IN THE

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 13-01234

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

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 Order of the United States District Court for the District of Progress

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BREIF FOR THE PLAINTIFF-APPELLANT, CROSS-APPELEE, JACQUES BONHOMME

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JURISDICTIONAL STATEMENT

The United States District Court for the District of Progress had proper jurisdiction under 28 U.S.C. § 1331 (1980) as the issues present "arise under" the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq*., which is a law of the United States. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over the subject matter of this case because it is an appeal from a motion to dismiss by the district court. The district court's order granting the motion is a final judgment that was timely appealed by Bonhomme, Maleau, and the State of Progress, thus jurisdiction is proper pursuant to 28 U.S.C. § 1291(2006); FED. R. APP. P. 4.

STATEMENT OF THE ISSUES

I. Whether the injury suffered by Bonhomme resulting from Maleau's discharge of arsenic into the water on his property makes him as a real party in interest under Federal Rules of Civil Procedure 17.

II. Whether the definition of "citizen" in the CWA as "any person," 33 U.S.C. § 1365(g), extends to Bonhomme, a foreign national.

III. Whether Maleau's mining waste piles, which conveyed arsenic into a water of the U.S., are "point sources" under the CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

IV. IV. Whether Ditch C-1, a direct tributary of Reedy Creek with relatively permanent flow, is a "navigable water/water of the U.S." under the CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14).

V. Whether Reedy Creek, an interstate water with permanent flow, is a "navigable water/water of the U.S." under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).

VI. Whether Bonhomme violates the CWA when the arsenic added to Ditch C-1 by Maleau transferred from Ditch C-1, a water of the U.S., to Reedy Creek, another water of the U.S., through the culvert on Bonhomme's property.

STATEMENT OF THE CASE

Jacques Bonhomme ("Bonhomme") filed a complaint against Shifty Maleau ("Maleau") in the United States District Court for the District of Progress alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012), utilizing the citizen suit provision of the Act, 33 U.S.C. § 1365. R. at 4. Bonhomme alleges that arsenic from mining waste piles on Maleau's property is discharged into Ditch C-1, which carries the arsenic and eventually discharges into Reedy Creek, an interstate, navigable waterway. R. at 4–5. Following the commencement of this action, the State of Progress ("Progress") also filed a complaint against Bonhomme in the United States District Court for the District of Progress alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251–1387 (2012), also under the citizen suit provision, 33 U.S.C. § 1365. R. at 5. Progress alleges that because the arsenic discharges from a culvert on Bonhomme's property into Reedy Creek, Bonhomme is in violation of the Clean Water Act. R. at 5. As a matter of right, Maleau intervened in Progress's action, and Progress and Maleau moved to consolidate their action with Bonhomme's, which the Court granted absent no objection from Bonhomme. R. at 5.

Following consolidation, the defendants in each case filed motions to dismiss. R. at 5. On July 23, 2012, the district court granted the State of Progress's motion to dismiss without prejudice, but denied Bonhomme's motion to dismiss. R. at 10. The court held that Bonhomme was not the proper plaintiff because: (1) he was not a citizen as required by the Clean Water Act despite it being defined as "any person," and (2) he was not the real party in interest to the action. R. at 7–8; 10. The district court did not reach a decision on the merits in Bonhomme's case, but stated that if it had it would have found

for Maleau on all issues. R. at 10. Thus, the district court would have held: (1) that the mining waste piles were not point sources, (2) that Ditch C-1 was not a navigable water way, and (3) Bonhomme violates the Clean Water Act even though the pollutants were added to Ditch C-1 by Maleau. R. at 1–2.

Bonhomme, Progress, and Maleau each filed a timely Notice of Appeal. R. at 1. Bonhomme appeals the decision of the district court with respect to its holdings that (1) he was not the real party in interest, (2) he is not a citizen as defined by the Clean Water Act, (3) Maleau's mining waste piles are not point sources, (4) Ditch C-1 is not a navigable waterway, and (5) that he is liable even though the pollutants were initially placed in the water by Maleau. R. at. 1–2. Maleau appeals with respect to the district court's holding that Reedy Creek is a water of the United States. R. at 2. Finally, Progress appeals with respect to the district court's holding that Ditch C-1 is not a navigable waterway. R. at 2. This Court granted review on September 14, 2013. R. at 3.

STATEMENT OF THE FACTS

Bonhomme's Lodge and Lands

Jacques Bonhomme is a French national and the president of the corporation Precious Metals International, Inc. ("PMI"), which is incorporated in Delaware and is principally located in New York City. R. at 6; 8. Bonhomme owns and maintains land as well as a hunting lodge in the State of Progress that fronts Wildman Marsh, an extensive wetlands, much of which is contained within the Wildman National Wildlife Refuge and maintained by the United States Fish and Wildlife Service. R. at 5–6. The Marsh adds over $25 million to the local economy from duck hunting, as the Marsh draws hunters from around the world. R. at 6. Bonhomme often brings his friends and business

acquaintances to the lodge for duck hunting activities. R. at 6. In addition to the marsh, there is a ditch, Ditch C-1, which runs through Bonhomme's property before flowing into a larger body of water, Reedy Creek, which is adjacent to Bonhomme's property. R. at 5.

Maleau's Mining Operations and Discharge of Arsenic

Shifty Maleau operates a gold mine and extraction operation next to the Buena Vista River in Lincoln County, Progress. R. at 5. This operation produces "overburden and slag," which Maleau then trucks to his property in Jefferson County and deposits the overburden and slag next to Ditch C-1, creating mining piles. R. at 5. Over time, small channels have eroded connecting the piles to Ditch C-1. R. at 5. Whenever it rains, arsenic from the piles is leached into the water, and flows through the channels into Ditch C-1. R. at 5.

The Contamination of Bonhomme's Property

The land where Maleau deposits his overburden lies upstream of Bonhomme's land in Jefferson County, Progress. R. at. 5. After the arsenic is leached from Maleau's mining piles, it travels down Ditch C-1 and eventually travels through Bonhomme's property. R. at 5. Bonhomme has tested the waters of Ditch C-1 both upstream and downstream of Maleau's property, as well as the waters of Reedy Creek both upstream and downstream of the outflow of Ditch C-1. R. at 6.

The tests showed that arsenic was not present in Ditch C-1 upstream of Maleau's property, nor in Reedy Creek upstream of the outflow from Ditch C-1. R. at 6. Trace amounts of arsenic have also been found in the Marsh itself, and at least three Blue-winged Teal have been contaminated as well. R. at 6. The tests provide strong evidence that the arsenic was deposited into the water from Maleau's mining waste piles, a

conclusion further supported by the fact that arsenic is associated with gold mining. R. at 6. As a result of these tests, Bonhomme has been forced to reduce the number of hunting parties he brings each year from eight down to two. R. at 6.

