants. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 104 (2004). A discharge in violation of the CWA (CWA) is a strict liability offense. 33 U.S.C. §§ 1311(a), 1342. The CWA does not prohibit only

intentional discharges of pollutants; regulatory provisions of the Act are written without regard to intentionality, making the person responsible for the discharge of any pollutant strictly liable. *United States v. Earth Sciences, Inc.,* 599 F.2d 368, 374 (10th Cir. 1979). As such, anyone who discharges pollutants without a permit, is subject to enforcement actions under the CWA. 33. U.S.C. § 1319. Consequently, under the CWA, discharge of a pollutant includes point sources that do not themselves generate pollutants; a point source need only convey the pollutant to navigable waters. 33 U.S.C. § 1362(7), (14). *South Florida Water Management Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 104 (2004).

Further, while the EPA has stated that water transfers are not subject to regulation under the NPDES permitting program, *Friends of Everglades v. S. Florida Water Mgmt. Dist.,* 570 F.3d 1210, 1219 (11th Cir. 2009), this rule does not apply to meaningfully distinct water bodies. *Miccosukee*, 541 U.S. at 112. Ditch C-1 and Reedy Creek are "meaningfully distinct" as defined by the EPA, as transfers, and the additions of pollutants between the two bodies of water, is environmentally significant and would have a substantial adverse impact on the receiving waterbody. 2005 WL 6523663 (E.P.A.G.C.), 14.

The CWA is a prohibition on discharges, except as in compliance with the Act. The CWA also designs a permit program to authorize and regulate discharges in compliance with the Act. 33 U.S.C. § 1342. In order to effectively implement this program, the CWA regulates the discharges of pollutants from identifiable point sources, or discrete conveyances which directly add pollutants to navigable waters of the United States. Bonhomme owns and manages such a point source, and despite claims that pollutants in the waters may originate from other locations, the CWA focuses on pollutants being added to Reedy Creek from his identifiable point source.

B. Owners and operators of point sources cannot escape liability without proving that the pollutant reached the water through a confined, discrete conveyance. 33 U.S.C. § 1362(14).

The term "point source," as used in the CWA, does not necessarily refer to the place where pollutant was created, but rather refers only to the proximate source from which the pollutant is directly introduced to the destination water body. 33 U.S.C. § 1362(14);. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). While in some situations waste piles may cause a point source discharge where the pollutants travel from the pile to the water through a point source as defined by the CWA, seepage from piles that eventually make their way to surface waters that are not collected or channeled cannot be considered point sources. *See generally Abston Const.* 620 F.2d at 45*; Greater Yellowstone Coalition v. Lewis* 628 F.3d 1143, 1152-53*; Ecological Rights Foundation v. Pacific Gas & Electric Co*. *Ecological Rights Found. v. Pac. Gas & Elec. Co.,* 713 F.3d 502, 508 (9th Cir. 2013) (dismissing allegations that defendants were illegally discharging pollutants via storm water runoff because plaintiffs did not show that the pollutants reached the water through a defined, discrete conveyance). To establish a violation of the CWA (CWA), the United States must prove that the defendant is a person who discharged a pollutant, from a point source, into navigable waters, without authorization. 33 U.S.C. §§ 1311, 1344. *U.S. v. Huseby,* 862 F. Supp. 2d 951 (D. Minn. 2012).

Bonhomme violates the CWA by allowing pollutants to flow into Reedy Creek through his culvert, which is a point source under the CWA. Even if Bonhomme is able to demonstrate that Maleau indirectly adds arsenic to Ditch C-1 via the waste piles, Bonhomme is liable for this discharge regardless of who added the arsenic to Ditch C-1 because he owns the culvert/point source discharging the pollutant into Reedy Creek. Maleau's mining waste piles, cannot by themselves constitute point sources, where there is no discernible, confined and discrete conveyance of pollutants to the water. The point source, in this situation, is instead the culvert owned and managed by Bonhomme.

CONCLUSION

For the foregoing reasons, the judgment of the court should be affirmed as to the determination that Bonhomme is not a proper plaintiff. If this court does proceed to the merits of the case, it should find that Maleau's waste piles are not point sources and that both Reedy Creek and Ditch C-1 are navigable waters/waters of the United States and subject to the jurisdiction of the CWA.

Respectfully submitted,

Dated: December 3, 2013

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