Team No. 27

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 13-01234

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

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BRIEF OF JACQUES BONHOMME
Plaintiff-Appellant, Cross-Appellee
Defendant-Appellant, Cross-Appellee

Oral Argument Requested

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STATEMENT OF THE JURISDICTION

This case involves an appeal by Jacques Bonhomme (Bonhomme), the State of Progress (Progress) and Shifty Maleau (Maleau) following the issuance of the Order of the District Court in D.C. No. 155-CV-2012 and D.C. No. 165-CV-2012 on July 23, 2012. (Record at 1). The District Court had jurisdiction to hear the case because the case arose under the Clean Water Act (CWA) and federal district courts have original jurisdiction over questions of federal law. 28 U.S.C. § 1331 (2006). This Court retains proper jurisdiction to hear appeals from final decisions of a district court. 28 U.S.C. § 1291 (2006).

STATEMENT OF ISSUES PRESENTED ON APPEAL

I. Whether Bonhomme is a real party in interest under Federal Rule of Civil Procedure 17 in order to bring suit against Maleau for violating the CWA pursuant to 33 U.S.C. § 1311(a) where Bonhomme owns property upon which pollutants are present.

II. Whether Bonhomme is a “citizen,” defined as a "person... having an interest which is or may be adversely affected," under the CWA in 33 U.S.C. § 1365(g) where he is a foreign national bringing suit against a United States citizen for violation of the CWA.

III. Whether Maleau’s mining waste piles are a “point source” under the CWA in 33 U.S.C. § 1362(14) where arsenic from said piles is contaminating the water in Ditch C-1, that water travels directly to Reedy Creek, and Reedy Creek has been held a "navigable water" under the CWA by the court below.

IV. Whether Ditch C-1 is a “navigable water” under the CWA in 33 U.S.C. § 1362(7) where said ditch contains a continuous flow of water for at least nine months of the year and acts as a tributary to Reedy Creek.

V. Whether Reedy Creek is a “navigable water” under the CWA in 33 U.S.C. § 1362(7) where said creek passes from New Union to Progress, contains constant water flow throughout the year, and flows into Wildman's Marsh.

VI. Whether Bonhomme violated the CWA where arsenic from Maleau's waste piles is conveyed from Ditch C-1, to a culvert on Bonhomme's property, and finally to Reedy Creek.

STATEMENT OF THE CASE

This is an appeal from an Order of the United States District Court for the District of Progress in D.C. No. 155-CV-2012 and D.C. No. 165-CV-2012 dated July 23, 2012. (R. at 1). In those consolidated actions, Bonhomme brought suit against Maleau under the citizen suit provision of the CWA and Progress brought suit against Bonhomme under the same provision, both for the same discharge of arsenic into Reedy Creek. (R. at 4–5). Maleau intervened as a matter of right under the CWA in the suit against Bonhomme. (R. at 5). The Order appealed from both dismissed Bonhomme's suit against Maleau and denied Bonhomme's motion to dismiss the suit brought against him by Progress. (R. at 10).

Bonhomme appeals the lower court's order on all points other than the finding that Reedy Creek is a "navigable water" under the CWA. (R. at 1–2). Bonhomme argues that he is a real party in interest under Federal Rule of Civil Procedure 17 irrespective of the status of Precious Metals International, Inc. (PMI), contrary to the holding of the court below. (R. at 2). Bonhomme contends the court below erred in determining that Bonhomme, as a foreign national, is not a "citizen" as defined in the CWA. (R. at 2). Further, Bonhomme appeals the decision of the court below that Maleau's mining piles are not a "point source." (R. at 2). Joined by Progress, Bonhomme asks this Court to reverse the lower court and hold Ditch C-1 as a “navigable water” under the CWA. (R. at 2). The lower court gave proper deference to Environmental Protection Agency (EPA) regulations and applied the CWA and appropriate case law properly in holding Reedy Creek as a "navigable water" under the CWA; Bonhomme urges this Court to affirm that holding. (R. at 3). Finally, Bonhomme argues the court below erred in finding him in violation of the CWA as Maleau indirectly adds arsenic to Ditch C-1 via waste piles. (R. at 3). Bonhomme

respectfully asks this Court to affirm the lower court regarding the definition of Reedy Creek as a "navigable water" under the CWA and to reverse the court below on all other issues.

STATEMENT OF THE FACTS

Maleau operates an open pit gold mining and extraction operation adjacent to the traditionally navigable Buena Vista River in Lincoln County, Progress. (R. at 5). Maleau trucks the overburden and slag materials from his property in Lincoln County to his property in Jefferson County, Progress and places it into piles that are adjacent to Ditch C-1. (R. at 5). Ditch C-1 is a drainage ditch that was constructed in 1913 by an association of landowners. (R. at 5). Ditch C-1 begins on Maleau's property line and flows for three miles through several other properties before it crosses Bonhomme's property and discharges through a culvert on the property into Reedy Creek. (R. at 5). The ditch contains running water, except during annual periods of drought which last no longer that three months. (R. at 5). Reedy Creek begins in the State of New Union and flows for about fifty miles. (R. at 5). The Creek flows into the State of Progress just before reaching Bonhomme's property. (R. at 5). The Creek then flows for several miles before emptying into Wildman's Marsh. (R. at 5). The Creek maintains continuous water flow throughout the year. (R. at 5).

Maleau's mining piles are currently leaching arsenic into Ditch C-1. (R. at 5). When it rains, rainwater runoff flows down the sides and through the piles eventually discharging through channels that have been eroded by gravity. (R. at 5). The channels run from the pile into Ditch C-1. (R. at 5).

Bonhomme has tested the water in Ditch C-1 both upstream and downstream of Maleau's property. (R. at 6). Upstream of Maleau's waste piles, no arsenic is detectable in Ditch C-1. (R. at 6). Downstream of the waste piles, arsenic is present in high concentrations. (R. at 6). As the

flow of Ditch C-1 increases, the concentration of arsenic downstream from the waste piles decreases in proportion to the flow. (R. at 6). There is also a detectable amount of arsenic in Wildman's Marsh. (R. at 6). Arsenic is a pollutant commonly associated with gold and other mining extraction. (R. at 6).

Bonhomme's property fronts part of Wildman's Marsh. (R. at 6). Wildman's Marsh is a major destination for duck hunters from Progress, New Union and five neighboring states. (R. at 6). Bonhomme uses the marsh for duck hunting activities with his business and social friends. (R. at 6). Bonhomme also has a large hunting lodge on the property, which sits on the edge of the marsh near the point where the creek flows into the marsh. (R. at 6). Bonhomme has decreased his hunting parties from eight per year to two per year based on the arsenic contamination in Wildman's Marsh. (R. at 6). Bonhomme is concerned that the arsenic has fouled the water in Wildman's Marsh, affecting the wildlife that live in and visit the area. (R. at 6). The U.S. Fish and Wildlife Services have detected arsenic in three Blue-winged Teal in the Marsh. (R. at 6).

STANDARD OF REVIEW

This case comes before the Court on appeal from two motions to dismiss, one of which the District Court granted and one it denied. Appellate courts "review dismissal of a cause of action under Federal Rule of Civil Procedure 12(b)(6)... *de novo*." *Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 327 (2nd Cir. 1997). Further, the reviewing court "must accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Id.*

SUMMARY OF THE ARGUMENT

The United States District Court for the District of Progress erred in dismissing the citizen suit brought by Bonhomme under the CWA and in denying Bonhomme's motion to

dismiss the similar suit against him. However, the lower court properly identified Reedy Creek as a "navigable water" under the CWA.