The Waters

Ditch C-1 was constructed in 1913 as a drainage ditch to drain saturated soils sufficiently for agricultural use. R. at 5. The owners of the land at the time of construction, including predecessors in interest to both Bonhomme and Maleau, placed restrictive covenants in the deeds of each of the properties requiring them to maintain Ditch C-1. R. at 5. Ditch C-1 is primarily fed by the saturated ground, but rainfall also contributes to the volume of flow. R. at 5. It is 3 feet wide by 1 foot deep and contains running water at all times except during annual periods of drought, which may last only a few weeks to three months each year. R. at 5. It begins before Maleau's property, flows through several other properties, gathering more groundwater as it flows, before reaching Bonhomme's property, where it then flows directly into Reedy Creek through a culvert under his farm road. R. at 5.

Reedy Creek begins in the State of New Union and runs for about 50 miles through Progress before ending in Wildman Marsh. R. at 5. Millions of migratory fowl use the extensive wetlands biannually, supporting the multi-million dollar hunting industry. R. at 5. Reedy Creek maintains water flow throughout the year, and acts as a water supply for Bounty Plaza, a service stop on Interstate 250 located in New Union. R. at 5. Farmers in both New Union and Progress rely on the water that flows through Reedy Creek for the irrigation of crops, which are then sold in interstate commerce. R. at 5.

STANDARD OF REVIEW

This case turns on the interpretation of several statutes by the district court. Issues of statutory interpretation are questions of law which this court reviews *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991). Under *de novo* review, no deference should be given to the decisions of the district court. *Rabkin v. Oregon Health Scis. Univ.*, 350 F.3d 967, 971 (9th Cir. 2003).

SUMMARY OF THE ARGUMENT

This Court should reverse the district court's dismissal of Bonhomme's case, and find in his favor on all counts. In addition, this Court should dismiss the suit brought by Progress and Maleau against Bonhomme.

Bonhomme is a real party in interest under Federal Rules of Civil Procedure 17(a) because he is the person entitled to enforce the CWA. First, Bonhomme is a citizen as defined by the CWA because he is "any person." The argument by the district court that this definition does not deprive citizen of meaning is without merit. Unlike the definition of "navigable waters," the intent of the citizen suit provision is to allow the broadest swath of people to act as a private attorney generals to protect the shared interest every man has in the environment. Second, Bonhomme has been forced to reduce his hunting parties each year from eight to six, and thus has an interest that "is . . . adversely affected." The "interest adversely affected" prong will be satisfied if the party can show they have suffered an injury-in-fact. The Supreme Court precedent makes it clear that so long as the party is directly suffering an invasion of a legal interest, rather than merely alleging the existence of a legal interest, that party will satisfy the injury-in-fact requirement. Finally, Bonhomme is not precluded from bringing his suit because his

action was commenced prior in time to that of Progress, and even if Progress had filed first, its action named a different defendant. Therefore, Bonhomme is a real party in interest.

Although the district court did not reach any of the substantive CWA issues on the merits, it correctly stated that Reedy Creek is a water of the U.S. Reedy Creek is an interstate water with permanent flow. It is also a tributary to an intrastate wetland, Wildman Marsh, the degradation of which could affect interstate or foreign commerce. Reedy Creek and Wildman Marsh attract interstate and international duck hunters creating a market worth over $25 million dollars annually. Additionally the wetlands are partially contained within the Wildman National Wildlife Refuge, which is a federally owned and maintained area. Reedy Creek is also the water source for a business servicing interstate customers, and for agricultural irrigation that produces crops sold in interstate commerce. Because degradation of Reedy Creek and Wildman Marsh could affect interstate commerce, they are waters of the United States.

The district court erroneously and prematurely determined that Ditch C-1 is not a water of the U.S. without applying either of the possible *Rapanos* tests. The *Rapanos* decision and the EPA regulations incorporating it set out a very specific test for the determination of CWA jurisdiction. The district court could have applied either or both of the tests outlined in *Rapanos* and satisfied the EPA's regulations, but it failed to consider either. Ditch C-1 is a direct tributary to Reedy Creek, a water of the U.S. It is therefore also a jurisdictional water so long as it has a relatively permanent flow and a continuous surface connection. Ditch C-1 continuously flows directly in to Reedy Creek except in times of drought; it is a water of the United States. Although the EPA

regulations do not require a significant nexus analysis, where a tributary is found to meet the relatively permanent flow test, Ditch C-1 also meets that standard. Ditch C-1 is a permanent channel with bed and banks, that drains saturated soil over several miles, eventually flowing directly into Reedy Creek, a navigable water. The record shows that pollutants in Ditch C-1 are also conveyed in significant quantities from Ditch C-1 into Reedy Creek. The significant nexus test focuses on the goals and purposes of the CWA, which would be rendered futile if direct tributaries with a substantial effect on covered waters are excluded from CWA jurisdiction. Because Ditch C-1 could have a substantial effect on the water quality in Reedy Creek it is a water of the U.S.

The district court also erroneously stated that it would find Maleau's waste piles were not point sources. EPA regulations state that surface runoff that is collected or channeled by man is a point source. 40 C.F.R. § 122.2. Case law also supports that although rainwater runoff is generally a nonpoint source form of pollution, not covered by the CWA, it becomes a point source if it flows through channels or ditches. Waste piles that erode forming channels or gullies are point sources, even if they are created by gravity rather than man. The deciding factor is not the nature of the pollutant, or whether the channels or gullies are man-made, but whether they are discernible confined discrete conveyances as defined by the CWA and EPA regulations. Maleau's waste piles formed channels. The arsenic discharges from those identifiable conveyances into a water of the U.S. rendering the piles themselves and the channels formed among them point sources.

Bonhomme is not in violation of the CWA for the arsenic that flowed into Reedy Creek that Maleau discharged into Ditch C-1. In 2008, the EPA promulgated a regulation adopting the "unitary water" theory in regards to the CWA. This regulation excluded

"activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use" from the definition of a discharge of a pollutant under the CWA. This regulation was reviewed by the 11th Circuit in *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.* That court concluded that the regulation was permissible as it was a reasonable interpretation of ambiguous language within the statute. As a result, the transfer of water from Ditch C-1 to Reedy Creek does not qualify as a discharge of a pollutant and Bonhomme is not in violation of the CWA.

ARGUMENT

I. JACQUES BONHOMME IS A REAL PARTY IN INTEREST AND THEREFORE CAN MAINTAIN HIS SUIT UNDER RULE 17(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE BECAUSE HE IS A CITIZEN AS DEFINED BY THE CLEAN WATER ACT WITH AN INTEREST THAT IS ADVERSELY AFFECTED AND THEREFORE IS THE PERSON ENTITLED TO ENFORCE THE RIGHTS PROVIDED BY THE CLEAN WATER ACT.

