D.C. No.155-CV-2013; D.C. No. 165-CV-201q3

In The
UNITED STATES COURT OF APPEALS FOR THE TWELTH 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

BRIEF FOR STATE OF PROGRESS, *Plaintiff-Appellant, Cross-Appelle.*

Team #26
Counsel for the Plaintiff-Appellant, Cross-Appelle
1563 Progress Avenue
Progress City, Progress, USA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

United States Supreme Court Cases

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

Cases Page(s)

United States Circuit Court of Appeals Cases

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

Cases — Page(s)

Statutes

Federal Regulations

Congressional History

STATEMENT OF JURISDICTION

The decision of the United States District Court of Progress was entered January 1st, 2013. The State of Progress, the Plaintiff-Appellant Cross Appellee, filed a timely appeal to the United States Court of Appeals for the Twelfth Circuit on January 15th, 2013. The United States Court of Appeals for the Twelfth Circuit granted this appeal on February 14th, 2013.

QUESTIONS PRESENTED

1. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating CWA Sec. 301(a)?

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

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

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

5. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA Sec. 502(7), (12), 33 U.S.C. Sec. 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 the arsenic in Ditch C-1?

STATEMENT OF THE FACTS

After proper notice, Jacques Bonhomme sued Shifty Maleau for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2012), under the jurisdiction of the citizen suit provision of that statute, CWA § 505, 33 U.S.C. § 1365.

Maleau operates a gold mining and extraction operation adjacent to the traditionally navigable Buena Vista River in Progress. He trucks the overburden and slag from that operation to his property in Lincoln County and places it in piles adjacent to Ditch C-1 in Jefferson County, Progress. When it rains, rainwater runoff flows down the piles and percolates through

them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying arsenic from the piles into the water in the Ditch. Ditch C-1 is a drainage ditch dug into saturated soils to drain them sufficiently for agricultural use. It was constructed in 1913 by an association of landowners, including the predecessors in interest of Bonhomme and Maleau. Restrictive covenants in their deeds require them to maintain the Ditch on their properties. The Ditch contains running water except during annual periods of drought lasting from several weeks to three months. The water in Ditch C-1 is derived primarily from draining groundwater from the saturated soil, with some rainwater runoff after rain events. From Maleau's property line, Ditch C-1 runs three miles through several agricultural properties before it discharges through a culvert underneath a farm road on Bonhomme's property directly into Reedy Creek. All of the properties, including Bonhomme's and Maleau's, that Ditch C-1 runs through lie in Progress.

Reedy Creek is about fifty miles long. It begins in the State of New Union where it is used as the water supply for Bounty Plaza, a service area on Interstate 250 ("I-250") selling gasoline and food. I-250 is a federally-funded, east-west interstate highway. In both states, farmers whose land adjoins the Creek divert the water for agricultural purposes, primarily irrigation. They sell their agricultural products in interstate commerce. Just before reaching Bonhomme's property, Reedy Creek flows into the State of Progress, where it flows for several miles before ending in Wildman Marsh. Wildman is an extensive wetlands and a stopover essential to over a million ducks and other waterfowl during their twice annual migrations from the Arctic to the tropics and back. Much of the wetlands is contained within the Wildman National Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service. The area is a major destination for duck hunters from Progress, New Union and five

neighboring states. Bonhomme's property fronts part of the wetlands, and he has used it (along with his large hunting lodge that sits on his property on the edge of the marsh) in the past primarily for hunting parties composed primarily of business clients and associates of Precious Minerals International (PMI). Bonhomme has decreased his hunting parties, held for the benefit of PMI, from eight a year to two a year.

Bonhomme is a 3% shareholder in PMI (the largest shareholder) and is also on the Board of Directors of PMI. PMI conducted or paid for the sampling and analyses to support Bonhomme's contention that the arsenic in Reedy Creek and Wildman Marsh comes from Maleau. PMI pays the attorney and expert witness fees for Bonhomme in this case. The hunting parties which occur in Wildman Marsh are held for the benefit of PMI. Also, Bonhomme does not live in the hunting lodge on his property; he only uses it for hunting when holding hunting parties for the benefit of PMI.

Before suing Maleau, Bonhomme tested the water in Ditch C-1 both upstream and downstream of Maleau's property and the water in the Reedy both upstream and downstream of the outflow of Ditch C-1. Upstream of the Maleau property, arsenic is undetectable in Ditch C-1. Just below the Maleau property, arsenic is present in Ditch C-1 in high concentrations. As Ditch C-1 flows from the Maleau property toward Reedy Creek, the concentration of arsenic decreases in proportion to the increasing flow in the Ditch. In Reedy Creek above the discharge from Ditch C-1, arsenic is undetectable. However, just below the discharge of Ditch C-1 into Reedy Creek, arsenic is present in the Creek in significant concentrations. Arsenic is also detectable at lower levels throughout Wildman Marsh. Bonhomme owns the culvert from which Ditch C-1 discharges the arsenic into Reedy Creek.

SUMMARY OF THE ARGUMENT

1. PMI IS THE REAL PARTY IN INTEREST UNDER FRCP 17, NOT BONHOMME.

The decrease in hunting parties are the "injury in fact" in this case. The hunting parties are held for the exclusive benefit of PMI, not Bonhomme. Due to the fact that PMI is experiencing the injury in fact in this case, PMI, not Bonhomme, is the real party in interest under F.R.C.P. 17. Bonhomme was given ample opportunity to substitute PMI as the real party in interest yet chose not to, and therefore has no basis based on a procedural discrepancy by the lower court to file an appeal on this issue.

2. BONHOMME DOES NOT QUALIFY AS A CITIZEN UNDER THE CWA DUE TO HIS BEING A FOREIGN NATIONAL.

The term citizen as defined by the CWA implies that said citizen is a citizen of the United States of America. The fact that the definition of Citizen under CWA 505(g) is narrower than the broader definition of person contained in CWA 502(5), which is broad, does not strip Citizen of all of its meaning. The right to commence a citizen suit is a right given to United States citizens conferred to them by a United States federal statute (the CWA). The word citizen as defined by Black's legal dictionary is someone, among other things, who enjoys all of a civil state's rights. As this is a United States federal statute drafted by the United States Congress it is implicit that the right being conveyed to file a citizen suit is a right only conveyed to United States citizens.

In addition the case *U.S. E.P.A. v. City of Green Forest, Ark.,* 921 F.2d 1394, 1403 (8th Cir. 1990) stated, "the citizen-suit provision puts the citizen in the role of a private attorney general." It would be absurd to assume that the United States Congress intended for foreign nationals to act as private attorney generals in United States Federal Courts. This point is further evidence in

the context of the CWA, that implicit in the term citizen is the exclusivity to only United States Citizens.

3. MALEAU'S WASTE PILES ARE NOT "POINT SOURCES" PER THE CWA.

Courts have stated that the Clean Water Act definition of point source under 33 U.S.C. 1362(14) (2013) does not include unchanneled and uncollected surface waters, and that the regulations must reflect and apply to these types of discharges only. *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976); *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979). Federal decisions have even gone so far as to include slag and waste piles, which allow water to flow through them into waters of the United States to be "point sources" under the CWA. *Wash. Wilderness Coal. v Hecla Mining Co*., 870 F Supp. 983 (ED Wash 1994).