The court below misapplied Federal Rule of Civil Procedure 17 to deny standing to Bonhomme. FED. R. CIV. P. 17. The proper application of Rule 17, as illustrated in *Mitsui*, allows Bonhomme to bring suit as a real party in interest because he is entitled to enforce a substantive right under the governing law. *Mitsui & Co. v. P.R. Water Res. Auth.*, 528 F. Supp. 768 (D.P.R. 1981). Further, it is not necessary that only one real party in interest exists; therefore, Bonhomme meets the requirements of Rule 17 even if he is a front for PMI. *Smedberg v. Detlef's Custodial Serv., Inc.*, 940 A.2d 674 (Vt. 2007).

The lower court also failed to properly interpret the citizen suit provision of the CWA by denying Bonhomme the ability to bring suit because he is a foreign national. 33 U.S.C. § 1365 (2006). Public policy dictates that the citizen suit provision should be interpreted to govern as many potential offenses as possible. The explicit purpose of the CWA also supports this broad interpretation. 33 U.S.C. § 1251 (2006).

The District Court further erred in determining that Maleau's waste piles do not meet the definition of a "point source" as stated in the CWA. 33 U.S.C. § 1362(14) (2006). The District Court misinterpreted *Consolidated Coal* and *Appalachian Power* to reach this faulty conclusion. *Consolidated Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979); *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976). Maleau's waste piles are a "point source" as they meet the applicable definition and constitute a conveyance.

The court below improperly concluded that Ditch C-1 is not a "navigable water" under the CWA, but correctly held that Reedy Creek is a "navigable water." Contrary to the opinion below, a "point source" such as Ditch C-1 can also be a "navigable water." *United States v.*

Vierstra, 802 F. Supp. 2d 1166 (D. Idaho 2011). In this case, Ditch C-1 is a "navigable water" based on the statutory and regulatory definitions of that term. 33 C.F.R. § 328.3(a) (2013); 40 C.F.R. § 230.3(s) (2013). Similarly, Reedy Creek is a "navigable water" by those definitions as noted above. The proper test for "navigable waters," as elucidated by Justice Scalia for the plurality in *Rapanos*, supports holding both Ditch C-1 and Reedy Creek as "navigable waters." *Rapanos v. United States*, 547 U.S. 715 (2006).

Finally, the lower court incorrectly denied Bonhomme's motion to dismiss on the theory that Progress stated a valid cause of action. Bonhomme qualifies under the Water Transfers Rule, promulgated by the EPA, and is not required to acquire a National Pollutant Discharge Elimination System (NPDES) permit. 40 C.F.R. § 122.3(i) (2013). The courts must give deference to such regulations whenever possible under the rules stated in *Chevron* and its progeny. *Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

I. The District Court Below Erroneously Held That Bonhomme Is a Front for Precious Metals International, Inc. and Thus Not a Real Party in Interest.

Under the Federal Rules of Civil Procedure, only a real party in interest has standing to bring suit in federal court. FED. R. CIV. P. 17(a)(1). The effect of this language is that the action "must be brought by the person who, according to the governing substantive law, is entitled to enforce the right" and "directs attention to whether plaintiff has a significant interest in the particular action he has instituted." *Mitsui*, 528 F. Supp. at 776 (quoting 6 CHARLES ALAN WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1542 and 1543 (1971)). Here, Bonhomme filed suit under the citizen suit provision of the CWA and that statute must provide the substantive law at issue. (R. at 4). Bonhomme is entitled to enforce the citizen suit provision as pollutants are being discharged on his property. (R. at 5). While PMI has a

legitimate interest in Bonhomme and the result of this litigation, the status of PMI does not affect Bonhomme's standing as a real party in interest. (R. at 6).

A. Bonhomme Is a Real Party in Interest as He Is Entitled to Enforce the Citizen Suit Provision of the Clean Water Act.

Stated simply, a real party in interest is the party entitled to enforce the right being pursued under the applicable governing substantive law. *See, e.g.*, *Smedberg*, 940 A.2d 674; *Race v. Hay*, 28 F.R.D. 354 (N.D. Ind. 1961). The governing substantive law, and right to be enforced, for the present case can be found in the citizen suit provision of the CWA. 33 U.S.C. § 1365 (2006); *See also Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440 (D. Md. 1985). That provision allows "any citizen" to commence an action on his own behalf against "any person" who is alleged to be in violation of 33 U.S.C. §§ 1251 *et seq*. 33 U.S.C. § 1365(a)(1) (2006). While this might seem like broad enough language to allow any number of suits, there are a few technical requirements Bonhomme must, and does, satisfy.

Under the citizen suit provision of the CWA, a "citizen" is statutorily defined to mean a "person... having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2006). As a property owner, Bonhomme stands to suffer a loss of both economic value and aesthetic enjoyment should any pollutants come into contact with his property or the surrounding area. The court in *Chesapeake Bay* analyzed the "adversely affected" element of standing in terms of geographic proximity and a violated interest in the nature of recreational use, environmental quality, or aesthetic value. *Chesapeake Bay*, 608 F. Supp. at 445. Additionally, the court in *Student Public Interest Research Group, Inc. v. Monsanto Co.* clarified that, in addition to the geographic connection, an "injury may be aesthetic, conservational or recreational, as well as economic." *Monsanto*, 600 F. Supp. 1479, 1484 (D.N.J. 1985), *modified on other grounds by Student Public Interest Research Group v. Monsanto Co.*, 727 F. Supp. 876 (D.N.J. 1989). That

court also specified the standing requirements under the CWA are the same requirements promulgated by the Supreme Court of the United States[1] to obtain judicial review. *Monsanto*, 600 F. Supp. at 1484. The *Morton* requirements for standing to obtain judicial review are that the challenged action must have caused the party an "injury-in-fact" and the alleged injury must be to an interest "arguably within the zone of interests to be protected or regulated" by the statute in question. *Morton*, 405 U.S. at 731–32. The "injury-in-fact" test requires the party bringing suit to be among the injured, while the "zone of interests" test will relate directly to the statute under review. *Id.* at 733–35. Here, Bonhomme has suffered injury-in-fact by virtue of the pollutants on his property and those pollutants, along with the damage they cause, are precisely the interest within the purview of the CWA. (R. at 5).

In order to bring a citizen suit, Bonhomme still needs to identify a party "alleged to be in violation" of the CWA. 33 U.S.C. § 1365(a)(1) (2006). For purposes of this action, Maleau is "alleged to be in violation" of 33 U.S.C. § 1311(a) pending the outcome of this suit. That section provides "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (2006). This broad language clearly includes Maleau as a person allegedly discharging a pollutant. As such, Bonhomme has standing under 33 U.S.C. § 1365 as the governing law used to determine a real party in interest for Federal Rule of Civil Procedure 17.