An action will be maintained where the real party in interest brings that action. Fed. R. Civ. P. 17(a). So long as a person is entitled to enforce the right provided by the governing substantive law — in this case, the Clean Water Act — they will be the real party in interest. *Proctor v. Gissendaner*, 579 F.2d 876, 880 (5th Cir. 1978); *see also* C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1543, at 334 (2d ed. 1990). As a result, there may be more than one real party in interest, as "it is not necessary that there always be only one real party in interest." *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Mgmt., Inc.*, 620 F.2d 1, 4 (1st Cir. 1980).

The Clean Water Acts provides in part that "any citizen may commence a civil action on his own behalf" and defines citizen as "a person or persons having an interest

which is or may be adversely affected." 33 U.S.C. § 1365(a), (g). This action will proceed unless proper notice is lacking or a civil or criminal action has already been commenced by the State or Administrator. 33 U.S.C. § 1365(a), (b). Accordingly, because Bonhomme is a 'citizen' as defined by the Clean Water Act, and because he the State has not already commenced an action to require compliance, Bonhomme is entitled to bring a citizen suit under Clean Water Act § 505, and is therefore a real party in interest. It is immaterial whether PMI also qualifies as a real party in interest.

A. Bonhomme is a "citizen" as defined by the Clean Water Act because the Act purposefully does not limit citizen suits to United States citizens, but rather allows any person to protect the collective interest in the environment.

When engaging in statutory interpretation, the text itself is the starting point of the analysis. *Desert Place, Inc. v. Costa*, 539 U.S. 90, 98 (2003). The Clean Water Act states in part that "any citizen may commence a civil action on his own behalf" and defines citizen as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a), (g). Thus, the statute can properly be read as allowing "any person or persons having an interest which is or may be adversely affected" to commence an action. This conclusion is supported by this Court's precedence.

In *Bennett v. Spear*, the Supreme Court addressed the broad nature of "citizen suits" found in many statutes. *Bennett v. Spear*, 520 U.S. 154, 164–65 (1997). Using the Clean Water Act as an example, the Court read the statute as "[any person] having an interest which is or may be adversely affected." *Id*. at 165 (citing 33 U.S.C. § 1365(g)). *Bennett* clearly shows the Court's interpretation of the Clean Water Act's citizen suit provision extends to "any person."

The Court's continued discussion lends further credence to this conclusion. The Court noted that there are "two interrelated considerations" that persuaded it to read the citizen suit provisions in this broad manner. *Id*. First, the Court noted that the environment is "a matter in which it is common to think all persons have an interest." *Id*. Thus, the citizen-suits provisions of environmental law are written in such a way to allow all persons to protect that interest. Second, the purpose of the provision "is to encourage enforcement by so-called 'private attorney generals.'" *Id*. The Court supported this contention by relying on the fact that citizen-suits abolish "the usual amount-in-controversy and diversity-of-citizenship requirements" and also provide for the "recovery of the costs of litigation" and it also reserves "a right of first refusal to pursue the action initially" to the Government. *Id*.

While these considerations lent some credence to the Court's expansive reading, the strongest argument came from its decision in *Trafficante v. Metropolitan Life Ins. Co.* *Id*. (stating that the expanded view of "any person" comes *a fortiori* [argument from a yet stronger reason] from *Trafficante*). *Trafficante* centered on the citizen suit provision of the Civil Rights Act of 1968, which read "'any person who claims to have been injured by a discriminatory housing practice' [could] sue for violations." *Id*. at 166; *see generally* 42 U.S.C. § 3610(a). The Court held that this provision granted standing to the full extent provided for by Article III of the U.S. Constitution. *Bennett*, at 165. Indeed, the citizen-suit language at issue in *Bennett* was even clearer than that in *Trafficante*, essentially mandating the expansive reading of "any person." *Id*. at 166.

Furthermore, the argument of the district court is misplaced. The court argued that the term "citizen" is not deprived of its meaning solely by defining it as "any

person." R. at 8. The support for this argument came from the Supreme Court's decision in *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("SWANCC"). R. at 8. In that case, the definition of "navigable waters" was at issue. R. at 8. The Court held that although "navigable waters" is defined as "waters of the United States," the modifier "navigable" was not deprived of meaning. R. at 8. This argument lacks merit.

The purpose of the modifier "navigable" serves a completely separate and distinct function from the purpose of the definition of "citizen" as "any person." The definition of navigable waters as waters of the United States determines federal regulatory jurisdiction over water bodies. *See SWANCC*, at 167 (2001); *see also Rapanos v. U.S.*, 547 U.S. 715, 732 (2006). Thus the term navigable serves as a jurisdictional limit. *Id.* Contrast that with the legislative purpose of the broad definition of "citizen." As previously discussed, the purpose of the citizen suit provision in the Clean Water Act is to facilitate the protection of the environment, an interest shared by all people alike. Defining "citizen" as "any person" facilitates this interest by allowing "everyman" to enforce the Act. *See Bennett*, 520 U.S. at 166.

B. <u>As the owner of the lodge adjacent to Wildman Marsh, Bonhomme has a clear interest that was adversely affected by the discharge of arsenic into Ditch C-1 as it forced Bonhomme to reduce the number of hunting parties he has on his land each year.</u>

The question of whether or not an interest "is or may be adversely affected" is inherently limited by the Article III standing requirement — derived from the "case" or "controversy" requirement — that there be an injury-in-fact. U.S. CONST. art. III, § 2; *Pub. Interest Research Grp. v. Magnesium Elektron*, 123 F.3d 111, 122 (3d Cir. 1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)). In other words, the

"adversely affected" requirement of the Clean Water Act will be satisfied so long as Bonhomme suffers a concrete and particularized invasion of a legally protected interest that is actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 563 (1992). In cases involving environmental harms, the injury-in-fact requirement will be met where the plaintiff uses "the area affected by the challenged activity." *Id*. at 565–66 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 887–89 (1990)).

The Supreme Court's case law clearly supports the conclusion that Bonhomme has suffered an injury-in-fact. There is one commonality between the cases in which injury-in-fact is lacking: the plaintiff is not among the injured parties. In *Lujan v. Defenders of Wildlife*, the injury alleged by the plaintiffs was the threat to endangered species. *Id*. at 564. However, the plaintiffs failed to allege, "how damage to the species would produce 'imminent' injury" to themselves. *Id*. While the Court did recognize a cognizable interest in observing and using the endangered animal species, absent a showing that the plaintiff's interest in using the endangered species was affected, no injury-in-fact existed. *Id*. at 562–63.