In *Decker v. Northwest Envtl. Def. Ctr.*, 133 S.Ct. 1326 (2013), the U.S. Supreme Court reversed a 9th Circuit decision in *Northwest Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176 (2010), in which the lower court found stormwater run-off from logging road to constitute an industrially related stormwater discharge. Though not applied to the mining context, a similar analysis can be used to show that in the context of off-site, temporary mining waste storage, stormwater run-off is exempted from NPDES permitting. The CWA authorizes stormwater permits and the associated regulations requires stormwater NPDES permits when the stormwater is "associated with industrial activity." 40 C.F.R. §122.26(b)(14) (2013); 33 U.S.C. §1342(p)(2)(B) (2013). The permitting for industrial stormwater discharges applies to a broad range of facilities enumerated in the statute. 40 C.F.R. §122.26(b)(14) (2013). Within the same section the industrial activity "excludes areas located on plant lands *separate from the plant's industrial activities, such as* office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas." *Id.* To place an

exemption of a broad range of off-site activities but to state that it is in some way limited to those categories included in the statute would lead to absurd results like requiring permits for trucks carrying waste that water percolates to and which somehow reaches navigable waters. In this instance the Court should rule that the mining waste piles fall within the exemption from the statute.

4. REEDY CREEK IS A NAVIGABLE WATER/WATER OF THE UNITED STATES PER THE CWA.

The district court correctly granted the motion to dismiss, holding that Reedy Creek is a navigable water/water of the United States under the 33 U.S.C. §1362(7). Maleau's argument that Reedy Creek is not a navigable water/water of the United states fails both due to the nature of Reedy Creek being both permanent and an interstate waterway, which also provides a service to interstate commerce both in State of Progress and New Union. Under the CWA definition of "navigable waters" and the federal government codified definitions of "waters of the U.S." Reedy Creek is clearly a navigable water/water of the U.S. as it runs some 50 miles acres along the border of New Union and the State of Progress.

The Commerce Clause has been employed by the Supreme Court to extend the definition of "Waters of the United States" to waters, including nonnavigable waters, which are connected to interstate commerce, whether through navigation, power generation, flood control, or groundwater. *Sporhase v. Neb.*, 458 U.S. 941 (1982). Reedy Creek's use at the intersection of an interstate highway for the service station put its use directly within interstate commerce. Further due to Reedy Creek's own status as a waterway that substantially affects interstate commerce, its termination in the Wildman Marsh, a Water of the United States and a resource that exerts a

significant effect on Interstate Commerce, confers on to Reedy Creek the status of Water of the United States.

5. DITCH C-1 IS A "NAVIGABLE WATER"/"WATER OF THE UNITED STATES UNDER § CWA 502(7), (12), 33 U.S.C. § 1362(7), (12).

1. Due to the nexus between Reedy Creek and Ditch C-1, C-1 is also a navigable water/water of the US.

Both the language of the CWA and subsequent Court decisions make it clear that the CWA is intended to cover more waters than just traditionally navigable waters. 160 A.L.R. Fed. 585 (Originally published in 2000). Under the Commerce Clause Congress has extended the reach of the CWA, which includes regulating activities on non-navigable tributaries that could affect the navigability of a traditionally navigable waterway. *Rapanos v. United States*, 547 U.S. 715 (2006). Because Ditch C-1 flows into Reedy Creek, substantially affecting Reedy Creek's water volume and water quality, it has affected the navigability of a traditionally navigable waterway. Moreover, water that borders navigable waters is also included in the definition of navigable waters. *United States. v. TGR Corp.*, 171 F.3d 762 (2d Cir. 1999).

Due to the position of Ditch C-1, which directly flows in the navigable waters of Reedy Creek, Ditch C-1 is appropriate for regulation. The scope of control of the Act extends to a discharge into any waterway where that water could reasonably end up in any body of water in which there is some public interest. *United States v. Saint Bernard Parish*, 589 F. Supp. 617, (E.D. La. 1984). Therefore, the waters of Ditch C-1, should be controlled under the CWA. Should the court find that Ditch C-1 is not a navigable water, the court should still find that the CWA applies to Ditch C-1 as a "water of the United States." *U. S. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1323 (6th Cir. 1974). Due to Ditch C-1's flow into Reedy Creek, a navigable water of the United States, it is clear that there is a sufficient nexus between Ditch C-1 and

Reedy Creek to find that Ditch C-1 is also a navigable water/water of the United States under the CWA.

2. Ditch C-1 is also a water of the United States because of its direct proximity to federal wetlands.

Even if this court were to decide that C-1 does not substantially affect a navigable water, Ditch C-1 would still be considered a water of the US due to its close and direct proximity to federal wetlands. *Riverside Bayview* 474 U.S. 121, 132 (1985) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). In light of previous District Court and Supreme Court decisions, the court below did not err in granting Maleau's motion to dismiss on this issue.

6. BONHOMME IS LIABLE REGARDLESS OF WHO ADDED THE ARSENIC TO DITCH C-1 BECAUSE HE OWNS THE CULVERT/POINT SOURCE DISCHARGING THE POLLUTANT INTO REEDY CREEK.

1. Bonhomme is liable regardless of who added the arsenic to Ditch C-1 because he owns the culvert/point source discharging the pollutant into Reedy Creek.

The CWA is a strict liability statute. *See United States v. Winchester Municipal Utilities,* 944 F.2d 301, 304 (6th Cir.1991), and simple ownership may be enough to trigger liability under the CWA. The District Courts have yet to decide a case with facts identical to the case at hand, however, cases involving abandoned mines provide the best analogy to Bonhomme's passive fault. In those cases, the defendants were not the but-for cause of the pollution, yet the courts found a "discharge" of a pollutant enough to hold the defendant's liable.

Administrative regulations and an EPA policy statement provide further support for this view. *See* 40 C.F.R § 122.26(b)(14)(iii) (stating "active or inactive mining operations" are among the industrial activities that require a stormwater discharge permit under 33 U.S.C. § 1342(p)); (stating "discharges from abandoned mines are point sources which require a

traditional NPDES permit"). Moreover, Bonhomme has an active duty to maintain Ditch C-1 and the culvert. That duty removes the passive nature of the discharge.

2. Bonhomme's ownership of the culvert satisfies the five necessary elements for liability under § 301(a) of the CWA.

The phrase "discharge of a pollutant" found in 33 U.S.C. § 1311(a) is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus, a "discharge of a pollutant" occurs when five elements exist: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 165 (D.C.Cir.1982).

Maleau's waste piles cannot be considered a point source just because some of the waters discharged into Ditch C-1 *may* enter the Reedy Creek and flow through to Wildman Marsh. *George v. Reisdorf Bros., Inc.,* 696 F. Supp. 2d 333, 338-39 (W.D.N.Y. 2010) (holding that the fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the Clean Water Act).

