Team No. 29

C.A. No. 13-01234

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

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

BRIEF OF JACQUES BONHOMME
Plaintiff-Appellant, Cross-Appellee

Oral Argument Requested

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Jacques Bonhomme seeks review of the final decision of the United States District Court for the District of Progress issued on July 23, 2012.

Federal district courts have original jurisdiction over civil actions arising under the laws of the United States, including the Administrative Procedure Act, 5 U.S.C. § 702 (2006) and Clean Water Act Section 502(7), (12), 33 U.S.C. § 1362(7), (12), (14) (2008). The Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from final decisions of the District Court of Progress. 28 U.S.C. § 1291, 1294(1) (2006).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

I. Whether the district court erred in determining Bonhomme is not a real party in interest under FRCP 17, despite Bonhomme having suffered concrete personal injuries that are directly traceable to the discharge of arsenic by Maleau.

II. Whether the district court erred in finding that Bonhomme is not entitled to file suit as a "citizen" under CWA Section 505, 33 U.S.C. § 1365, when the statute defines "citizen" as any person.

III. Whether the district court erred in holding that Maleau's mining waste piles are not "point sources" under CWA Section 502, 33 U.S.C. § 1362, despite the waste piles being a discernible, confined, and discrete conveyance mechanism.

IV. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA Section 502, 33 U.S.C. § 1362, as a relatively permanent flowing body of water that meets the significant nexus test.

V. Whether the district court was correct in holding that Reedy Creek is a "navigable water/water of the United States" under CWA 502, 33 U.S.C. § 1362, as it is used in interstate commerce.

VI. Whether the district court erred in holding that Bonhomme and not Maleau violates the CWA.

STATEMENT OF THE CASE

Defendant, Bonhomme, owns property that contains Ditch C-1, which carries water over his property before passing through a culvert and entering Reedy Creek. (R. at 5). Ditch C-1 is a drainage ditch used for the purpose of draining saturated soils for agricultural use and is located entirely within the State of Progress. *Id*. Before reaching Bonhomme's property, Ditch C-1 travels through property owned by Maleau. *Id*. In the first action, Bonhomme filed suit against Maleau alleging Maleau violates CWA § 301(a), 33 U.S.C. §1311(a) through the discharge of arsenic into Reedy Creek. *Id*. Subsequently, plaintiff, the State of Progress, filed suit arguing that Bonhomme violates CWA § 301(a), 33 U.S.C. §1311(a) through the discharge of arsenic into Reedy Creek. *Id*. On the second suit, Maleau has intervened and the first action was consolidated into the second action. *Id*.

The District Court granted Intervener Maleau and Plaintiff Progress' motion to dismiss. (R. at 10). The District Court held that Bonhomme lacked standing to file suit under the CWA, that mining waste piles are point sources under the CWA, that Ditch C-1 is a navigable water under the CWA, that Reedy Creek is a water of the United States, and that Bonhomme and not Maleau violated the CWA. (R. at 2-3, 10).

Bonhomme now appeals the District Court's decision on all grounds except for the finding that Reedy Creek is a water of the United States. (R. at 10). Maleau appeals the District Court's decision finding that Reedy Creek is a water of the United States. (R. at 2). The State of Progress also appeals the lower court's decision that Ditch C-1 is not a water of the United States. *Id*.

STATEMENT OF FACTS

The dispute in this case centers on the discharge of arsenic into Ditch C-1 and Reedy Creek. (R. at 5). Shifty Maleau (hereinafter Maleau) conducts a gold mining operation in the State of Progress adjacent to the navigable Buena Vista River. (R. at 1, 5). Maleau trucks overburden and waste from the mining operations in Lincoln County, Progress to his property in Jefferson County, Progress. (R. at 5). The mining waste is stored in piles adjacent to Ditch C-1. (R. at 5). When it rains, precipitation runoff flows down the piles and percolates through them, collecting and carrying arsenic from the piles into the water of the adjacent Ditch C-1. (R. at 5).

Ditch C-1 is a drainage ditch constructed 1913 by an association of landowners, which includes the predecessors in interest of the current property owners, for the purpose of draining saturated soils for agricultural use. (R. at 5). Restrictive covenants in the deeds of the properties situated along Ditch C-1 require the property owners to maintain the Ditch. (R. at 5). Ditch C-1 contains semi permanent running water except during periods of drought that last from several weeks to a few months. (R. at 5). After flowing down the waste piles and collecting arsenic, the contaminated water flows for three miles through the Ditch, before it discharges into Reedy Creek via a culvert located on property owned by Jacques Bonhomme (hereinafter Bonhomme). (R. at 5).