Similarly, in *Lujan v. National Wildlife Federation*, the alleged injury was to the recreational and aesthetic enjoyment of federal lands due "to the staking of mining claims and oil and gas leasing". *Lujan v.Nat'l Wildlife Fed'n*, 497 U.S. 871, 886–87 (1990). Again, the Court recognized a legally protected interest in recreational and aesthetic enjoyment of the lands, but found no injury-in-fact because the plaintiffs had failed to show that their enjoyment was injured because they were not viewing the allegedly affected federal lands. *Id*.

Lastly, in *Sierra Club v. Morton*, the alleged harm was the aesthetic and ecological changes resulting from the building of a road through federal lands. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Again, the Court recognized a legally cognizable interest in the maintenance of environmental well-being. *Id*. But, the alleged injury was not one which would "fall indiscriminately upon every citizen." *Id*. Rather, only those who use the federal lands for their "aesthetic and recreational values" will be injured. *Id*. The plaintiff's had failed to allege that any of their members were among those who would be affected by the development of the road and, as a result, no injury-in-fact existed. *Id*.

These cases are in stark contradistinction to the Supreme Court's decision in *Bennett v. Spear*. The alleged injury in *Bennett* was that the plaintiffs were receiving less water as a result of restrictions imposed on lake levels by the federal government. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The government argued that plaintiffs had failed to show an injury-in-fact because plaintiffs demonstrated only a decrease in the aggregate amount of water available to the public, but not a decrease in the water they received. *Id*. The Court rejected that argument, stating in part "given petitioners' allegation in the complaint that the amount of available water will be reduced and that they will be adversely affected thereby, it is easy to presume specific facts under which petitioners will be injured." *Id*. at 168. As a result, the plaintiffs had successfully established an injury-in-fact. *Id*.

The present case is in line with *Bennett*. First, Bonhomme has a statutorily created legally cognizable interest deriving from the citizen suit provision of the Clean Water Act. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–78 (noting that while

citizen-suits create a legal right, they don't abolish the Article III standing requirement). Absent this statutory right, Bonhomme would still have a legal interest in the recreational use of his land. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886–87 (1972). According to the precedent of the Supreme Court, Bonhomme has successfully alleged an injury to his legally protected interest. Bonhomme has reduced the number of hunting parties he brings to his lodge every year from eight down to two, fearing that the arsenic has fouled up the waters used by the hunting parties. R. at 6. If Maleau continues to discharge arsenic into Ditch C-1, the water quality of Reedy Creek and Wildman Marsh will continue to deteriorate, causing further harm to Bonhomme and his hunting parties. Maleau contends this is a result of a decline in the economy, rather than the arsenic in the waters. R. at 6. However, on a motion to dismiss, the court must "presume that general allegations embrace those specific facts that are necessary to support that claim." *Bennett*, 520 U.S. at 168. As a result, the court must presume that the injury is a result of the arsenic, not economic downturn, and the injury-in-fact requirement is sufficiently plead.

C. Bonhomme is not precluded from bringing a suit under § 505(b)(1)(B) because the government's action for compliance commenced after Bonhomme's and because the target of the government action differed from that of Bonhomme's action.

A person will be precluded from commencing a citizen suit only "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(B). This provision serves to protect the defendant assuring she will "not be subjected simultaneously to multiple suits, and potentially to conflicting court orders, to enforce the same statutory standards." *Conn. Fund for the Env't v. Contract Plating Co.*,

631 F. Supp. 1291, 1293 (D. Conn. 1986) (citing *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985)). Accordingly, a two-prong test must be satisfied in order for a defendant to avoid defending a citizen suit. First, a suit by the State or Administrator must be pending against the defendant at the time the citizen suit is commenced. *Id.* Secondly, and only if the first prong is met, the State must be "diligently prosecuting" the pending action. *Id.*

Bonhomme is clearly not precluded from bringing his citizen suit by § 1365(b)(1)(B). First, Bonhomme's citizen suit was commenced prior in time to the State action by the State of Progress. R. 5. Even if the State of Progress had commenced their action before Bonhomme, Bonhomme would still not be precluded because Bonhomme's action was against a different defendant. R. 4–5. Therefore, because the first prong of the test was answered in the negative, whether the State of Progress was "diligently prosecuting" their action need not be reached.

II. REEDY CREEK IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER CWA § 502 (7), (12) BECAUSE IT IS AN INTERSTATE WATER.

Reedy Creek is an interstate river that flows into a federal wetland partially within the borders of a national wildlife refuge. R. at 5. It supports an interstate hunting industry that adds over $25 million annually to the economy. R. at 5. Additionally the degradation of Reedy Creek could affect interstate or foreign commerce, because it provides a source of water for irrigators in New Union and Progress who sell their crops in interstate commerce, as well as for a business that services traffic on an interstate highway. R. at 5. CWA Section 101 explicitly lays out Congress' objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33

U.S.C. § 1251(a). To achieve the nation's goal Congress mandated the cessation of all unpermitted pollution by 1985. 33 U.S.C. § 1251(a)(1). The National Pollution Discharge Elimination System (NPDES) under Section 402 prohibits any activity involving (1) the discharge (2) of any pollutant (3) by any point source (4) into navigable waters, without a permit. 33 U.S.C. § 1311. The EPA and Army Corps are tasked with generating regulations to achieve Congress' mandate, and enforcing CWA permitting provisions, to the broadest extent constitutionally permissible. "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz,* 415 U.S. 199, 231 (1974).

Section 502(7) of the regulations defines the jurisdictional limits on enforcement of the CWA by defining navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7); *see also,* 40 C.F.R. § 122.2. The origin of federal jurisdiction to regulate waters is most frequently traced to the Commerce Clause, which gives Congress the power to "regulate commerce . . . among the several states." U.S. CONST. art. I § 8, cl. 3. The definition of navigability has broadened over time. *PPL Montana, LLC v. Montana,* 132 S.Ct. 1215, 1228 (2012) (explaining that a water's "navigability in fact" is considered in cases assessing federal jurisdiction and regulatory authority over waters, but that the test for navigability is applied differently for example in Federal Power Act cases than it is in Clean Water Act cases). The EPA defines "waters of the United States" to include in part: waters which are navigable in fact; all interstate waters, including interstate wetlands; intrastate waters, "the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce

including . . .[waters which are or could be used for interstate or foreign travelers for recreational or other purposes; [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce . . . [or are or could be used for] industrial purposes by industries in interstate commerce;" and their tributaries. 40 C.F.R. § 122.2.