The artificial mechanism that introduced the pollutant in the present case is Bonhomme's culvert, which discharged arsenic into Reedy Creek from Ditch C-1. Bonhomme's affirmative conduct in maintaining the culvert is enough to make the culvert a point source. As such, Maleau is not liable for any storm runoff that may have traveled from his waste piles into Ditch C-1 and ultimately into Reedy Creek. The court below did not err in denying Bonhomme's motion to dismiss as his culvert is a point source.

ARGUMENT

ISSUE 1: PMI IS THE REAL PARTY IN INTEREST UNDER F.R.C.P. 17, NOT BONHOMME.

F.R.C.P. 17(a) states that 'every action shall be prosecuted in the name of the real party in interest.' This has been defined as the person who 'by the substantive law has the right to be enforced.' 3 Moore's Federal Practice, par. 17.02 at page 1305 (2nd. ed. 1964). *Kenrich Corp. v. Miller*, 256 F. Supp. 15, 17 (E.D. Pa. 1966) aff'd, 377 F.2d 312 (3d Cir. 1967). In the case at hand the substantive law that gives a party a right to be enforced is the Clean Water Act (CWA). Specifically, CWA Sec. 505, 33 U.S.C. 1365, which states: "(a) except as provided in subsection (b) of this section and section 309(g)(6), *any citizen may commence a civil action on his own behalf*…"

To commence such a civil action the citizen must have suffered an 'injury in fact' – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or hypothetical.'" *Sierra Club v. SCM Corp.,* 580 F. Supp. 862 (2d Cir. 1984). The 'injury in fact' requirement is one of the three requirements for a citizen to have 'constitutional standing'. These requirements are articulated in the case *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Although the issue of standing is not being argued in this instance, the 'injury in fact' requirement of the standing analysis sheds a great deal of light on whether PMI or Bonhomme is the real party in interest under F.R.C.P. 17(a).

CWA Sec. 505(g) defines citizen stating: "'citizen' means a person or persons having an interest which is or may be adversely affected." CWA Sec. 502(5) General Definitions, 33 U.S.C. Sec. 1362 states: "the term "person" means an individual, corporation, partnership, association, State, municipality, Commission, or political subdivision of a State, or any interstate body. Therefore, PMI's status as a corporation does not prohibit their ability to bring such a

citizen suit. In the case at hand the "person" which is adversely affected is clearly PMI. The presence of arsenic purportedly fouls the waters of Reedy Creek, Wildman Marsh, and wildlife residing or visiting the marsh. The interest which is adversely affected in this case is the ability of PMI to hold hunting parties in Wildman Marsh. The frequency of hunting parties in the Marsh has decreased from eight to two a year. Bonhomme does not live at his lodge adjacent to Wildman Marsh but uses it exclusively for hunting parties composed primarily of business clients and associates of PMI. Therefore, the only time that Bonhomme benefits from the aesthetic or recreational attributes of the marsh he is doing so for the benefit of PMI, and PMI directly benefits from the hunting parties as it uses them to entertain clients. The Supreme Court has held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetics and recreational values of the area will be lessened. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (U.S.S.C. 2000).

. The aesthetic recreational value experienced on these hunting parties is used for the benefit of PMI and PMI's clientele. Thus, the decline in recreational benefit is experienced by PMI as a corporation, and is the injury in fact in this case. Therefore, PMI is the real party in interest in this case. Bonhomme who is the largest shareholder and CEO is clearly undertaking this litigation to further the interests of PMI and not his own. This is further evidenced by the fact that PMI is also paying the attorney and expert witness fees for Bonhomme in this case. The District Court in this case also took judicial notice that the attorney general of Progress has stated that Bonhomme filed suit against Maleau to injure his ability to compete with PMI (who is in direct competition with Maleau's gold mining business).

Bonhomme also does not have any cause for appeal on this issue due to a fault in procedure by the District Court in this case. F.R.C.P 17(a) states: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a *reasonable time* has been allowed *after objection* for *ratification, joinder, or substitution* of the real party in interest." The District Court below gave PMI and Bonhomme an opportunity after Maleau raised this real party in interest issue in his answer. PMI chose not to join this suit at that time and the District Court correctly dismissed the claim for not stating the real party in interest. Therefore, due to the correct determination of the real party in interest by the District Court in this case, as well as there being no procedural discrepancy that would warrant an appeal of the District Court's, Bonhomme's claim should be dismissed due to PMI, not Bonhomme, being the real party in interest under F.R.C.P. 17(a).

ISSUE 2: <u>BONHOMME DOES NOT QUALIFY AS A CITIZEN UNDER THE CWA DUE TO HIS BEING A FOREIGN NATIONAL.</u>

The District Court dismissed Bonhomme's claim on account of his being a foreign national, not a citizen of the United States of America, and therefore is not a citizen under Sec. 505(g) of the CWA. As stated above CWA Sec. 505(g) defines citizen stating: "'citizen' means a person or persons having an interest which is or may be adversely affected." CWA Sec. 502(5) General Definitions, 33 U.S.C. Sec. 1362 states: "the term "person" means an individual, corporation, partnership, association, State, municipality, Commission, or political subdivision of a State, or any interstate body. Neither the definition of "Citizen" or "Person" under the CWA expressly authorize foreign nationals to commence citizen suits, nor do they mention or contemplate foreign nationals in any way. This requires that the court make a determination of whether the term Citizen, as defined above requires interpretation, or whether it is plain and clear

to mean citizens of the United States. If the court determines that such a term is not plain and clear then an interpretation of the meaning of citizen, as to whether foreign nationals are authorized to commence citizen suits is required.

In the case *Caminetti v. United States,* 242 U.S. 470 (1917), the United States Supreme Court stated that "it is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms." This articulation of the "plain meaning rule" allows for courts to first determine whether the language of the statute is plain and clear. If so then there is no more need for the court to interpret the statute to have any other meaning. If appropriate to apply the plain meaning rule, the court should look to the English definition of the relevant words at issue.

Due to the presence of definitions for the word citizen in Sec. 505(g) of the CWA and the definition of the word person in Sec. 502(5) of the CWA, a court may infer that such terms are not plain and obvious in their meaning on their face, and if they were they would not require such statutory definition. If this is the case, as stated above, the court must interpret disregard the plain meaning rule, and undertake the task of statutory interpretation.

In the case *Watt v. Alaska*, the Supreme Court stated, "Although starting point in statutory construction is the statutory language itself, ascertainment of meaning apparent on the face of a single statute need not end the inquiry as the plain meaning rule is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists, i.e., circumstances of enactment of particular legislation may persuade a court that Congress did not intend words of common meaning to have their literal effect." 451 U.S. 259 (1981). When looking at the CWA as a whole and any and all legislative history surrounding the

enactment of the CWA, there is no contemplation or mention of foreign nationals acting as citizens in the commencement of a citizen suit. But, the definition of the word "person" in CWA Sec. 502(5) broadens the meaning of citizen to include entities that are not specifically individual people who are citizens of the United States. Therefore the court must look at the purpose of having a broader definition of "person" be included within the narrow definition of the term "citizen" and whether contained in said purpose was the intent to allow for foreign nationals to bring citizen suits under the CWA.