B. Bonhomme Is a Real Party in Interest Regardless of the Status of Precious Metals International, Inc.

Even if PMI is a real party in interest, there are two basic rules of law that do not preclude Bonhomme's suit. First, it is not necessary that an action be brought in the name of the person who ultimately will benefit from any recovery. *See, e.g.*, *Honey v. George Hyman Constr. Co.*, 63 F.R.D. 443 (D.D.C. 1974); *Race*, 28 F.R.D. at 355. If a plaintiff's action will preclude

[1] *See* Sierra Club v. Morton, 405 U.S. 727 (1972).

other potential actions then the plaintiff is a real party in interest. *Indep. Sch. Dist. v. Statistical Tabulating Corp.*, 359 F. Supp. 1095, 1099 (N.D. Ill. 1973). Second, it is not necessary that there always be only one real party in interest. *Smedberg*, 940 A.2d at 684. PMI will suffer mere economic harm through competition, but Bonhomme stands to suffer immediate injury as a concerned property owner. The court below noted that PMI cannot buy a plaintiff in this suit, but Bonhomme is clearly a separate party suffering distinct injury. (R. at 8). PMI cannot be faulted for taking a financial interest, not to mention a public relations interest, in its own president by paying for various expenses involved in this litigation. Similarly, a property owner such as Bonhomme is entitled to use his property in any legal fashion he wishes. Bonhomme's use of his property includes hosting parties or events for his company, as well as his own social guests. This is a well-settled principle as stated by the Supreme Court of the United States:

> Property is more than just the physical thing- the land, the bricks, the mortar- it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial.

Dickman v. Comm'r, 465 U.S. 330, 336 (1984) (quoting *Passailaigue* v. *United States*, 224 F. Supp. 682, 686 (M.D. Ga. 1963) (emphasis in original)).

The lower court also found that Bonhomme is a "front" for PMI. (R. at 1). At most, Bonhomme acted as an agent of PMI while serving in his capacity as President of the corporation. (R. at 6). It is settled that an agent with an ownership interest in the subject matter of the suit is a real party in interest. *Hanna Mining Co. v. Minn. Power & Light Co.*, 573 F. Supp. 1395, 1398 (D. Minn. 1983). Numerous cases have held under Rule 17(a) that an agent who has contracted in his own name for a disclosed or undisclosed principal, or who acted as an agent during the course of the transaction involved in the litigation, may sue for damages suffered by

the principal. *See, e.g.*, *Mitsui*, 528 F. Supp. at 776; *Prevor-Mayorsohn Caribbean, Inc. v. P.R. Marine Mgmt., Inc.*, 620 F.2d 1, 2 (1st Cir. 1980); *Bache & Co. v. Int'l Controls Corp.*, 324 F. Supp. 998, 1004–05 (S.D.N.Y. 1971), *aff'd* 469 F.2d 696 (2nd Cir. 1972). Here, the transaction involved in the litigation constitutes a series of activities where both Bonhomme and PMI benefitted. (R. at 7). Specifically, PMI paid for or conducted testing of water from Reedy Creek; PMI paid for attorney and expert witness fees in Bonhomme's case; PMI is in direct competition with Maleau's mining operations; and Bonhomme uses his hunting lodge primarily for clients and associates of PMI. (R. at 7–8). As President of PMI, Bonhomme constantly serves in a principal-agent relationship. (R. at 7). Such an agent is a proper plaintiff even if the damages were sustained by another; he claims no financial interest in the transaction or litigation; and he did not have title to, or more than a transient possessory or custodial interest in, the property forming the subject of the dispute. *See, e.g.*, *Prevor-Mayorsohn*, 620 F.2d at 2; *Bache*, 324 F. Supp. at 1005. In this case, Bonhomme sustained actual damage, he has a financial interest in the litigation, and he has title to the property forming the subject of the dispute. (R. at 5–6). Bonhomme is clearly a real party in interest through his agent capacity even if he is not a real party in interest through his individual capacity.

II. The District Court Below Erroneously Held That Bonhomme Cannot Maintain Suit Under the Clean Water Act Because He Is a Foreign National.

Bonhomme falls under the unambiguous statutory definition of a "citizen" contained in the CWA citizen suit provision. 33 U.S.C. § 1365(g) (2006). "Citizen" is statutorily defined to mean a "person... having an interest which is or may be adversely affected." *Id.* Going one step further, "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5) (2006). This issue ultimately boils down to a question of statutory interpretation in

defining the term "person," which should be guided by both public policy and well-reasoned logic.

A. Defining "Person" Within the Clean Water Act to Include Bonhomme Is Consistent with Public Policy.

Where a term is defined by statute, that definition controls throughout the whole statute. *See, e.g.*, *United States v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993); *In re Etchin*, 128 B.R. 662 (Bankr. W.D. Wis. 1991). A statutory definition of a term also generally excludes all other meanings for that term. *See, e.g.*, *Burgess v. United States*, 553 U.S. 124 (2008); *Colautti v. Franklin*, 439 U.S. 379 (1979). Thus, if Bonhomme is not a "person" who can sue under § 1365, then he is also not a "person" who can be sued. 33 U.S.C. § 1311(a) (2006) (providing a discharge of any pollutant by "any person" is unlawful). Public policy dictates that Bonhomme should be held accountable for a violation of the CWA if one occurs. This is a point with which Maleau and Progress seem to concur by maintaining claims against Bonhomme. Consequently, Bonhomme must also be allowed to hold others responsible for similar violations. A plaintiff bringing a citizen suit under the CWA cannot even win monetary damages, eliminating any potential for abuse by broadening the definition. *See Sierra Club v. SCM Corp.*, 580 F. Supp. 862 (W.D.N.Y. 1984), *aff'd* 747 F.2d 99 (2nd Cir. 1984).

Standing is a widely criticized, albeit important, concept that some believe "gives far too much power to courts in a variety of ways, often at the expense of consistency, congressional authority, and even basic fairness." Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011). To demonstrate the absurdity of denying standing to a foreign national, the following situation is illustrative. If Bonhomme joined a local environmental organization, that group could bring a citizen suit if it met the organizational standing requirements. "An organization has standing to sue on its own behalf if it meets the

same standing test that applies to individuals." *Am. Immigration Lawyers Ass'n v. Reno*, 18 F. Supp. 2d 38, 49 (D.D.C. 1998). This means the organization could bring a citizen suit under the CWA on Bonhomme's behalf, using his injury-in-fact, while still meeting the statutory definition of a "person." 33 U.S.C. § 1362(5) (2006). This straw man procedure is unnecessary under a more sensible interpretation of the statute which recognizes Bonhomme as a "person" in his individual capacity. Further, a wide variety of legal areas disapprove of straw man transactions. *See, e.g.*, *United States v. Moore*, 84 F.3d 1567 (9th Cir. 1996) (explaining that federal courts have banned straw man sales in order to effectuate the purpose of federal gun control laws); *Rekowski v. First Sec. Bank*, No. 96 C 50076, 1997 U.S. Dist. LEXIS 908, at *1 (N.D. Ill. Jan. 30, 1997) (recognizing the ability to sever a joint tenancy without the need for a straw man procedure to avoid absurd results); *In re Wrubleski*, 380 B.R. 635 (Bankr. S.D. Fla. 2008) (stating no legal authority exists to support the assertion that one may avoid paying federal income tax obligations based on a straw man position).

B. Including Bonhomme in the Definition of "Person" Is Consistent with the Purpose of the Clean Water Act.

The purpose of the CWA is to eliminate the discharge of pollutants into "navigable waters" under the CWA. 33 U.S.C. § 1251(a)(1) (2006). Allowing a foreign citizen to utilize the citizen suit provision increases the number of parties who might incur an injury-in-fact sufficient to grant standing for court action. Similarly, defining "person" to include foreign citizens increases the number of potential violators of the CWA who can be regulated by the citizen suit provision. Congress also explicitly directed the President to influence foreign countries to act to achieve the goals of the CWA to "at least the same extent as the United States does under its laws." 33 U.S.C. § 1251(c) (2006). This provision very clearly indicates an inclusive policy

toward foreign citizens when dealing with the CWA and enforcement of water pollution programs.