Reedy Creek is a water of the U.S. because it is an interstate water, beginning in New Union and flowing into the State of Progress where it ends in Wildman Marsh. R. at 5. Reedy Creek could also qualify for federal jurisdiction as a tributary of Wildman Marsh, an intrastate wetland. Such wetlands are included in federal CWA jurisdiction if their degradation or destruction could affect interstate or foreign commerce. 40 C.F.R. § 122.2. Reedy Creek and Wildman Marsh attract interstate and international duck hunters adding over $25 million to the economy each year. The stability of this interstate market could be threatened by concern over the presence of arsenic in Blue-winged Teal in Wildman Marsh. If arsenic levels continue to rise, and affect the ecology, or hydrology of Wildman Marsh, this multi-million dollar market could be lost, along with any benefits to interstate or foreign commerce.

Reedy Creek is a navigable water or water of the U.S. as defined by the EPA regulations, because it is an interstate water. *Georgia v. City of East Ridge, Tenn*, 949 F. Supp. 1571, 78 (N.D. Ga. 1996) (finding an unnamed tributary to an interstate creek was a water of the U.S. as a tributary to jurisdictional waters). Because tributaries of waters of the U.S. are included in CWA jurisdiction; Reedy Creek is alternatively a water of the U.S. as a tributary of Wildman Marsh, an interstate wetland, the degradation of which could affect the interstate duck hunting industry in Progress. 40 C.F.R. § 122.2.

III. DITCH C-1 IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER CWA § 502 (7), (12) BECAUSE IT MEETS BOTH THE PLURALITY'S AND JUSTICE KENNEDY'S TESTS ENUMERATED IN *RAPANOS*.

In *Rapanos v. United States*, the Supreme Court of the United States considered the breadth of federal agency jurisdiction over waters of the United States under the CWA, specifically regarding wetlands adjacent to traditionally navigable waters. 547 U.S. 715 (2006). The Court's split decision has added confusion to an already complex area of law, because there was a four justice plurality written by Justice Scalia, a four justice dissent written by Justice Stevens, and Justice Kennedy's concurrence, each suggesting a different test for determining whether a specific water body is a water of the U.S.

The plurality determined that the federal regulatory agencies had defined "waters of the U.S." too broadly in their attempt to fulfill the lofty environmental goals Congress set at the CWA's inception. *Id.* at 724, 732. While it reemphasized that "navigable" is not devoid of meaning, it maintained that it is broader than traditionally "navigable-in-fact" waters. *Id.* at731 (citing *SWANCC*, 531 U.S. at 172) (finding that an entirely intrastate abandoned sand and gravel pit that happened to evolve into ponds with no hydrological connection to any interstate waters could not fall within the definition of navigable waters, because it would render the navigability requirement meaningless). The plurality's test limits federal CWA jurisdiction to the more commonly understood meaning of "waters" as "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows," or "relatively permanent bodies of water." *Id.* at 733, 34. The plurality requires at least, "the ordinary presence of water." *Id.*

Although the plurality suggested that man-made drainage ditches, would "by and large" not constitute waters of the U.S. because 'ditch' is contained in the non-exhaustive list of point sources, and it "would make little sense" for the definitions of 'point source' and 'waters of the U.S.' to overlap, it did not foreclose that possibility. *Id.* at 735-36. In fact, in a footnote, Justice Scalia states that it would be possible for a ditch to be a water of the U.S. if it had a relatively permanent flow, rather than just an occasional, intermittent, or ephemeral flow. *Id.* at 736 n.7. The plurality focuses on the physical characteristics of each water body, rather than creating rigid categorical exclusions from the definition. *Rapanos*, 547 U.S. 736 n.7 (2006).

Justice Kennedy's concurring opinion endorsed the Court's test from *SWANCC*, requiring a "significant" nexus to traditionally navigable waters. *Id.* at 759. It also recognized that "navigable waters" is defined by the governing federal regulatory agencies as "waters of the United States, including the territorial seas" and that that definition includes something more than a water's "susceptibility to use in interstate commerce." *Id.* at 760. It recognized that the Army Corps considers a tributary a jurisdictional water so long as it has an ordinary high water mark, but *Rapanos* dealt mainly with wetlands not focusing on tributaries. *Id.* at 761.

The circuit courts are split about which *Rapanos* test governs. Although some circuits have finessed their way out of determining which test applies, or have not yet had a case on the issue, they are in the minority. *See*, *U.S. v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008) (declining to adopt a test because the evidence presented at trial supported jurisdiction under either test); *U.S. v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (declining to decide which test controls because jurisdiction was proper under either the

test). This court should follow the majority of circuits, which have adopted Justice Stevens' suggestion that meeting either test is sufficient for CWA jurisdiction, because all four of the dissenting Justices would have allowed a much broader jurisdictional test. *See*, *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006); *U.S. v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (following the 1st Circuit); *U.S. v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (agreeing with the 1st Circuit). The regulating agencies have also adopted Justice Stevens' suggestion that satisfying either test meets the jurisdictional requirement. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabel v. United States, (Dec. 2, 2008), http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_12_3_wetlands_CWA_Jurisdiction_Following_Rapanos120208.pdf (hereinafter *Agency Guidelines*). Federal regulating agencies, in this case the EPA and Army Corps, are responsible for elucidating specific provisions of the CWA. Once the agencies have done so, courts cannot simply substitute their own interpretation of the statue for that of the agency's so long as it is reasonable. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The guidelines represent the EPA's interpretation of its own regulation, which are entitled to this court's deference. *Decker v. Nw.Envtl. Defense Ctr.*, 133 S.Ct. 1326, 1337 (2013) (explaining that "[w]hen an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation) (internal quotation marks omitted). This Court should adopt this teset outlined in the *Agency Guidelines*, as other circuits have done. *See, e.g.*, *Precon Dev. Corp., v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 283 (4th Cir. 2011).

The minority of circuits base their adoption of one test or the other based on the narrowest-grounds-rule from *Marks v. U.S.*, 430 U.S. 188, 193 (1977). This test is ill-adapted to the *Rapanos* decision, because either test could be narrower under different circumstances. *See, e.g., Johnson*, at 64 (explaining that the cases in which Justice Kennedy would not find jurisdiction are not a subset of the cases where the plurality would not find it). The narrowest-grounds-rule applies "when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* (internal quotations omitted). *See, U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (finding Justice Kennedy's test the narrowest on which five or more Justices would agree); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (adopting the 7th Circuit's decision that Justice Kennedy's test controls); *U.S. v. Robinson*, 505 F.3d 1208, 1222 (11th Cir. 2007) (adopting Justice Kennedy's test finding it narrower than the plurality's test). Even if this court adopts this approach and determines that either Justice Kennedy or the plurality's test governs, Ditch C-1 is still a jurisdictional water under either test.