In making this analysis it is important to note that the Supreme Court has held that by defining the narrow phrase "navigable waters" as the arguably broader concept of "waters of the United States," CWA Sec. 502(7), Congress did not deprive the term "navigable" of all meaning. *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172(2001); 33 U.S.C. Sec. 1362. The definition issue regarding the terms Citizen and Person in this case at hand is analogous to the definition issue in *Solid Waste* as the first term "citizen" defined by CWA Sec. 505(g) has a narrower definition than the broader concept of "persons". There is no reason in this case that the Court should divert from the logical analysis the Supreme Court applied in *Solid Waste*. Under the same logical analysis the Court would find that the broader definition of "person" does not deprive the term "citizen" of all meaning. If this is the case then the Court should not deprive the term "citizen" of all meaning. Black's Legal Dictionary defines the term "Citizen" as

> **citizen,** *n.* (14c) **1.** 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 the civil state, entitled to all its privileges.

CITIZEN, Black's Law Dictionary (9th ed. 2009), citizen

The term "citizen suit" is defined by Blacks Legal Dictionary as:

> **citizen suit.** An action under a statute giving citizens the right to sue violators of the law (esp. environmental law) and to seek injunctive relief and penalties. • …. The statutes therefore authorize, among other things, "private attorneys general" (citizens) to protect the environment….
>
> CITIZEN SUIT, Black's Law Dictionary (9th ed. 2009), citizen suit

Black's Legal Dictionary notes in the definition of the word citizen that such a person, as a member of a civil state, and that said person is entitled to all of that state's rights and privileges. In this case we have a United States federal statute, designed to protect United States waters, and the right to bring a suit is given by the United States government to citizens. Therefore, due to the definition of the word citizen including being a member of a civil state and being afforded all that state's rights and privileges, the conferring of such a right to citizens implies that the citizens receiving said right are citizens of the state conferring said right. This analysis clearly results in the term citizen meaning a citizen of the United States of America, thus excluding foreign nationals.

As stated above in the Black's Legal Dictionary definition of citizen and citizen suit, the term citizen in the context of receiving a right conferred by the United States Congress implies that the term means citizen of the United States. Therefore, if the broad definition of "person" does not deprive "citizen" of its meaning, and "citizen" in this context means citizen of the United States.

It is also important to note in this case that under Black's Legal definition of Citizen Suit and the case *U.S. E.P.A. v. City of Green Forest, Ark.,* which stated, "the citizen-suit provision puts the citizen in the role of a private attorney general." 921 F.2d 1394, 1403 (8th Cir. 1990). It seems an absurd assumption to assume that the Congress of the United States of America intended for foreign nationals to play the role of a private attorney general in United States

Federal Court. This fact is even more evidence that the term "citizen" was never intended to include foreign nationals, and implies Citizen of United States in its meaning.

ISSUE 3: REEDY CREEK IS A NAVIGABLE WATER/WATER OF THE UNITED STATES UNDER THE CLEAN WATER ACT.

1. **Navigable water/waters of the United States are broad terms not only encompassing non-navigable in-fact waterways but waterways which could be used in or which affect interstate commerce**

The district court was correct when it granted our motion to dismiss on this issue, holding that Reedy Creek is a navigable water/water of the United States under the Clean Water Act §502(7) and judicial interpretations of the statutory language. Maleau argues that Reedy Creek is not a navigable water/water of the United States and that as such any discharge into Reedy Creek cannot constitute a prohibited act under 33 U.S.C. §1362(12). This argument fails due to the nature of Reedy Creek being a permanent interstate waterway which also provides a service to interstate commerce in State of Progress and New Union. Further, Reedy Creek should still be considered to fall under the statutory definition of a "Water of the United States" as it is a tributary feeding the Wildman Marsh, within the Wildman National Wildlife Refuge that is owned and maintained by the United States Fish and Wildlife Service.

The CWA defines "navigable waters" as the waters of the United States including territorial seas. 33 U.S.C. §1362(7). The federal government has codified definitions of "waters of the United States" to include (1) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, (2) all interstate waters, and (3) all other waters such as intrastate lakes, rivers, streams (including intermittent streams),.."wetlands." 40 C.F.R. §122.2 (a)-(c) (2013). Among the stated purposes of the CWA is the stated objective of restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a) (2013).

The House of Representatives accompanying the proposed bill stated that the House Committee "fully intends that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations." H.R. Rep. No. 92-911, at 131 (1972). Rep. Dingell, in a conference committee discussion, stated that "navigable waters" is broadly defined for water quality purposes and "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense." 118 Cong. Rec. 9124-9215(daily ed. October 4, 1972).

Not long after the passage of the Federal Water Pollution Control Act, the U.S. Supreme Court in *U.S. v. Riverside Bayview Homes, Inc.* allowed an Army Corps of Engineers definition of wetlands, one which was intermittently flooding so as to become saturated, to fall within the definition of "navigable waters." 474 U.S. 121 (1985). The Court stated that the term "navigable" as used in the statute is of limited import and the adopted definition in the CWA was intended to expand Congress' Commerce Clause powers to include waters that were not "navigable" under the classical understanding of the term. *Id.* at 133; *See* S.Conf.Rep. No. 92-1236, at 144 (1972); 118 Cong. Rec. 33756-33757 (1972). The Court found the Army Corps' construction of the statute to be entitled to deference because it was reasonable and not in conflict with the expressed intent of Congress. *Id.* at 139; *Chemical Manufacturers Assn. v. Natural Res. Def. Council, Inc.,* 470 U.S. 116 (1985); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A more recent attempt to extend the definition of 'navigable waters' was brought before the Supreme Court in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps. Of Eng'rs*, 531 U.S. 159 (2001). The case stemmed from an Army Corps of Engineers determination that the term navigable waters included isolated holding ponds, some of which were only seasonal,

because they served as habitat for migratory birds. *Id.* at 171. It was the courts rationale that extending this reading of the statute from *Riverside Bayview Homes* is to not simply read the term 'navigable' as having limited import, but to actually "give it no effect at all." *Id.* at 172. The Court here reinforced that the tern navigable at least demonstrates Congressional intent to assert "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*, Citing *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (U.S. Sup. Ct. 1940).

More recently the Supreme Court in *Rapanos v U.S.* has refined the boundaries of the meaning of "navigable waters" in future judicial discussion. 547 U.S. 715 (2006). The Court in the majority and a concurrence by Justice Kennedy elucidated two tests for determining whether a water body is within the authority of the CWA definition. The Court held that the CWA definition refers not to water in general; rather that it includes relatively permanent, standing or flowing bodies of water. *Id* at 716. The Court stated that in use of the traditional phrase "navigable waters" the CWA confers jurisdiction only over relatively permanent bodies of water and only wetlands with a "continuous surface connection to bodies that are 'waters of the United States' are adjacent to waters of United States and thus covered by the Act." *Id.* at 717.