Reedy Creek is a fifty-mile long waterway that has not, nor is it capable of being used for waterborne transportation. (R. at 9). Reedy Creek is however used as a water supply for travelers on I-250 and as such, is necessary for interstate commerce. (R. at 9). Also, in both the State of New Union and the State of Progress, farmers use water from Reedy Creek to irrigate land used for agriculture. (R. at 5). Water from Reedy Creek flows downstream from the State of New Union through the State of Progress, and ends in Wildman Marsh. (R. at 5). Wildman

Marsh is a large wetlands that comprises part of the Wildman National Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service. (R. at 6). The wetlands are also an essential stopover for ducks and other waterfowl during their biannual migrations. (R. at 5-6). As a result of the waterfowl activity, the wetlands attract a significant number of hunters each year that add over $25 million to the local economy. (R. at 6).

Bonhomme tested the water in Ditch C-1 both downstream and upstream of Maleau's property and both downstream and upstream of the discharge point of Ditch C-1. (R. at 6). Arsenic was undetectable in Ditch C-1 upstream of Maleau's property. (R. at 6). Just downstream of Maleau's property, arsenic is present in Ditch C-1 in high concentrations. (R. at 6). As Ditch C-1 downstream from Maleau's property towards Reedy Creek, the arsenic concentration level decreases in proportion to the increasing water flow of the Ditch. (R. at 6). In Reedy Creek, above the outflow from Ditch C-1, arsenic is undetectable. (R. at 6). However, just below the outflow from Ditch C-1 into reedy Creek, arsenic is present in the creek in high concentrations. (R. at 6). There are also detectable levels of arsenic throughout Wildman Marsh. (R. at 6). Arsenic is commonly found in areas of gold mining and extraction and is known to be a poison. (R. at 6).

As a result of the arsenic contamination, Bonhomme is afraid to continue to use the marsh for hunting purposes. (R. at 6). Since the contamination, he has decreased the number of hunting trips he takes from eight a year to two a year. (R. at 6). Also during this time, the overall economy has declined, as have the profits of Bonhomme's company Precious Metals International (hereinafter PMI). (R. at 6).

STANDARD OF REVIEW

This case comes before this Court on appeal from the District Court's grant of summary judgment. A motion for summary judgment is appropriate when "there is no genuine dispute as to any material fact and… the moving party is entitled to judgment as a matter of law." Red. R. Civ. P. 56(c). This court reviews questions of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Thus, this courts jurisdiction to decide Appellants' claims must be reviewed *de novo*.

SUMMARY OF THE ARGUMENT

The District Court improperly granted summary judgment for Maleau on the issues of Bonhomme's standing as a real party in interest, Bonhomme's standing as a "citizen" under the Clean Water Act, Maleau's mining waste piles being classified as point sources under the CWA, whether Ditch C-1is a navigable water of the United States, and Bonhomme's violation of the CWA, as well as properly granted summary judgment on the issue of whether Reedy Creek is a navigable water of the United States.

The lower court incorrectly applied Federal Rules of Civil Procedure 17(a) which requires that a plaintiff be a real party in interest based on the Supreme Court's holding of who qualifies as a party in interest in *U.S. ex rel. Eisenstein v. City of New York, New York*. 556 U.S. 928, 934 (2009). Bonhomme has standing to challenge Maleau's release of toxins into Ditch C-1 because he holds legal title to the property and a recognized interest in the wetlands.

The District Court misinterpreted the Clean Water Act's citizen suit provision which defines a citizen as "a person" without qualification. 33 U.S.C. § 1365(a). Bonhomme has standing to challenge Maleau, despite his status as a foreign national, because Congress made no

attempt to restrict the meaning of "a person" and the Supreme Court has ruled that the term must be interpreted literally. *Bennett v. Spear*, 520 U.S. 154 (1997).