A. Ditch C-1 is a water of the United States under the plurality's test in *Rapanos*, because it maintains a relatively permanent flow and has a continuous surface connection to a navigable water.

The plurality's test requires "relatively permanent, standing or continuously flowing bodies of water" with a "continuous surface connection" to a water of the U.S." *Rapanos*, at 739, 742. The agency joint guidelines further define "relatively permanent non-navigable tributaries of traditional navigable waters" as tributaries that "typically

flow year-round or have continuous flow at least seasonally," at least three months of the year. *Agency Guidelines,* at 6. Ditch C-1 is fed primarily from groundwater, as the ground around the ditch is normally saturated. R. at 5. Rainwater runoff also feeds the flow in the ditch. R. at 5. Although Ditch C-1's flow is sometimes interrupted by periods of seasonal drought, this dry period lasts at the most a few weeks to three months. R. at 5.

An exception to the typical continuous flow requirement is drought. *Id.* at 7, n. 25. Justice Scalia in the plurality stated that the "relatively permanent" test was not meant to exclude waters that dry up during drought, or even seasonal rivers that "contain continuous flow during some months of the year but no flow during dry months." *Rapanos,* at 732, n. 5. However, streams whose only source of flow is precipitation do not automatically fall within CWA jurisdiction. *Id.* When a water is found to be a relatively permanent non-navigable tributary of a traditional navigable water, there is no need to perform the significant nexus analysis. *Id.* Because Ditch C-1 meets the relatively permanent flow requirement it is a water of the U.S.

The first part of the plurality's test examines factors suggesting a relatively continuous flow. Some factors considered by circuit courts are: the presence of ponding in adjacent wetlands suggesting soil saturation, buttressing of tree trunks, which can occur in saturated soils to stabilize trees, and the formation of hummocks, which are small rises in topography formed often by flowing water. *U.S. v. Donovan,* 661 F.3d 174, 185 (3d Cir. 2011). Although the trial court did not address the merits of whether Ditch C-1 was a water of the U.S. and the factual record was not developed through discovery or trial testimony, the factual record adopted by the court itself provides enough

information to meet the plurality's test. The record states that Ditch C-1 is surrounded by saturated soils, and is in fact primarily fed by draining saturated groundwater. R. at 5.

The types of plants present, whether they are the types that thrive in saturated soil conditions, and the presence of morphologic conditions such as whether the water has an ordinary watermark, a bed, or bank, and whether there is flowing water in the channel are also factors. *Donovan*, at 185. Although the record is devoid of information about buttress roots or the type of vegetation present on those plots where the land is not used for agricultural purposes, it is clear that Ditch C-1 is a permanent channel dug into the ground, and is in fact required to be maintained by the landowners through which it flows in perpetuity. R. at 5. There is a continuous flow in Ditch C-1 that continues to drain more water from the saturated soils as it approaches Reedy Creek. R. at 5. Although the ditch does dry during seasonal droughts for as long as a few weeks to several months, the plurality and the EPA guidelines accept this as a normal condition of some permanent streams. R. at 5; *Rapanos*, at 732; *Agency Guidelines*, at 6–7.

Downstream characteristics are also relevant. Permanence can be shown through the presence of infrastructure, built to accommodate the transfer of water, for example the presence of culverts, which "reflect a perennial flow" from the channel into other waters. *Id.* Ditch C-l flows through a culvert directly into Reedy Creek, a water of the U.S., indicating both its permanence, and the final requirement of the plurality's test: a continuous surface connection. R. at 5. The deciding factor in this analysis is whether Ditch C-1 has a relatively permanent flow, or an ephemeral, intermittent flow. According to the agency guidelines and case law, it is clear that Ditch C-1's flow is well within the definition of relatively permanent flow, making it a jurisdictional water under the CWA.

B. Ditch C-1 is a water of the United States under Justice Kennedy's concurring opinion in *Rapanos*, because it possesses a "significant nexus" to a traditionally navigable water.

The significant nexus test has not yet been applied to a tributary by the United States Supreme Court. Some lower courts have suggested that there is a question about whether the significant nexus test is even applicable to jurisdiction over tributaries. *U.S. v. Vierstra*, 803 F. Supp. 2d 1166, 1171 (D. Idaho) (citing *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1215 n.2 (D. Or. 2009) (stating that significant nexus test applies only to wetlands)). If this court finds it necessary to apply the significant nexus test out of caution, or for purposes of being thorough, Ditch C-1 is still a jurisdictional water of the U.S.

The Eleventh Circuit noted that the test has been applied more frequently to determine jurisdiction over wetlands, but applied the test, which requires a water to significantly affect "the chemical, physical, and biological integrity of other covered waters more readily understood as navigable," in the context of a tributary anyway. *U.S. v. Robinson*, 505 F.3d 1208, 1218 (11th Cir. 2007). The court in *Robinson* noted that although a "mere hydrologic connection" is not enough, the true focus of the test is on the CWA's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* (remanding the case to the district court because it did not apply the correct test, and noting that the record was devoid of any evidence showing a pipe manufacturer's discharges into a creek, which flowed through four other water bodies before it reached, and could have had any "possible chemical, physical, or biological effect" on a navigable water. *Id.* at 1223) *But see*, *Envtl. Protection Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 823 (N.D. Cal. 2007) (finding at summary judgment,

that relying on maps and observations to show a hydrologic connection between ephemeral streams *was* sufficient, but would require evidence of a significant effect on water quality in navigable waters at trial) (emphasis added).

The *Agency Guidelines*, although they do not require a significant nexus finding for waters that meet the plurality's test, provide some guidance about what factors would be considered. *Agency Guidelines,* at 8. The guidelines focus on the interrelated nature of waters; based on a much more scientific inquiry into the hydrological and biological characteristics of the waters, and whether they are connected. Relevant hydrological factors include: the tributary's volume, duration, frequency of flow, specifically at the point at which the water flows into the navigable water or higher order tributary, its proximity to the traditionally navigable water, and whether it has a direct impact on the navigable water. *Id.* at 10. (suggesting gauge data, flood predictions, historic records of water flows, statistical data, personal observations or records as relevant evidence).

The trial court's factual record in this case is devoid of much scientific evidence, because it dismissed the case on procedural grounds before reaching the merits of the substantive CWA issues. R. at 10. However, the court accepted that Ditch C-1 has at least some flow, because it "contains running water" except during periods of drought. R. at 5. Based on the record little is known about Ditch C-1's flow volume, or proximity to Reedy Creek, but the flow into Reedy Creek is direct, not indirect through another tributary or groundwater seepage. R. at 5.