2. <u>Reedy Creek is a navigable water/water of the United States under the Clean Water Act.</u>

Courts have marked the outer boundaries of a reasonable interpretation of the definition of navigable water/water of the United States in the case *U.S. v. Riverside Bayview Homes, Inc*, 474 U.S. 121 (1985). Under the standard articulated in *Riverside Bayview*, Reedy Creek is certainly a navigable water/water of the United States runs some 50 miles across the border of New Union and State of Progress. Further, it cannot be argued that Reedy Creek itself is too far isolated a

waterway to be consider a water of the U.S. as it is utilized both as a source of farmland irrigation and as a water source for the Bounty Plaza service area along I-250. Reedy Creek is a navigable water/water of the United States because it is both interstate waterway of the United States and because it exerts effects on interstate commerce, both of which are within the definitions of the CWA. 33. U.S.C. §1362(7) (2013).

3. Reedy Creek is a channel of interstate commerce putting it within federal control under a commerce clause analysis.

In modern Commerce Clause jurisprudence, Congressional power to regulate commercial activity, which is purely intrastate, has been affirmed in several ways. The Supreme Court in *United States v. Lopez* identified "three broad categories of activity that Congress may regulate under its commerce power." 514 U.S. 549, 558 (1995). Congress may first regulate "the use of channels of interstate commerce" *Id.* (citing *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 256 (1964)). Secondly, "Congress is empowered to regulated and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S.549, 558 (1995) (citing *Shreveport Rate Cases*, 234 U.S. 342 (1914). Finally, "Congress' commerce authority includes the power to regulate those activities having substantial relation to interstate commerce, … *i.e.* those activities that substantially affect interstate commerce" 514 U.S. 549, 558-559 (1995) (citing *Jones & Laughlin Steel*, 301 U.S. 1 (1937).

In the environmental context, the EPA and Army Corps of Engineers base their regulations upon the third avenue in aggregated 'substantial effects." The regulations specify three ways in which interstate Commerce might be affects including (1) when the waters "are or could be used by interstate or foreign travelers for recreational or other purposes," and when the waters "are used or could be used for industrial purpose by industries in interstate commerce. 33

C.F.R. § 328.3(i)–(iii) (2013). In support of this assertion the legislative history of the CWA shows a clear intent that the definition of "Waters of the U.S." was to include the broadest definition allowable as an exertion of congressional Commerce Clause powers. SEN. CONSIDERATION OF THE REPORT OF THE CONFERENCE COMM., Serial No. 93-1, Oct. 4, (1972), *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972, at 178 (1973). In the House, statements of Senator Dingell make clear the extent to which this is meant to be considered in the CWA context stating "[I]t is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation – highways, railroads, air traffic, radio and postal communication, waterways, et cetera. The 'gist of the Federal test' is the waterway's use 'as a highway' no whether it is 'part of a navigable interstate or international commercial highway.' HOUSE CONSIDERATION OF THE REPORT OF THE CONFERENCE COMMITTEE, Serial No. 93-1, at 250-251 (1972), *reprinted in* A Legislative History of the Water Pollution Control Act Amendments of 1972 (1973).

The Commerce Clause explanation has been employed by the Supreme Court to extend the definition of "Waters of the United States" to waters, including nonnavigable waters, which are connected to interstate commerce, whether through navigation, power generation, flood control, or groundwater. *Sporhase v. Neb.*, 458 U.S. 941 (1982). (holding that underground water is an article in commerce subject to federal regulation and suggesting that surface waters are also an article of commerce). The Supreme Court has even gone so far as to hint to a belief that merely by nature of being an interstate waterway it then falls under Congressional authority in the CWA. *City of Milwaukee v. Ill.*, 451 U.S. 304 (1981); *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981). Though no express mention is made in the Courts or the regulations as to this rule, the Supreme Court makes special consideration, even when not

needed, to establish the intrastate nature of waters it's seeking to exempt from the definition. *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs,* 531 U.S. at 169 (2001). Both the commercial applications of Reedy Creek and its basis as an interstate water clearly put it within the definitions of "Waters of the U.S." Reedy Creek's use at the intersection of an interstate highway for the service station put its use directly within interstate commerce. Further downstream, Reedy Creek supports the uses of agricultural operations for irrigations, which impliedly had an effect on interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). Reedy Creek flows through both New Union and State of Progress conferring onto it the status of being interstate in nature, which would demand higher deference to its nature as affecting interstate commerce under Supreme Court discussion. *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs* 531 U.S. at 169. Reedy Creek also flows into a federally protected water, Wildman Marsh, thus putting it directly into contact and support of interstate commerce associated with migratory birds and tourism.

4. **Wildman marsh is a navigable water/water of the United States under the Clean Water Act**

Due to Reedy Creek's own status as a waterway that substantially affects interstate commerce, its termination in the Wildman Marsh, a Water of the United States and a resource that exerts a significant effect on Interstate Commerce, confers on to Reedy Creek the status of Water of the United States. Similar to analysis of Reedy Creek the basis of analysis begins at the CWA interpretation of "Navigable Waters" that includes an express mention of "wetlands." 40 C.F.R. §122.2 (a)-(c) (2013). The Supreme Court has a two phase process by which a wetland may be defined in order to fall within the protection of the CWA. The first hurdle is a deferential interpretation standard based on the agency's reasonable interpretation of the statutory language. *Riverside Bayview*, 474 U.S. 121 (1985). Here the agency must show that its definition of the

wetland in question as such, must be a reasonable interpretation of the statute. The second means elucidated by the Supreme Court applies to wetlands adjacent to Waters of the United States, requiring a "significant nexus" between the navigable water and the wetland. *Rapanos*, 547 U.S. 715, 731 (2006). Wildman Marsh is the termination point of Reedy Creek, which itself exerts significant effects on interstate commerce thus conferring on to Wildman Marsh a significant nexus to a Water of the U.S.

Beyond a commerce analysis as done above, Federal Courts have asked and answered the question as to when a Wetland can be considered a Navigable Water under the CWA. Though *Rapanos* created a test requiring 'significant nexus,' determination of what this means within the bounds of future interpretation has yet to be seen. *Rapanos*, 547 U.S. 715 (2006). The Army Corps. has interpreted that within the meaning of "navigable waters" are "wetlands" affecting interstate commerce. *U.S. v. Pozsgai*, 999 F.2d 719 (3d. Cir. 1993). Given the broad intent of Congress to effectuate the purposes of the CWA, inclusion of Wetlands that are federally managed and affect interstate commerce is a permissible application of the statute and regulatory interpretation. 33. C.F.R. §328.3(b).

Though recent precedent has found that isolated bodies of water themselves cannot be included in the definition, even isolated waters that have been deemed to be "wetlands" by the Army Corps are within the definition of "Waters of the U.S." In *Hoffman Homes v. Adm'r, U.S. E.P.A.*, 999 F.2d 256 (7th Cir. 1993), the Army Corps. designated two areas that had been illegally filled by a housing developer as having been wetlands based on local plant species and soil saturation. The challenge was the extent to which the EPA could regulate this small, approximately one acre, of wetlands under the CWA. The court honed in on the fact that EPA's regulation's stated a ban on degradation of wetlands which "could affect" interstate commerce.