Defining "person" narrowly as Maleau and Progress suggest will also render other provisions of the CWA contrary to public policy or, at the very least, ineffective. For example, an Administrator would not be granted the power to act in the event of an emergency if only the health of foreign citizens was in imminent and substantial endangerment. 33 U.S.C. § 1364 (2006). Section 1364 of the CWA requires the health of a "person" to be endangered prior to an Administrator taking action. *Id.* Even more ludicrous, blatant and intentional discharge of a pollutant by a foreign citizen would not be unlawful under the CWA by such a narrow definition of "person." 33 U.S.C. § 1311(a) (2006). Section 1311(a), linked to the cause of action created by the CWA citizen suit provision, only covers discharges by "any person." *Id.* If dangerous pollution in a foreign country were a near certainty, the Administrator would not be authorized to include said country in a hearing regarding the pollution unless a United States citizen happened to be in that country and in danger. 33 U.S.C. § 1320 (2006). Section 1320, once again, requires that a "person" be in danger before inviting a foreign country to a hearing regarding pollution within that foreign country. *Id.* This final example is perhaps the most absurd as Congress clearly contemplates pollution in foreign countries and the inclusion of foreign citizens in hearings, but Maleau and Progress still contend that foreign citizens are not included in other considerations of the CWA despite a uniform definition of "person."

The importance of the word "person" is not a novel argument on appeal. The lower court discussed the definition of this term, admitting that "person" should be construed in a broader fashion than the word "citizen" to comport with the intent of Congress. (R. at 8). However, that court took issue with the lack of express mention of foreign nationals in the CWA and dismissed

Bonhomme's motion for that reason. (R. at 8). There are countless statutes that do not enumerate foreign nationals as falling under their purview which still apply to foreign nationals, Federal Rule of Civil Procedure 17 being among them. *See, e.g.*, FED. R. CIV. P. 17; 16 U.S.C. §§ 690 *et seq.* (2012) (defining "person" as "an individual, partnership, association, or corporation," yet applying criminal provisions to all violators); FED. R. EVID. 601 (providing every "person" is competent to be a witness unless otherwise stated and applying to all citizens). Congress spoke explicitly as to the purpose of the CWA and that intent is only hampered by narrowly constricting the definition of "person." 33 U.S.C. § 1251 (2006). Even the jurisdictional provision of the statute itself provides the district courts with jurisdiction regardless of the citizenship of the parties, removing barriers to litigation and contemplating various types of citizens. 33 U.S.C. § 1365(a) (2006). Excluding Bonhomme by affirming the lower court and dismissing his case undercuts clear congressional mandate.

III. The District Court Erred in Granting the Motion to Dismiss on the Issue of Maleau's Mining Waste Piles Because the Waste Piles Are a "Point Source."

The District Court erred when it granted Maleau and Progress' motion to dismiss because Maleau's mining waste piles are a "point source" under the CWA. 33 U.S.C. § 1362(14) (2006). First, the CWA defines "point source" as any "discernible, confined and discrete conveyance." *Id.* Maleau's mining waste piles are a "point source" under this definition and case law supports this assertion. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (2004). Second, Maleau and the District Court inaccurately pointed to *Consolidated Coal* and *Appalachian Power* to justify why Maleau's waste piles are not a "point source." (R. at 9). Here, the discharges from the waste piles are not simply unchanneled and uncollected surface waters, which was the complaint in those cases. *Consolidated Coal*, 604 F.2d at 249; *Appalachian Power*, 545 F.2d at 1373.

Contrary to the lower court's ruling, Bonhomme can show that waste piles can be conveyances and thus a "point source" under the CWA.

A. Maleau's Waste Piles Fit into the Definition of a "Point Source" Under § 1362(14) of the Clean Water Act.

Under the CWA, a "point source" is "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14) (2006). The definition is to be broadly interpreted because Congress intended the definition of "point source" to "embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *United States v. Earth Scis. Inc.*, 599 F.2d 368, 373 (10th Cir. 1978) (interpreting the legislative intent behind the CWA's definition of "point source"). In the case at bar, Maleau's waste piles are identifiable conveyances.

Maleau's waste piles are similar in nature to the waste piles in *Abston*, which the court indicated were identifiable conveyances. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41 (5th Cir. 1980). In *Abston*, the erosion of piles of discarded material resulted in rainwater carrying pollutants into a "navigable water." *Id.* at 43. Similar to the case at bar, the miners in *Abston* did not directly place the pollutants into the water, but instead just placed the discarded material next to the water. *Id.* The Fifth Circuit held that "gravity flow, resulting in a discharge into navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials." *Id.* at 45. Here, the waste piles are collecting the water and materials. (R. at 5). The water is flowing into and through the waste piles. (R. at 5). The water is then pulled out by gravity and discharged into Ditch C-1 through channels eroded by gravity. (R. at 5). Maleau's waste piles are thus a "point source."

Further, the court in *Abston* said that a "point source" may also be present when "erosion of spoil pile walls results in discharges into a navigable water by means of ditches, gullies and

similar conveyances." *Abston*, 620 F.2d at 45. In the present case, the water flows into Maleau's waste piles and then is discharged through channels eroded by gravity. (R. at 5). This fits into the situation explained by the court in *Abston* as a channel is a "similar conveyance" to a ditch or gully. *Abston*, 620 F.2d at 45. In both instances, the polluted water is being conveyed through an eroded waterway. (R. at 5). While this case does not present erosion of pile walls, it does present a situation of rainwater flowing down the piles and through them, bringing the pollutants with it through the eroded channels. (R. at 5). While it is true that a pile is not always a conveyance, this is not just a pile. It is a waste pile that water flows through before discharging into channels that are eroded from the waste pile to the body of water. (R. at 5). As in *Abston*, these mining piles are a conveyance. *Abston*, 620 F.2d at 45. Maleau's waste piles are a "point source"; therefore, they require a NPDES permit to discharge any pollutants.

The District Court found that piles are not normally "point sources." (R. at 9). However, in *Parker* the Eleventh Circuit held that a pile of debris was a "point source" under the CWA. *Parker*, 386 F.3d at 1009. In *Parker*, there were piles of debris strewn about on the defendant's property. *Id.* The court in *Parker* echoed the court in *Avoyelles*[2] in holding that storm water collected in piles of industrial debris could be a "point source." *Parker*, 386 F.3d at 1009. Here, Maleau has a pile of mining waste that is collecting water as rainwater flows through each pile, eventually discharging through channels. (R. at 5). While piles are not always conveyances, case law shows that waste piles can be conveyances and thus "point sources." Here, Maleau's waste piles are a "point source" and should be treated as such.

[2]Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983).