There is evidence in the record that pollutants in the ditch do enter Reedy Creek, and that those same pollutants have been found in animal life in Wildman Marsh. R. at.6. This is relevant because ecological factors including the potential of Ditch C-1 to carry

pollutants to Reedy Creek, or to provide aquatic habitat for species which also live in Reedy Creek are factors. *Agency Guidelines*, at 11. The record also establishes that Ditch C-1's channel has a bed and banks. R. at 5. "Out of an abundance of caution," one federal district court applied the significant nexus test to a tributary canal after it found the water met the plurality's test. *Vierstra*, 803 F. Supp. 2d at 1172. That court found a significant nexus existed where a canal had a seasonal connection for six to eight months of the year via another stream to a navigable water. *Id.* In that case, the court found this surface connection, along with the government's expected evidence regarding volume and flow, and water samples showing shared pollutants between the waters, met the significant nexus requirement. *Id.* The court pointed out that the tributary's contributions of total suspended solids and coliform bacteria could also impact a section of the tributary that was already not in compliance with total maximum daily load requirements, demonstrating the importance of extending CWA jurisdiction to tributaries with a significant nexus to otherwise covered waters. *Id.*

After the physical characteristics of Ditch C-1 are determined, the second step is to evaluate whether it has an effect that is more than speculative or insubstantial on Reedy Creek. *Agency Guidelines*, at 11. Ditch C-1 is a permanent channel with bed and banks, that drains saturated soil over several miles, flowing directly into Reedy Creek, a traditionally navigable water. R. at 5. If these hydrological characteristics alone are not enough to establish a significant nexus, the record provides evidence that pollutants in Ditch C-1 flow directly into Reedy Creek. R. at 6. This shows that Ditch C-1 may have a significant effect on the water quality of Reedy Creek, and the plants and animals that live there. Because the purpose of the significant nexus test mirrors that of the CWA

itself, it is clear that Ditch C-1 must be included under CWA jurisdiction. If direct tributaries of traditionally navigable waters are not included, the regulating agencies will be unable to effectively regulate navigable waters, and meet the goals of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to protect Reedy Creek from degrading pollutants that threaten its hydrologic and ecologic characteristics, Ditch C-1 must also be protected, because evidence in the record shows there is a significant nexus between Ditch C-1, which draws its flow from the saturated soils adjacent to Reedy Creek, and the creek itself.

IV. MALEAU'S MINING WASTE PILES ARE "POINT SOURCES" UNDER CWA § 502 (12), (14) BECAUSE THEY ARE THE SOURCE OF NATURALLY ERODED CHANNELS WHICH DISCHARGE ARSENIC INTO WATERS OF THE U.S.

Section 502(14) of the CWA defines "point source" as "any discernible, confined and discrete conveyance . . ." 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. The EPA regulations include additions of pollutants from "surface runoff which is collected or channeled by man." 40 C.F.R. § 122.2. Maleau's mining operation is located next to an established traditionally navigable water, the Buena Vista River. R. at 5. Instead of allowing his mining overburden and slag waste to sit near the Buena Vista River, where it would indisputably require a permit, Maleau trucks it to Jefferson county, where he piles it adjacent to Ditch C-1. R. at 5. Rainwater has formed eroded channels which convey arsenic from the piles into the ditch. R. at 5. This collection and channeling of polluted storm water is point source pollution under the CWA.

As explained above, Ditch C-1 is a water of the U.S., because it has a relatively permanent flow with a direct surface connection to a navigable water, and it has a significant nexus to Reedy Creek. Point sources are present "where miners design spoil

piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches . . . even if the miners have done nothing beyond the mere collection of rock and other materials." *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (holding that surface runoff from rainfall, "when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution." *Id.* at 74.). The Fifth Circuit explained that the deciding factor is not whether gravity caused the channeling, but whether "discernible, confined, and discrete conveyance(s)" discharged pollutants, whether they are man-made or caused by rain and gravity. *Id*. It emphasized that the CWA does not exempt miners from liability if they do not construct the channels themselves, so long as they were "reasonably likely" to form and convey pollutants into a navigable body of water. *Id*. In this case, Maleau purposefully piled his waste right next to a ditch with a relatively permanent flow. The ditch flows directly in to a navigable water, and mining piles are known to be "highly erodible" by rainwater. *Id*. at 43. Maleau is liable for his piles, which are point sources.

The CWA does not cover nonpoint source pollution because it is "virtually impossible to isolate to one polluter." *U.S. v. Earth Scis., Inc.*, 599 F.2d 368, 371 (10th Cir. 1979) (identifying oil and gas runoff caused by rainfall on highways as an example). In this case there is substantial evidence that shows Maleau is the only polluter responsible for the arsenic in Reedy Creek and Wildman Marsh. R. at 6. The CWA's legislative history suggests that the definition of point source was developed to include the widest possible definition, and that nonpoint source pollution was only excluded because of the impossible task of regulating it via a permitting program. *Id.* at 373. The

court in *Earth Sciences* found that it would contravene the intent of the CWA to exempt any activity from regulation if it "emits a pollutant from an identifiable point." *Id.* In this case, there was no arsenic detected above Maleau's property, but below his property it is present in "high concentrations." R. at 6. The arsenic in Ditch C-1 comes from Maleau's piles, an identifiable point from which pollution enters CWA jurisdictional waters. R. at 5.

Several courts have found that mining waste piles can be the source for point source pollution, when miners do not take adequate measures to prevent pollutants from escaping into navigable waters. *Earth Sciences* involved an closed system operation designed for extracting gold from ore. 599 F.2d at 370. The process involved placing ore on a plastic membrane, and then spraying it with a highly toxic mix of sodium cyanide-sodium hydroxide solution. *Id.* That material was funneled downhill to a pool, where it was pumped to a processing trailer, and then back into the system. *Id.* The system was unfortunately imperfect; snow melt and rainfall caused the pool to fill and overflow multiple times, even after notice was given to the company. *Id.* On closer inspection it was discovered that the pool was also leaking, allowing the berm to seep polluted groundwater which flowed to a nearby creek. *Id.* at 371. Because the system was permitted and designed to be a closed circulating system, the court found that any escaped pollutant, whether it was from overflow caused by abnormal rains or snowmelt, or seeping groundwater escaping the dirt berm, was in violation of the permit. *Id.* at 374. Any additional discharge was a separate addition, and required a permit. *Id.* at 374. Likewise, Maleau cannot escape the required permit application for pollutants escaping his waste piles, just because he moved them away from one navigable water to another.

His piles are discharging arsenic through discernible, confined, discrete channels, formed by rainwater runoff, that convey those pollutants into jurisdictional waters. R. at 5, 6.