Id. at 260. The Court of Appeals agreed that the use of the word "could" states ad permissible intent to regulate effects on wetlands which have a " potential rather than actual, [and] minimal rather than substantial" effect on interstate commerce. *Id.* at 261. Further, the court stated that a reasonable interpretation of the statute can extend to finding the presence of migratory birds as the basis for a proper connection to interstate commerce. In our case, there is at least a potential to affect interstate commerce through the migratory birds present in the Wildman Marsh. Further, there is a connection based solely on the fact that this is a protected area by the Federal government, and degradation therein is another valid connection to interstate commerce by way of tourist value in maintenance of pristine national lands. Despite the ruling in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps. Of Eng'rs,* 531 U.S. 159 (2001), in which the court found that a completely isolated water body could not be considered under the CWA, Wildman Marsh is directly connected to interstate waters, navigable waters and federal protection.

ISSUE 4: <u>THE SLAG PILES ON MALEAU'S LAND CONSTITUTE NON-POINT SOURCES AND THE STORMWATER DISCHARGES ARE EXEMPTED FROM THE CWA</u>

The Clean Water Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include…storm water discharges." 33 U.S.C. 1362(14) (2013). The EPA codifies discharge limitations in its regulations based only on those sources, which constitute "point sources" 40 C.F.R. 401.10 (2013). This creates a statutory scheme whereby the administrator issues permits for discharge from individual "point sources" *Id.* at § 1342. "Point source" is written into the statutory scheme to convey liability on the person or persons causing the addition of any

pollutant to navigable waters. *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623 (D. R.I. 1990). The key distinction therefore in our matter is between what constitutes a point source and what is a non-point source discharge.

The federal courts, including the Supreme Court have wrestled with what constitutes a point source in many instances, none of which match the facts of this case. Courts have stated that "point sources" do not include unchanneled and uncollected surface waters, and that the regulations must reflect and apply to these types of discharges only. *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976).; *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979). In proving connection to a discharge, allegations of generalized stormwater runoff doesn't establish a "point source" discharge absent showing that the stormwater was discretely collected and conveyed to Waters of the United States. *Ecological Rights Found.n v. Pac. Gas and Elec. Co.*, 713 F.3d 502 (9th Cir. 2013). The broad discretion as to what "point sources" includes has extended even to ditches that coastal landowners' dug on their tract of land where ditches served to channel and collect stormwater and other pollutants that were subsequently discharged into waters of the United States. *N. C. Shellfish Growers Ass'n v. Holly Ridge Assoc.*, 278 F.Supp.2d 654 (D. E.D. N. C. 2003).

Federal decisions have even gone so far as to include slag and waste piles, which allow water to flow through them into waters of the United States to be "point sources" under the CWA. *Wash. Wilderness Coal. v Hecla Mining Co.*, 870 F Supp 983 (E.D. Wash. 1994) (stating that a discharge from pond or refuse pile can easily be traced to their source). Thus, even though runoff may be caused by rainfall of snow melt percolating through pond or refuse pile, discharge is from point source because pond or pile acts to collect and channel contaminated water.); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005) (Stating that mining

piles which flowed into run-off ponds leaking into Waters of the U.S. constituted a "point source"); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5Th Cir. 1980) (Operator liable for stormwater discharges through spoil piles because they were designed by the operator and allow erosion gullies to form.). All of these decisions have come down at the District and Appeals Court levels and came prior to recent Supreme Court precedent, which applies to our facts more succinctly.

In *Decker v. Northwest Envtl. Def. Ctr.*, 133 S.Ct. 1326 (2013), the Supreme Court reversed a 9th Circuit decision in *Northwest Envtl. Def. Ctr. v. Brown*, 617 F.3d 1176 (2010), in which the lower court found stormwater run-off from logging road to constitute an industrially related stormwater discharge. In that case Justice Kennedy found that the EPA regulatory exemption, explained below, deserves deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Though not applied to the mining context, a similar analysis can be used to show that in the context of off-site, temporary mining waste storage, stormwater run-off is exempted from NPDES permitting.

The primary exemption from the permitting statute exists in the form of the agricultural stormwater exception. 33 U.S.C. 1362(14). This statutory exemption applies in cases of field irrigation flowback and instances where rainwater comes into contact with manure piles and flows into navigable waters. *Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738 (5th Cir. 2011). The statute does authorize stormwater permits and the associated regulations require stormwater NPDES permits when the stormwater is "associated with industrial activity." 40 C.F.R. §122.26(b)(14) (2013).; 33 U.S.C. §1342(p)(2)(B) (2013). When a discharge is "composed entirely of stormwater" such discharge is entirely exempted from the NPDES permitting scheme. 33 U.S.C. § 1342(p)(1) (2013).

The permitting for industrial stormwater discharges applies to a broad range of facilities enumerated in the statute. 40 C.F.R. §122.26(b)(14) (2013). The term specifically includes "storm water discharges from industrial plant yards; immediate access roads and rail lines used or traveled by carriers of raw materials, manufactured products, waste material, or by-products used or created by the facility; material handling sites; refuse sites." *Id.* Within the same section the industrial activity "excludes areas located on plant lands *separate from the plant's industrial activities, such as* office buildings and accompanying parking lots as long as the drainage from the excluded areas is not mixed with storm water drained from the above described areas." *Id.* The regulations go on to enumerate more specific facilities including those associated with the mineral industry. 40 C.F.R. §122.26(b)(14)(iii) (2013). In interpretation of statutory or regulatory language courts will first avoid an absurd or contradictory result as a result of any specific reading. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989). To place an exemption of a broad range of off-site activities but to state that it is in some way limited to those categories included in the statute would lead to absurd results like requiring permits for trucks carrying waste that water percolates to and which somehow reaches navigable waters. In this instance the Court should rule that the mining waste piles fall within the exemption from the statute.

ISSUE 5: DITCH C-1 IS A "NAVIGABLE WATER"/"WATER OF THE UNITED STATES" UNDER CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14).

1. **Reedy Creek is a navigable water/water of the United States, due to the nexus between Reedy Creek and Ditch C-1, Ditch C-1 is also a navigable water/water of the United States.**

Both Congress' language of the CWA and subsequent Court decisions make it clear that the CWA is intended to cover more waters than just traditionally navigable waters. As such, the CWA includes regulating activities on non-navigable tributaries that could affect the navigability of a traditionally navigable waterway. *Rapanos v. United States*, 547 U.S. 715 (2006). Because

Ditch C-1 flows in Reedy Creek, substantially affecting Reedy Creek's water volume and water quality, it has affected the navigability of a navigable waterway.