B. Maleau's Waste Piles Are Not "Unchanneled and Uncollected Surface Waters."

Maleau and Progress cite *Consolidated Coal* and *Appalachian Power* as support for their argument. (R. at 9). The courts' holdings in *Appalachian Power* and *Consolidated Coal* were that "point sources" do not include unchanneled and uncollected surface waters. *Consolidated Coal*, 604 F.2d at 249; *Appalachian Power*, 545 F.2d at 1373. Surface water runoff, which is neither collected nor channeled, is classified as nonpoint source pollution and is not subject to the "point source" requirements. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2nd Cir. 2009). Maleau and Progress may argue that the facts present a situation of nonpoint source pollution. However, the facts of this case support the argument that the waste piles have collected and channeled the water. Here, the pollutants are being added to Ditch C-1 through channels that have eroded away from and between Maleau's waste piles. (R. at 5). Storm water is flowing into the piles where it is then held until gravity eventually pulls the water and pollutants from the piles. (R. at 5). The pollutants are then channeled through channels that lead from the pile and into Ditch C-1. (R. at 5). This does not present a situation of uncollected and unchanneled surface water. Maleau's waste piles are not uncollected and unchanneled surface water; they are a "point source." Further, the Second Circuit in *Natural Resources Defense Council, Inc.* defined nonpoint source pollution as "runoff [that] could not be traced to any identifiable point of discharge." *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 94 (2nd Cir. 2001) (citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)). Here, the runoff can be traced to an identifiable point: Maleau's waste piles. The waste piles channel the runoff into Ditch C-1. (R. at 5). Maleau and Progress' argument that this is a situation of nonpoint source pollution is flawed.

C. The Purpose of the Clean Water Act Is Better Served if Maleau's Waste Piles Are a "Point Source."

The purpose of the CWA is to eliminate the discharge of pollutants into "waters of the United States." 33 U.S.C.§ 1251(a)(1) (2006). Maleau's waste piles are currently leaching arsenic into Ditch C-1. (R. at 5). The arsenic is then traveling through the ditch, and into Reedy Creek, a "water of the United States." (R. at 5). By holding Maleau liable for the discharges, he will be forced to remove the waste piles and stop the pollution from continuing. Bonhomme, on the other hand, cannot do anything to stop the pollution of Ditch C-1 as he has no control over the addition of arsenic to the ditch. (R. at 5). Maleau is the only one who has the power to remove the waste piles because they sit on his property. (R. at 5). The purpose of the CWA, the elimination of pollutants, is better served by holding Maleau responsible for his waste piles. By holding Maleau responsible, he will be forced to remedy the problem and remove the waste piles.

IV. The Lower Court Erred in Determining That Ditch C-1 Is Not a "Navigable Water."

The District Court improperly ruled that precedent established by *Rapanos* precludes Ditch C-1 from the definition of "navigable water." First, the District Court improperly concluded that the ditch could not be a "navigable water" simply because it fits the definition of a "point source." A ditch can be a "point source" as well as a "navigable water" depending on the circumstances. *See Vierstra*, 802 F. Supp. 2d at 1173. Second, Ditch C-1 properly fits the statutory definition of "navigable water" and falls under the EPA's and the United States Army Corps of Engineers' (Corps) CWA regulations as a tributary; therefore, the EPA and the Corps will assert jurisdiction over it. 33 U.S.C. § 1362(7) (2006); 33 C.F.R. § 328.3(a) (2013); 40 C.F.R. § 230.3(s) (2013). Third, Ditch C-1 is a "navigable water" based on the *Rapanos* decision.

Rapanos, 547 U.S. 715. In *Rapanos*, the Supreme Court dictated two different tests to determine whether a body of water qualifies as a "navigable water" for CWA jurisdiction. *Id.* The plurality opinion, authored by Justice Scalia, and Justice Kennedy's concurring opinion defined "navigable water" in different ways. *Id.* The plurality test recognized that "navigable waters" only includes "relatively permanent, standing, or continuously flowing bodies of water." *Id.* at 733. Here, Ditch C-1 will meet the test as laid out by Justice Scalia in the plurality opinion. Justice Kennedy's test, however, only makes reference to wetlands as "navigable waters." *Id.* at 779–780. Justice Kennedy's test is applicable only to wetlands, and is therefore not applicable to the present case. *See Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1215 (D. Or. 2009). Lastly, even if this Court holds that Kennedy's test does apply outside of the wetlands context, case law states that if the water in question can meet either the plurality test or Kennedy's test then it is a "navigable water." *See*, *e.g.*, *N. Cal. River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). Here, Ditch C-1 can meet the plurality test and is therefore a "navigable water."

A. A Ditch Can Be a "Navigable Water."

The District Court erred when it determined that Ditch C-1 could not be a "navigable water" simply because it is a "point source." (R. at 9). While it is true that the CWA includes "ditch" in its list of "point sources," there is nothing in the CWA that precludes a ditch from being a "navigable water" instead. 33 U.S.C. § 1362(14) (2006). In *Vierstra* the court analyzed whether or not a canal could be a "navigable water" under the CWA. *Vierstra*, 802 F. Supp. 2d at 1173. The court held that a ditch or canal that fits the definition of "navigable water" under the CWA may, under certain circumstances, also constitute a "point source." *Id.* Further, courts in

the past have held that a ditch may fall within the definition of a “navigable water" under the CWA. *See*, *e.g.*, *Parker*, 386 F.3d at 1009 (explaining that ditches are "navigable waters" if they are tributaries of a larger body of water); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003) (giving *Chevron* deference to the Corps' decision to treat a roadside ditch as a "navigable water"); *Treacy v. Newdunn Assocs.*, 344 F.3d 407 (4th Cir. 2003) (holding that a ditch was a "navigable water"). Looking at these cases, it is clear that a ditch may be a “point source” and/or a “navigable water" under the CWA depending on the circumstances. The lower court erred by determining that this could not be the case.

B. Ditch C-1 Fits the Statutory Definition of “Navigable Water” as well as the EPA’s Regulatory Definition.

“Navigable waters" is a defined term in the CWA that expressly includes all "waters of the United States." 33 U.S.C. § 1362(7) (2006). The Supreme Court of the United States has recognized that Congress intended “navigable waters” to include something more than traditional navigable waters. *Rapanos*, 547 U.S. at 731. As a result, the Corps and the EPA have put out substantively equivalent regulatory definitions of "waters of the United States.” Both define “waters of the United States” to encompass not only traditional navigable waters used in interstate commerce, but also tributaries of traditional navigable waters and wetlands adjacent to covered waters. 33 C.F.R. § 328.3(a) (2013); 40 C.F.R. § 230.3(s) (2013). Courts have consistently held that a tributary is a “water of the United States." *See United States v. Moses,* 496 F.3d 984, 989 (9th Cir. 2007) (holding that Teton Creek was an intermittent tributary of "waters of the United States" and therefore a “water of the United States” itself); *See also Vierstra*, 802 F. Supp. 2d 1166 (finding that a canal could be a non-navigable “tributary” and therefore a “water of the United States"); *Gulf Restoration Network v. Hancock Cnty. Dev., LLC*, 772 F. Supp. 2d 761, 769–70 (S.D. Miss. 2011) (finding that Bayou Maron was a "water of the

United States" because it was a permanent flowing tributary of a larger bayou, which in turn was a tributary of a navigable-in-fact river). Ditch C-1 is a tributary of an interstate water, which is defined as a navigable water by the EPA and Corps. 33 C.F.R. § 328.3(a) (2013); 40 C.F.R. § 230.3(s) (2013). Courts have held in the past that a ditch can be a tributary of a larger body of water. *Parker*, 386 F.3d at 1009. In *Deaton*, the court analyzed whether a roadside ditch was properly categorized as a tributary. *Deaton*, 332 F.3d at 704. The court stated that the Corps interprets tributary to mean any "streams whose water eventually flows into navigable waters." *Id.* at 710. The court found that the ditch properly fit into the definition of tributary. *Id.* at 712. Ditch C-1 runs for three miles before discharging into Reedy Creek, an interstate water way and a "navigable water" under the CWA. (R. at 5). Therefore, Ditch C-1 will fit the statutory and regulatory definitions given by the CWA, EPA, and Corps.