Several other courts have also concluded that although rainwater runoff does not always originate from a point source, it does where the "storm water collects in piles of industrial debris and eventually enters navigable waters." *Parker v. Scrap Metal Processors,* 386 F. 3d 993, 1009 (11th Cir. 2004) (finding piles of debris point sources, where rainwater collected on them and then ran into navigable waters); *See also*, *Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, 940 F. Supp. 2d 1005, 1024 (D. Alaska 2013) (explaining that piles could be point source dischargers where pollutants travel from the pile through naturally occurring ditches or erosion gullies).

Recent cases confirm the breadth of the point source definition, specifically in the context of channels forming around mining waste piles, or where the piles themselves qualify as point sources. *See, e.g.*, *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 165–66 (4th Cir. 2010) (emphasizing the breadth of the statutory language of the CWA itself, the agency regulations interpreting it, including surface runoff collected by man); *Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 510, n.4 (9th Cir. 2013) (distinguishing utility poles from cases where mining piles were held to be point sources, because poles are not like natural gullies or channels formed by rainwater runoff); *S. Appalachian Mtn. Stewards v. Penn Va. Op. Co.*, No. 2:12CV00020, 2013 WL 57648, at *1, *1 (W.D. Va. Jan. 3, 2013) (stating that coal mining waste stored in 'gob piles' become point sources when they are located next to a stream, releasing pollutants into the stream). Maleau's piles are adjacent to the ditch in this case, making them point sources themselves when arsenic leaches from the piles into Ditch C-1.

Additionally any collection or channeling of polluted rainwater that enters Ditch C-1 through natural gullies or channels, is also a point source, because it is a discernible, confined, discrete conveyance as that definition has been interpreted by the EPA and case law.

V. BONHOMME IS NOT IN VIOLATION OF THE CWA, BECAUSE THE ARSENIC WAS ADDED TO DITCH C-1 BY MALEAU AND BECAUSE BONHOMME'S CULVERT MERELY TRANSFERS WATER FROM ONE WATER OF THE U.S. TO ANOTHER AND THUS THE FLOW OF ARSENIC FROM DITCH C-1 INTO REEDY CREEK IS NOT A DISCHARGE OF A POLLUTANT PROHIBITED BY THE CWA.

Unless a pollutant is added to navigable water from a point source, there is no CWA violation. 33 U.S.C. § 1362. While it is true that a point source does not necessarily have to generate the pollutant, the point source cannot simultaneously be a water of the U.S. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); *Rapanos v. United States*, 547 U.S. 715, 7353 (2006). As discussed above, Ditch C-1 is a water of the U.S., and this status does not change merely because the water flows into a culvert. Thus the culvert cannot be a point source as it is already a water of the U.S. Further, the culvert is not subject to regulation under NPDES under the "unitary waters" theory, as it merely serves to transfer water between two waters of the U.S. "without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219, 1228 (11th Cir. 2009).

Prior to 2008, the "unitary waters" theory was not well received. The Supreme Court discussed this theory with some skepticism in *South Florida Water Management District v. Miccosukee Tribe of Indians*, but chose not to rule on its merit. 541 U.S. 95, 106–07 (2004). The Court noted that the CWA did not "explicitly exempt nonpoint

pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *Id.* Further, the Court viewed the Act as protecting not just "'waters of the United States' as a whole," but also individual waters. *Id.* The Court also noted that the EPA practice at the time was to require regulation of irrigation ditches which discharged into navigable water even if the ditch was a navigable water. *Id.* at 107. Lastly, the Court noted that while many states were concerned that this sort of extensive regulation would greatly increase costs, many states viewed this regulation as necessary to protect water quality. *Id.* at 108. In addition, the "unitary waters" theory had been rejected by every court of appeals that considered it. *Friends of the Everglades*, 570 F.3d at 1217. However, following these decisions, the EPA promulgated a rule adopting the "unitary waters" theory as the proper construction of the CWA. *Id.* at 1218–19.

On June 13, 2008, an EPA regulation was finalized, reading "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use," is not subject to NPDES regulation. 40 C.F.R. 122.3(i). The first case to discuss the "unitary waters" theory following this regulation was *Friends of the Everglades v. South Florida Management District* by the Eleventh Circuit. 570 F.3d at 1218. As long as that regulation is a reasonable interpretation of an ambiguous statute, the regulation will be entitled to deference. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984)).

The court first rejects the argument that the language "addition . . . to navigable waters" is not ambiguous. *Id.* at 1219. As none of the case law provided by the parties aided the court, it started with statutory construction. *Id.* at 1222–23. Under these

principles, if a clear Congressional intent existed on the specific question before the court, the statute will not be ambiguous. *Id*. at 1223. After utilizing several tools of statutory construction including the text itself, the context of the text, and the context of the statute as a whole, the Court concluded that the language remained ambiguous. *Id*. at 1223–27.

Having reached the conclusion that the statutory language was in fact ambiguous, the court's final issue was whether the regulation promulgated by the EPA is a permissible construction of the statutory language. *Id*. at 1227 (citing *Chevron*, 467 U.S. at 843). The Court noted that there were two possibly reasonable interpretations of "any addition of any pollutant to navigable waters from any point source." *Id*. First, that the language means any addition of a pollutant to *any* navigable waters and second, the language means any addition to navigable waters *as a whole*. *Id*. Thus, because the EPA regulation was one of the two reasonable interpretations of the statutory language, it was not "arbitrary, capricious, or manifestly contrary to statute," and thus was a permissible construction of the CWA. *Id*. at 1227–28.

As a result of *Friends of the Everglades*, the transfer of water from Ditch C-1 into Reedy Creek is not a "discharge of a pollutant" as defined by the CWA. *See id*. Therefore, because Maleau was the but-for cause of the arsenic ending up in Reedy Creek, and because Bonhomme did not discharge a pollutant when the water transferred from Ditch C-1 to Reedy Creek, Bonhomme is not in violation of the CWA.

CONCLUSION

This Court should hold that Jacques Bonhomme is the real party in interest as required by the Federal Rules of Civil Procedure 17(a) because he is a person entitled to

enforce the citizen suit provision of the CWA. While the lower district court was correct in determining that Reedy Creek was a "navigable water," it incorrectly concluded that Ditch C-1 was not a "navigable water" and that Maleau's overburden and slag piles were not point sources. Further, the court incorrectly determined that Bonhomme is in violation of the CWA because the transfer of water from Ditch C-1 to Reedy Creek is not a discharge of a pollutant as defined by the CWA because it is exempted by the EPA water transfer regulation. For these reasons, Jacques Bonhomme respectfully requests that this Court reverse the decision of the district court granting Maleau's motion to dismiss. This Court should further grant Bonhomme's motion to dismiss.

Respectfully submitted,

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Counsel for Jacques Bonhomme