Again, the District Court incorrectly ruled that Maleau's dirt piles were not point sources within the definition provided by the CWA. 33 U.S.C.A. § 1362(14). However, there remains a factual question as to whether the piles constitute a point source where Courts have held that dirt piles can be considered point sources. *Sierra Club v. Abston Const. Co., Inc,* 620 F.2d 41 (5th Cir. 1980).

The lower court also erred in granting summary judgment on the issue of whether Ditch C-1 is a navigable water of the United States. As a relatively permanent body of water that has a significant nexus with a body of water that is navigable in fact, Ditch C-1 meets the test for a navigable water under both the plurality's holding and that of the persuasive concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006).

The District Court properly determined that Reedy Creek is a navigable water of the United States. This is due to the fact that Reedy Creek is an interstate waterbody that meets two prongs of the *Lopez* test, in that it is an instrumentality of, and has a significant effect on, interstate commerce. As such, it falls within the purview of the Commerce Clause and may be regulated under the CWA. *U.S. v. Lopez*, 514 U.S. 549 (1995).

Lastly, the District Court incorrectly held that Bonhomme violated the CWA because his property abuts the land where Ditch C-1 flows into Reedy Creek. As no party has suggested that Bonhomme introduced arsenic into Ditch C-1 and because even were the Plaintiff-Appellant to fill in the ditch, arsenic would still likely find its way into the creek. As such, public policy would be offended if this ruling is affirmed.

ARGUMENT

I. BONHOMME IS A REAL PARTY IN INTEREST BECAUSE HE HAS SIGNIFICANT INTERESTS AT STAKE.

Bonhomme is a real party in interest as required by FRCP 17(a). To have standing to sue, the petitioner must demonstrate that he or she has:

> (1)…suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citation omitted). FRCP also states that any "party authorized by statute" has the capacity to "sue in their own names without joining the person for whose benefit the action is brought." FRCP 17(a)(1)(G). Bonhomme meets these requirements and is therefore a real party in interest as required by FRCP 17(a).

Who is a "real party in interest" for purposes of FRCP 17 is a term of art. *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 934 (2009). A real party in interest is "an actor with a substantive right" which may be enforced. *Id*. *See also United HealthCare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3d 563, 569 (8th Cir. 1996) ("[FRCP 17] requires that the party who brings an action actually possess, under the substantive law, the right sought to be enforced."). Black's Law Dictionary defines a real party in interest as "[a] person entitled under the substantive law to enforce the right sued upon and who generally...benefits from the action's final outcome"). *Black's Law Dictionary* 1154 (8th ed.2004). A real party in interest "is the party who, by the substantive law, possesses the right to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *Best v. Kelly*, 39 F.3d 328, 329 (D.C. Cir. 1994) (citing Charles A. Wright, Law of Federal Courts 490 (1994)). As the title holder of a

property affected by Maleau's activities, and as a user of the wetlands, Bonhomme is a real party in interest as contemplated by FRCP 17.

The real party in interest is the holder of "legal title to property." 25 Fed. Proc., L. Ed. § 59:57 (citing *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 268 (C.C.A. 2d Cir. 1944); *Levitt & Sons, Inc. v. Swirnow*, 58 F.R.D. 524 (D. Md. 1973)). *See also* 59 Am. Jur. 2d Parties § 40 ("Generally, the holder of legal title to the subject matter of a cause of action is a real party in interest.") (*Citing Citibank (South Dakota), N.A. v. Carroll*, 148 Idaho 254, 220 P.3d 1073 (2009)). Said title holders are real parties in interest for the purposes of bringing suit to halt or prevent harm to their property. *Id*. These parties can maintain claims "without joining others who may have equitable interests in the affected property." *Id*. Because Bonhomme is the title holder of the property fronting the wetlands, he is a real party in interest and can maintain a suit to prevent harm to his property, and the use and enjoyment thereof.

In addition to being a real party in interest by virtue of his ownership of the parcel, Bonhomme also has a recognized interest in preserving the wetlands because of his use and enjoyment of the area. American jurisprudence has long recognized that merely "the desire to use or observe an animal species, even for purely aesthetic purposes, is undeniably a cognizable interest for purpose of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) (*citing Sierra Club v. Morton,* 405 U.S. 727, 734, 92 S.Ct. 1361, 1366 (1972)). *See also Friends of the Earth, supra*, 528 U.S. 167 at 183 (noting that the Supreme Court has "held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.").