Even should Ditch C-1 temporarily cease to supply enough water to Reedy Creek to substantially affect its water volume and quality, the use of a waterway does not need to continue to be navigable for it to fall into the category of navigable. 547 U.S. at 733. In *Rapanos*, the Court ruled that navigable waters include relatively permanent standing or flowing bodies of water. *Id.* Nowhere in the record does it appear that Ditch C-1 is not a relatively permanent flowing body of water. Order of the District Court, p. 5. Moreover, water that borders navigable waters is also included in the definition of navigable waters. *United States. v. TGR Corp.,* 171 F.3d 762 (2d Cir. 1999) (where the court found that a brook into which the defendant's employees discharged waste slurry from an asbestos removal project was a "navigable water" under the Act, noting that the Act defines "navigable waters" to mean "waters of the United States," which includes tributaries of navigable waterways).

Moreover, due to the position of Ditch C-1, which directly flows in the navigable waters of Reedy Creek, Ditch C-1 is appropriate for regulation. In *United States v. Saint Bernard Parish,* the court held that in the CWA Congress intended to control both the discharge of pollutants directly into navigable waterways and the discharge of pollutants into nonnavigable tributaries that flow into "navigable waters." 589 F. Supp. 617 (E.D. La. 1984). Thus, the scope of control of the Act extends to a discharge into any waterway where that water could reasonably end up in any body of water in which there is some public interest. *Id.* The waters of Ditch C-1, which directly flow into Reedy Creek, a body of water with substantial public interest, is water that should be controlled under the Act.

Even should the court find that Ditch C-1 is not a navigable water, the court should still find that Ditch C-1 applies to the Act as a "water of the United States. Congress intended that the Act apply to all "navigable waters," defined as "waters of the United States" in the CWA, including mainstreams and their tributaries. *U. S. v. Ashland Oil & Transp. Co.,* 504 F.2d 1317 (6th Cir. 1974); *see also U.S. v. Spanish Cove Sanitation, Inc.,* 91 F.3d 145 (6th Cir. 1996), cert. denied, 519 U.S. 1058 (1997); *see also U.S. v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), cert. denied, 522 U.S. 899 (1997) and cert. denied, 522 U.S. 1004 (1997) (where the court noted pollutants are equally harmful to this country's water quality whether they travel along man–made or natural routes, so the fact that bodies of water are man–made makes no difference).

In its holding, the *Ashland* court emphasized that the clear intention of Congress was to regulate the quality of water in the United States, regardless of whether that water was, at the point of pollution, a part of a navigable stream. *Id.* at 1323. The court reasoned that if congressional authority was limited to the bed of the navigable stream itself, and its tributaries were not subject to regulation, the powers of Congress' authority would be invalidated. *Id.* at 1326. Moreover, the court determined that pollution control of navigable streams could only be exercised by controlling pollution of their tributaries. *Id.* 1327. As such, the power of pollution control should likewise extend to the tributaries of navigable streams. *Id.*

Due to Ditch C-1's flow into Reedy Creek, a navigable water of the United States, it is clear that there is a sufficient nexus between Ditch C-1 and Reedy Creek to find that Ditch C-1 is also a navigable water/water of the United States under the CWA.

2. **Ditch C-1 is also a water of the United States because of its direct proximity to federal wetlands.**

Even if this court were to decide that C-1 does not substantially affect a navigable water, and therefore cannot be considered to be covered by the CWA, Ditch C-1 would still be

considered a water of the US due to its close and direct proximity to federal wetlands. The Corps of Engineers regulations have extended Corps regulatory authority to wetlands. In *U.S. v. Riverside Bayview Homes, Inc.,* the Supreme Court held that the Corps definition of waters as including wetlands adjacent to navigable waters, even if not inundated or frequently flooded by the navigable water, was reasonable under the statutory authority. 474 U.S. 121, 132, (1985) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). Thus, *Riverside Bayview* holds that Section 404 of the CWA extends to waters (and wetlands) adjacent to traditionally navigable water bodies. *Id.* In light of previous District Court and Supreme Court decisions, the court below did not err in granting Maleau's motion to dismiss on this issue.

ISSUE 6: BONHOMME VIOLATES § 404 OF 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 DICTH C-1.

1. Bonhomme is liable regardless of who added the arsenic to Ditch C-1 because he owns the culvert/point source discharging pollutants into Reedy Creek.

The CWA is a strict liability statute. *See United States v. Winchester Municipal Utilities,* 944 F.2d 301, 304 (6th Cir.1991); *see also Hawaii's Thousand Friends v. City and County of Honolulu,* 821 F.Supp. 1368, 1392 (D.Haw.1993); *see also United States v. Ohio Edison Co.,* 725 F.Supp. 928, 934 (N.D.Ohio 1989). The statute does not require fault as a prerequisite to assessing a monetary penalty, but rather fault may be considered along with other statutory factors to arrive at the actual penalty amount. *Hawaii's Thousand Friends,* 821 F.Supp. at 1392; *see also Ohio Edison,* 725 F.Supp. at 934.

CWA §301(a) simply states that "the discharge of any pollutant by any person shall be unlawful" unless authorized by a NPDES permit in section 402 or by Secretary of the Army approval under section 404. The plain language of the statute does not include any mention of fault as to liability. The CWA defines "discharge" as the "*addition* of any pollutant to navigable

waters from any point source" (emphasis added). The choice of the word "addition" has led to a split between the courts in deciding whether or not the word implies intentional action. Courts ruling on cases arising under violations of section 404 have found that the term "discharge" requires intentional action by an individual or company, however, those cases arising under section 402 have not. The highest courts to decide such cases are the U.S. District Courts for the Seventh and Tenth Circuits. *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000); *Sierra Club v. El Paso Gold Mines, Inc.,* 421 F.3d 1133 (10th Cir. 2005). In *Froebel*, the Seventh Circuit held that no administrative regulation or case law interpreted section 404 to require a permit in the absence of active conduct. 217 F.3d 928. In *El Paso Gold Mines* 421 F.3d 1133, however, the Tenth Circuit held that simple property ownership may create liability under CWA Section 402.

The District Courts have yet to decide a case with a fact pattern identical to the fact pattern with which we deal with in the present case, however, cases involving abandoned mines provide the best analogy to Bonhomme's passive fault. *See Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.,* 13 F.3d 305, 308 (9th Cir.1993) (holding that the collecting and channeling of surface runoff from inactive mine is "discharge of pollutants"); *American Mining Congress v. EPA*, 965 F.2d 759, 764–66 (9th Cir.1992) (holding EPA regulation requiring discharge permit for stormwater runoff from inactive mine is reasonable); *Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1172–74 (D.Mont.1995) (holding defendants liable for discharges from inactive mine). In the above cases, the defendants were not the but-for cause of the pollution, yet the courts found a "discharge" of a pollutant.