C. Under the Plurality Opinion in *Rapanos*, Reedy Creek Is a "Navigable Water."

While Ditch C-1 fits the EPA and Corps' definition of "navigable water," the Supreme Court in *Rapanos* narrowed the scope of the CWA's jurisdiction over waterways. *See Rapanos*, 547 U.S. 715. Therefore, in order for Ditch C-1 to be a "navigable water" it must fit one of the tests set out in *Rapanos*. *Id.* Justice Scalia, writing for the plurality, recognized that the statutory term "navigable waters" means something more than just traditional navigable waters. *Id.* at 731. The plurality maintained "navigable waters" included only "relatively permanent, standing or continuously flowing bodies of water." *Id.* at 739. The plurality emphasized that "navigable waters" are "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 733.

Ditch C-1 is a "navigable water" under the plurality test. Ditch C-1 runs for a stretch of three miles. (R. at 5). It contains continuously flowing water except during annual periods of

drought, which last from several weeks to at most three months. (R. at 5). The plurality opinion makes clear that the "relatively permanent" standard does not preclude a waterway from being a "water of the United States" based on the fact that it does not contain water during dry months. *Rapanos*, 547 U.S. at 732 n.5. As long as the body contains continuous flow during some months of the year, the relatively permanent standard is met. *Id.* The facts show that Ditch C-1 is "relatively permanent" based on its continuous flow for nine months out of the year. (R. at 5). Ditch C-1 passes the test set out by the plurality in *Rapanos*.

D. Kennedy's Concurrence in *Rapanos* Is Limited to Wetlands and Therefore Is Not Applicable to the Case at Bar.

Justice Kennedy's significant nexus test is inapplicable in determining the federal jurisdiction over "waters of the United States" outside of the wetlands context. Justice Kennedy, by requiring that "*wetlands* possess the requisite nexus," limited the applicability of his legal standard to wetlands adjacent to jurisdictional waters. *Rapanos*, 547 U.S. at 781 (emphasis added). The facts of this case deal with a non-navigable tributary of an interstate water. Thus, application of Kennedy's wetlands test is inappropriate.

Other courts faced with this issue have come to similar conclusions. In *Benjamin*, the defendant argued a creek was not a "water of the United States" because it did not maintain a significant nexus to the water quality of a navigable-in-fact water. *Benjamin*, 673 F. Supp. 2d at 1215. The defendant relied heavily upon Justice Kennedy's concurring opinion in *Rapanos* which explained that wetlands are not "waters of the United States" unless they maintain a significant nexus with a navigable-in-fact water. *Rapanos,* 547 U.S. 715 at 779. The *Benjamin* court, in agreement with the Ninth Circuit Court of Appeals,[3] held that the defendant's reliance on Kennedy's concurrence was misplaced because the significant nexus test applies only to

[3]N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

federal jurisdiction over adjacent wetlands. *Benjamin*, 673 F. Supp. 2d at 1215. Applying the reasoning of the *Benjamin* and *Healdsburg* courts, Kennedy's significant nexus test is only applicable to wetlands. Ditch C-1 is a non-navigable tributary, thus application of the significant nexus test is inappropriate.

In *City of Healdsburg,* the Ninth Circuit initially declared that Justice Kennedy's concurring opinion provided the "controlling rule of law." *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (*amended by* 496 F.3d 993 (9th Cir. 2007)). However, one year later, the Ninth Circuit issued an amended opinion in *City of Healdsburg,* holding that "Justice Kennedy's concurrence provides the controlling rule of law *for our case*." *City of Healdsburg*, 496 F.3d at 999–1000 (emphasis added). The court, by adding the phrase "for our case," limited its ruling to the facts at that time. The court "did not, however, foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard." *Id.* The facts in *City of Healdsburg* explicitly stated that the pond in question was not only surrounded by extensive wetlands, which connect to a navigable-in-fact river, but also that the pond's shoreline had receded so drastically that the area that was originally a pond became a wetland. *Id.* at 998. Thus, the application of the Ninth Circuit's holding in *City of Healdsburg* to the case at bar is inappropriate for two reasons: (1) the present case is not characterizing a wetland; and (2) the Ninth Circuit amended its original opinion to apply only to the facts specific to that case.

E. Even if This Court Holds That Kennedy's Test Is Applicable, Ditch C-1 Must Only Meet One Test to Be a "Water of the United States."

In *Rapanos,* the dissent made it clear that it would find jurisdiction when either the plurality's or Justice Kennedy's test is satisfied. *Rapanos*, 547 U.S. at 810. With the support of the dissenting Justices, both opinions command a majority of the Court and constitute a

controlling rule of law. *Benjamin*, 673 F. Supp. 2d at 1216; *See also League of United Latin Am. Citizens v. Perry,* 548 U.S. 399 (2006) (holding that the court can rely upon concurring and dissenting opinions to establish majority support for a legal standard); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (holding that the court of appeals correctly recognized that the four dissenting Justices and Justice Blackmun formed a majority to determine the correct legal standard); *Waters v. Churchill,* 511 U.S. 661, 685–86 (1994) (Souter, J., concurring) (reviewing plurality, concurring, and dissenting opinions to establish a legal test to be followed by lower courts). Other courts considering this issue have allowed the United States to assert jurisdiction under either the plurality test or Justice Kennedy's significant nexus test. *See*, *e.g.*, *Wilcox*, 633 F.3d 766; *Bailey*, 571 F.3d at 799; *Johnson*, 467 F.3d at 66; *Vierstra*, 803 F. Supp. 2d 1166; *United States v. Robison*, 521 F.3d 1319, 1327 (11th Cir. 2008) (Wilson, J., dissenting) (explaining that courts cannot conclude that Justice Kennedy's test is the only legal standard applicable to CWA jurisdictional determinations). Therefore, because Ditch C-1 can pass under the *Rapanos* plurality test's "relatively permanent" standard, it is properly considered a "water of the United States."

V. The District Court Correctly Determined That Reedy Creek Is a "Navigable Water" as Defined by the Environmental Protection Agency, the United States Army Corps of Engineers, and the Plurality Test in *Rapanos*.

The District Court correctly determined that Reedy Creek is a "navigable water" under the CWA. "Navigable waters" is a defined term in the CWA that expressly includes all "waters of the United States." 33 U.S.C. § 1362(7) (2006). The Supreme Court of the United States has recognized that with this broad definition Congress intended to exercise its wide-ranging powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable waters" under the traditional understanding of that term. *Rapanos*, 547 U.S. at 811.

The Corps and the EPA both define "waters of the United States" to encompass not only traditional navigable waters used in interstate commerce, but all interstate waters including interstate wetlands. 33 C.F.R. § 328.3(a)(2) (2013); 40 C.F.R. § 230.3(s)(2) (2013). Reedy Creek is an "interstate water" which is defined as a "navigable water" by the EPA and the Corps. 33 C.F.R. § 328.3(a)(2) (2013); 40 C.F.R. § 230.3(s)(2) (2013). However, as discussed earlier, the Supreme Court in *Rapanos* narrowed the Corps' expansive approach to the term and redefined "navigable waters." Under the plurality test in *Rapanos*, Reedy Creek is still considered a "navigable water." Kennedy's significant nexus test is not applicable because Reedy Creek is not a wetland.