The arsenic in the present case is not from an abandoned mine; but rather, from Maleau's waste piles. The cases involving abandoned mines are analogous to the present case. In *United States v. Earth Sciences*, the US brought a suit against Earth Sciences' gold leaching operation,

which was allegedly responsible for a pollutant discharge into Rito Seco Creek. 599 F.2d 368 (10th Cir. 1979). The waste product of gold leeching, sodium cyanide-sodium hydroxide was collected in sumps, including a reserve sump to catch run-off. *Id.* at 370. When April temperatures melted a blanket of snow on top of a heap of waste, the primary and reserve sumps were filled to capacity. *Id.* When the sumps overflowed, the run-off entered into Rito Seco Creek, contaminating it with sodium cyanide-sodium hydroxide. *Id.* The court found that the discharges of sodium cyanide-sodium hydroxide leachate solution from the reserve sump were discharges from a "point source" under the Federal Water Pollution Control Act. *Id.* at 374. The court noted that it was the flaws in the design of the reserve sump that led to the discharge. *Id.*

In another case similar to the present case, the Tenth Circuit held that simple property ownership may create liability under CWA Section 402, which requires a permit for "the discharge of any pollutant by any person" to navigable waters from a point source. *Sierra Club v. El Paso Gold Mines, Inc.,* 421 F.3d 1133 (10th Cir. 2005). In this case, the court shifted the CWA's focus from the active conduct suggested by the term "discharge" to mere property ownership, stating metaphorically "if you own the leaky 'faucet,' you are responsible for its 'drips.'" 421 F.3d at 1145. In the case, El Paso had never conducted any mining operations on its property. *Id.* at 1136. An inactive gold mine, and a partially collapsed mineshaft were located on the property. *Id.* Snowmelt and groundwater traveled through a series of drainage tunnels and underground shafts, including the El Paso mineshaft. *Id.* That water eventually discharged into Cripple Creek, navigable water via its significant nexus to the Arkansas River. *Id.*

The court held that the owner of property containing inactive gold mine could be liable, under Clean Water Act (CWA), for discharges of pollutants from abandoned mine shaft, even though owner had never conducted any mining operations on the property; Congress intended

successor owner of a point source of discharges to be subject to CWA's permitting requirements. *Id. at* 1144. The Tenth Circuit's ruling creates potential CWA liability for property owners without regard to whether the landowner engaged in any affirmative conduct affecting water quality.

Administrative regulations and an EPA policy statement provide further support for this view. *See* 40 C.F.R § 122.26(b)(14)(iii) (stating "active or inactive mining operations" are among the industrial activities that require a stormwater discharge permit under 33 U.S.C. § 1342(p)); (stating "discharges from abandoned mines are point sources which require a traditional NPDES permit"). Thus, the Act's intention would be limited should intentional action be required. For the Act's legislative intent to be carried out effectively, circumstances creating liability should be interpreted broadly. Moreover, Bonhomme has the duty to maintain Ditch C-1 and the culvert. That duty removes the passive nature of the discharge.

2. **Bonhomme's ownership of the culvert satisfies the five necessary elements of liability under CWA § 301(a)**.

The phrase "discharge of a pollutant" found in § 1311(a) is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus, a "discharge of a pollutant" occurs when five elements exist: "(1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C.Cir.1982).

It is undisputed that the arsenic in the present case is a pollutant and that it was present in Reedy Creek. As is clear from the analysis presented above, Reedy Creek and Ditch C-1 are navigable waters/waters of the United States. Determining the point source, however, is a bit more difficult. Recent case law is instructive in this matter. The sum of authority indicates that

whether a ditch, culvert, or other structure may constitute a point source is a highly fact-based inquiry. *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.,* 469 F. Supp. 2d 803, 822 (N.D. Cal. 2007).

A necessary component for establishing the discharge of a pollutant is that it originated from a "point source". *See* 33 U.S.C. § 1362(12) ("The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means ... any addition of any pollutant to navigable waters *from any point source*" (emphasis added)). The term "point source" is defined 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 ... from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Nonpoint source pollution is generally runoff. Runoff can take many forms, such as salt from roads, agricultural chemicals from farmlands, and other substances washed by rain, in diffuse patterns, over the land and into navigable waters. *United States v. Plaza Health Laboratories, Inc.,* 3 F.3d 643, 652 (2d Cir.1993), *cert. denied,* 512 U.S. 1245 (1994).

Maleau's waste piles cannot be considered a point source just because some of the waters discharged into Ditch C-1 *may* enter the Reedy Creek and flow through to Wildman Marsh. *George v. Reisdorf Bros., Inc.,* 696 F. Supp. 2d 333, 338-39 (W.D.N.Y. 2010) *aff'd*, 410 F. App'x 382 (2d Cir. 2011); *See No Spray Coalition, Inc. v. City of New York,* 2000 WL 1401458, *3 (S.D.N.Y.2000), *aff'd,* 252 F.3d 148 (2d Cir.2001) (holding that the fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the CWA.

Moreover, as in *El Paso Gold Mines,* there is a genuine issue of fact as to whether the pollutants traveled from Maleu's slag piles to Reedy Creek. 421 F.3d. at 1149. As the court in *El Paso Gold Mines* explained, "It may not be a difficult leap to presume that if water makes the

two and a half mile journey, then so do pollutants. But this ignores the evidence showing dramatic declines in zinc levels as water flows from the El Paso shaft toward the portal." *Id.* Similar to the present case, as Ditch C-1 flows from the Maleau property toward Reedy Creek, the concentration of arsenic decreases in proportion to the increasing flow in the Ditch. In Reedy Creek above the discharge from Ditch C-1, arsenic is undetectable. However, just below the discharge of Ditch C-1 into Reedy Creek, arsenic is present in the Creek in significant concentrations.

In *Froebel v. Meyer*, the Seventh Circuit held that the county was not required, under CWA, to obtain permit for discharge of pollutants based on its ownership of land from which abandoned dam had been removed by state agency, thereby causing ongoing movement of silt and sediment downriver, under theory that former dam impoundment and portion of river channel could qualify as "point source" because artificial structure had existed at that spot; natural reading of statutory language required point source to be distinct from navigable water, and broad reach of term "navigable waters" required "point source" to be read to mean point at which artificial mechanism introduced pollutant. 217 F.3d 928, 937 (7th Cir. 2000). The artificial mechanism that introduced the pollutant in the present case is Bonhomme's culvert, which discharged arsenic into Reedy Creek from Ditch C-1. Bonhomme's affirmative conduct in maintaining the culvert is enough to make the culvert a point source.

Because the pollutants discharge at the site of the culvert, Maleau is not liable for any storm runoff that may have traveled from his waste piles into Ditch C-1 and ultimately into Reedy Creek. Using the facts presented to this court, the court should find that Bonhomme's culvert is a point source. Therefore, the court below did not err in denying Bonhomme's motion to dismiss on this issue.

CONCLUSION

Therefore, as stated above, PMI not Bonhomme is the real party in interest under F.R.C.P. 17 and the court should dismiss on this issue. Bonhomme's status as a foreign national prevents him from bringing a citizen suit and the court should dismiss on this issue. Reedy Creek is a "Navigable Water/Water of the United States" and the court below did not err in finding as such. The slag waste piles located on Maleau's land are not point sources and the stormwater discharges are exempted under the CWA. Ditch C-1 is a "Navigable Water/Water of the United States" under the CWA. And, Bohnomme violates §404 of 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.