A. Reedy Creek Constitutes a "Navigable Water" Under Statutory and Regulatory Definitions.

The Corps and the EPA created similar regulatory definitions of "waters of the United States," which include all interstate waters. 33 C.F.R. § 328.3(a)(2) (2013); 40 C.F.R. § 230.3(s)(2) (2013). Reedy Creek is an "interstate water" which is defined as a "navigable water" by the EPA and the Corps. 33 C.F.R. § 328.3(a)(2) (2013); 40 C.F.R. § 230.3(s)(2) (2013). Reedy Creek is close to fifty miles long and maintains water flow throughout the year. (R. at 5). It begins in the State of New Union and flows into the State of Progress, where it then flows for several miles before ending in Wildman's Marsh. (R. at 5). Reedy Creek is an interstate body of water; thus, under the regulatory definitions set forth by the Corps and the EPA, Reedy Creek is a "navigable water."

B. Reedy Creek Is Subject to Clean Water Act Jurisdiction Under the Plurality Opinion in *Rapanos*.

In *Rapanos*, the Supreme Court of the United States held that the term "navigable waters" under the CWA includes only "relatively permanent, standing or flowing bodies of water, not

intermittent or ephemeral flows of water." *Rapanos*, 547 U.S. at 732. The plurality determined that the use of the article "the" and the plural number of "waters" showed plainly that §1362(7) did not refer to water in general. *Id.* The Court held that in that form, "the waters" refers to water "[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," or "the flowing or moving masses, as of waves or floods, making up such streams or bodies." *Id.* (citing WEBSTER'S NEW INT'L DICTIONARY 2882 (2d ed. 1954)).

Here, when applying the plurality's test, Reedy Creek is a "navigable water." Reedy Creek is fifty miles long. (R. at 5). The creek begins in the State of New Union where it is used as a constant water supply for Bounty Plaza. (R. at 5). The Creek then flows into the State of Progress where is stretches for several miles before flowing into Wildman's Marsh. (R. at 5). Reedy Creek is constantly diverted for agricultural purposes, but still continuously flows until it reaches Wildman's Marsh where the creek ends. (R. at 5). Reedy creek is a permanent and flowing body of water. (R. at 5). Thus, under the plurality test articulated by Scalia in *Rapanos*, Reedy Creek is a "navigable water" under the CWA because it is a relatively permanent and constantly flowing body of water.

C. Justice Kennedy's Significant Nexus Test in *Rapanos* Is Inapplicable Because Reedy Creek Is Not a Wetland.

Maleau may attempt to rely on Kennedy's significant nexus test in determining whether Reedy Creek is a "navigable water"; however, any reliance on Kennedy's test is misplaced. As discussed earlier, Justice Kennedy's significant nexus test is inapplicable to determining the federal jurisdiction over "waters of the United States." Justice Kennedy, by demanding that "*wetlands* possess the requisite nexus," purposefully limited the applicability of his legal standard to wetlands adjacent to jurisdictional waters, not non-traditionally navigable waters. *Rapanos,* 547 U.S. at 781 (emphasis added).

D. Even if This Court Finds the Significant Nexus Test Applicable, Reedy Creek Must Only Meet Either the Plurality or Significant Nexus Test for Clean Water Act Jurisdiction.

As discussed earlier, both the plurality opinion and the concurring opinion in *Rapanos* can command a majority of the court and constitute controlling law. *Benjamin*, 673 F. Supp. 2d at 1216. Other courts have allowed the United States to assert jurisdiction under the CWA if either the plurality's test or Kennedy's test is satisfied. *See, e.g.*, *Wilcox*, 633 F.3d 766; *Johnson*, 467 F.3d at 66; *Bailey*, 571 F.3d at 799; *Vierstra*, 803 F. Supp. 2d 1166; *Robison*, 521 F.3d at 1327. Here, it is irrelevant whether or not the significant nexus test applies because Reedy Creek is a "navigable water" under the *Rapanos* plurality test and only one of the two tests must be satisfied.

VI. Under the Water Transfers Rule Promulgated by the EPA, Bonhomme Does Not Violate the Clean Water Act when He Transfers Pollutants, Added by Maleau, from One "Navigable Water" to Another.

The District Court erred in denying Bonhomme's motion to dismiss because Bonhomme does not violate the CWA. The CWA prohibits the discharge of any pollutant to "navigable waters" from any "point source" without a permit issued by the Corps or the EPA. 33 U.S.C. § 1311(a) (2006). "Discharge" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006). The statutory inclusion of the word "addition" in the definition of "discharge" creates a but-for cause test. Case law precedent supports two definitions of "addition." *Compare S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 106 (2004), *with Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1219 (11th Cir. 2009). In 2008, the EPA promulgated the Water Transfers Rule which states that a water transfer that "conveys or connects waters of the United States" is exempt from NPDES permitting. 40 C.F.R. § 122.3(i) (2008). The EPA's rule rests upon the unitary waters theory, which posits that all "navigable waters" in the United States "should be viewed unitarily"

as the same, singular water. *Miccosukee*, 541 U.S. at 106. The current regulation holds that "water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (2013). In *Friends of the Everglades*, the Eleventh Circuit gave *Chevron*[4] deference to the EPA's Water Transfers Rule. *Friends of the Everglades*, 570 F.3d at 1219. Here, Bonhomme's culvert conveys "waters of the United States" without subjecting the transferred water to intervening industrial, municipal or commercial use; thus, Bonhomme is not liable under the CWA. *Id.* Even if *Chevron* deference was inaccurately given, Bonhomme is still not liable under the CWA.

A. Bonhomme's Actions Fit Under the Water Transfer Exemption of NPDES Permitting.

In 2005, the EPA issued an interpretive memorandum addressing "whether the movement of pollutants from one navigable water to another by a water transfer is the 'addition' of a pollutant potentially subjecting the activity to the permitting requirement under [the NPDES program]." Memorandum from the U.S. Envtl. Prot. Agency to Regional Administrators, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 2 (Aug. 5, 2005), http://www.epa.gov/ogc/documents/water_transfers.pdf. In 2008, the NPDES Water Transfers Rule created the following exemption to the NPDES permit program: "(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i) (2013). Therefore, the EPA essentially codified the unitary waters theory, though no mention of theory by name appears in the final rule analysis. *Id.* The EPA's own "broader evaluation of the relationship between waters" led it to make no

[4]Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

distinctions among "navigable waters" at all within the rule itself. *See* Memorandum from the U.S. Envtl. Prot. Agency to Regional Administrators, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers 2 (Aug. 5, 2005), http://www.epa.gov/ogc/documents/water_transfers.pdf.

In the present case, Bonhomme's culvert connects "waters of the United States." Ditch C-1 runs three miles before it crosses into Bonhomme's property and discharges through a culvert underneath a farm road on Bonhomme's property directly into Reedy Creek. (R. at 5). Additionally, the culvert does not transfer water for industrial, municipal, or commercial use, but rather transfers for agricultural use. (R. at 5). Bonhomme's culvert simply conveys a "water of the United States" to another "water of the United States." Ditch C-1 runs through several agricultural properties, passing without the addition of more arsenic, before it ends in Reedy Creek. (R. at 5). Therefore, the transfer of water through the culvert clearly falls under the Water Transfers Rule.

Maleau and Progress may argue that the unitary waters theory is inapplicable because the majority of the circuit courts disagree with the reasoning. However, the majority of the circuit courts that rejected the unitary waters theory did so before the EPA issued a regulation concerning the "addition... to navigable waters." *Friends of the Everglades*, 570 F.3d at 1218; *See, e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 83 (2nd Cir. 2006); *Plains Res. Council v. Fidelity Exploration and Dev.*, 325 F.3d 1155, 1163 (9th Cir. 2003); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2nd Cir. 2001); *Dubois v. U.S. Dep't of Agric.,* 102 F.3d 1273, 1296 (1st Cir. 1996); *Dague v. City of Burlington,* 935 F.2d 1343, 1354–55 (2nd Cir. 1991). The Supreme Court in *Miccosukee* found no EPA position applicable to the issue at hand. *See generally*

Miccosukee, 541 U.S. 95. Therefore, there was no position with which to give *any* deference, much less *Chevron* deference. *Id.* (emphasis added). In 2009, post-EPA codification of the unitary waters theory, the Eleventh Circuit in *Friends of the Everglades* analyzed the issue holding that there was an EPA regulation to which the court should give deference. *Friends of the Everglades,* 570 F.3d at 1219.

B. The Supreme Court in *Friends of the Everglades* Correctly Gave the EPA Water Transfer Regulation *Chevron* Deference.

The Eleventh Circuit in *Friends of the Everglades* was the first court to address the "addition... to navigable waters" issue in light of the new EPA Water Transfer regulation. *Friends of the Everglades*, 570 F.3d 1210. The Eleventh Circuit reviewed the case *de novo* and resolved that the EPA's rule was entitled *Chevron* deference determining that the statute was ambiguous. *Id.* The Supreme Court in *Chevron* held that with regard to judicial review of an agency's construction of a statute, if Congress has not directly spoken to the issue and the agency's interpretation is based on a permissible construction of the statute, then the agency's interpretation is given deference. *Chevron,* 467 U.S. at 838. In the first step of *Chevron* analysis, a court must apply tools of statutory construction. *Id.* A court must examine the text of the statute, its structure, and its stated purpose in an attempt to ascertain whether Congress had a specific intent. *Id.* at 843. Once a court finds the statute ambiguous, it must decide whether the agency's interpretation was a permissible construction of that language. *Id.* at 837. If a court finds the agency interpretation was a permissible construction of the language, that court must give the interpretation *Chevron* deference. *Id.*

In *Friends of the Everglades*, the court determined that the parties put forward two reasonable statutory interpretations of "addition." *Friends of the Everglades*, 570 F.3d at 1219. The plaintiffs suggested "any addition... to [any] navigable waters," while the defendants,

including the government on behalf of the EPA, suggested "any addition... to navigable waters [as a whole]." *Id.* at 1227. In that case, South Florida Water Management operated pumps that transferred pollutants from canals to Lake Okeechobee, two distinct bodies of water, without NPDES permits. *Id.* at 1214. The court found both interpretations reasonable and then went on to determine that the EPA's rule was not "arbitrary, capricious, or manifestly contrary to the statute;" thus, the EPA interpretation of "any addition... to navigable waters [as a whole]" is given *Chevron* deference. *Id* at 1227–28 (quoting *Chevron*, 467 U.S. at 844). The court went on to hold that South Florida Water Management District did not violate the CWA, under a regulation promulgated by the EPA, which accepted the unitary waters theory that transferring pollutants between "navigable waters" was not an "addition to navigable waters." *Id.* at 1227–28; 40 C.F.R. § 122.3(i) (2013).

C. Even if *Chevron* Deference Was Inaccurately Given, Bonhomme Is Still Not Liable Under the Alternative Definition of Addition.

The plaintiffs in *Friends of the Everglades* contended that addition means "any addition... to [any] navigable waters," because the Supreme Court decision in *Miccosukee* only stated that water transfers between water bodies that are not "meaningfully distinct" are exempt from the NPDES permitting requirement. *Miccosukee*, 541 U.S. at 112. There, the plaintiffs asserted that "additions" occur when a "point source" moves polluted water to a hydrologically distinct "navigable water," contrary to the natural flow. *Id.* at 109. The Supreme Court adopted a metaphor to explain this "addition" theory in *Miccosukee*: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110. Under that metaphor, the "waters of the United States" are not a variety of pots, but one single pot. Ladling pollution from one "navigable water" to another does not add anything to the pot.

In *Miccosukee*, the Supreme Court held that the NPDES permit requirement did not apply to a "point source" merely pumping water containing pollutants back into the same navigable body of water from which the polluted water discharge was taken. *Id.* at 112. The factors that determine whether the bodies of water are the same "navigable water" are: (1) hydrological connections of the source and receiving bodies of water; (2) differing biological or ecosystem characteristics of the respective bodies of water; and (3) whether the transfer of water would occur naturally. *See Miccosukee*, 541 U.S. 95.

Here, when applying the factors dictated by the Supreme Court, Reedy Creek and Ditch C-1 are the same "navigable water." First, Ditch C-1 flows directly into Reedy Creek creating a hydrological connection. (R. at 5). Second, no facts indicate that there is a substantial difference in the biological or ecosystem characteristics of Ditch C-1 and Reedy Creek. Lastly, the transfer of water from Ditch C-1 to Reedy Creek occurs naturally. Ditch C-1 is a feeder to Reedy Creek and is only three feet across and one foot deep on average. (R. at 5). The ditch contains running water throughout the year, excluding time periods of extreme drought. (R. at 5). The water from Ditch C-1 directly discharges into Reedy Creek and that transfer of water from Ditch C-1 to Reedy Creek occurs naturally. (R. at 5). In *Dubois*, the court held that the determining information was whether the flow was natural, not whether the transferring body of water was man-made. *Dubois*, 102 F.3d at 1296–97. Therefore, the fact that Ditch C-1 was dug into saturated soils in order to drain them sufficiently for agricultural use does not affect the analysis. (R. at 5).

Even if this court determines that the Eleventh Circuit inaccurately gave the EPA Water Transfer regulation *Chevron* deference, Bonhomme is still not liable under the CWA. Bonhomme transferred pollutants from Ditch C-1 to Reedy Creek; however, Ditch C-1 and

Reedy Creek are determined to be the same "navigable water" when applying the *Miccosukee* factors. Therefore, Bonhomme did not create any "addition... to [any] navigable waters," much less "any addition... to navigable waters [as a whole]."

CONCLUSION

For the previously stated reasons, Bonhomme respectfully requests that this Court affirm the court below in part and reverse in part. As Bonhomme has stated the proper applications and interpretations of both Federal Rule of Civil Procedure 17 and the CWA citizen suit provision, the lower court improperly dismissed his suit for lack of standing. The District Court also erred in failing to find Maleau's waste piles as a "point source" under the CWA. The court below inconsistently applied the definition of "navigable waters," correctly holding that Reedy Creek is a "navigable water" and incorrectly holding Ditch C-1 is not. Finally, this Court should reverse the lower court's holding that Bonhomme violated the CWA as the arsenic came from Maleau's waste piles and Bonhomme is exempt under the Water Transfers Rule.