Bonhomme's property fronts the wetlands and Maleau's activities affect his parcel. (R. at 6). As the legal title holder, the law is clear that Bonhomme is a real party in interest. He is also a party in interest because his use of the land has been affected. Although Bonhomme's trips are *primarily* hunting trips with PMI business associates and business clients, it is also indicated in the record that Bonhomme used the hunting lodge, and the wetlands area more generally, for social trips and to hunt with acquaintances. (R. at 6). Under these facts, Bonhomme has clearly evidenced "the desire to use or observe" the animals, and to use the wetlands itself. *Lujan, supra*, 504 U.S. 555, 562-63. His use of the wetlands has also declined significantly due to arsenic buildup in the Wetlands. (R. at 6). Whereas he previously made eight hunting trips per year, Bonhomme is now only making two trips per year. (R. at 6). Bonhomme is afraid to continue his hunting parties because of the environmental impact on the area caused by Maleau's activity.

Despite the fact that PMI has paid for the sample and analyses to support Bonhomme's contention that the arsenic in Reedy Creek and in the Marsh comes from Maleau's activities, and the fact that PMI pays attorney and expert witness fees for Bonhomme in this case, does not give PMI status as the real party in interest. (R. at 7). Third party payment of legal fees is completely permissible in litigation insofar as the party is made aware and consents to the payment, and the third party payment does not interfere "with the lawyer's independence of professional judgment or with the client-lawyer relationship." MRPC 1.8(f). Similarly, courts have held that even paying for the costs of *litigation* – not necessarily legal fees – does not automatically make the payer the party in interest. *Armour Pharm. Co. v. Home Ins. Co.*, 60 F.R.D. 592, 593 (N.D. Ill. 1973). In *Armour Pharmaceuticals*, a third party insurance company agreed to pay the plaintiff's attorney fees, litigation costs, and even suggested the counsel who was ultimately retained by the plaintiff to litigate the matter. *Id*. at 593-93. Despite these facts, the court held that the plaintiff

was the real party in interest and was not merely a nominal plaintiff as the defendant had asserted. *Id*. at 594. Further, the fact that PMI stands to benefit from the litigation does not render them the real party in interest. *Id*. ("[M]erely because one may benefit by the result in litigation does not make him 'a real party in interest.'") (citing *Lindemann v. American Ins. Co.*, 217 Mich. 698, 87 N.W. 331 (1922)).

Defendant alleges that Bonhomme is a "bought" plaintiff, and that PMI cannot maintain this suit by "purchasing" Bonhomme. (R. at 8). Accordingly, Maleau argues that Bonhomme is not the real party in interest. *Id*. This is not the case. The real party in interest is the party who possesses a substantive right sought to be enforced; not the party who will ultimately benefit from the litigation. *Best v. Kelly*, 39 F.3d 328, 329. Bonhomme possesses a substantive right which he can enforce in this matter as a landowner of property adjacent to the wetlands. He also possesses an enforceable substantive right as a party who has even the desire to use the wetlands to hunt wildlife, or even for wholly esthetic uses. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The fact that Bonhomme possesses these substantive rights is undeniable. Athough PMI stands to benefit from the litigation, this fact alone does not make it the real party in interest. *Armour Pharm. Co. v. Home Ins. Co.*, 60 F.R.D. 592, 593 (N.D. Ill. 1973). Nor does the fact that PMI is paying for the costs of litigation and attorney's fees make it the real party in interest. *Id*. Bonhomme possesses independent substantive rights, distinguishable from any rights PMI may have, which he is seeking to enforce in this action. This makes him the real party in interest for purposes of FRCP 17(a).

Bonhomme also is a real party in interest because he is a party who is authorized by statute to maintain a suit as contemplated within Rule 17. FRCP 17(a)(1)(G). Under the Clean Water Act, (pursuant to 33 U.S.C. § 1365(a)), "any citizen may commence a civil action on his

own behalf" under the statute. A "citizen" is defined as being "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). A "person" is further defined as meaning an individual. 33 U.S.C. § 1362(5). Bonhomme is a party authorized by statute to maintain a suit pursuant to the CWA, and is therefore the real party in interest under the federal rule. As such, Bonhomme is authorized to sue pursuant to the statute as a real party in interest pursuant to FRCP 17(a)(1)(G).

II. THE CLEAN WATER ACT'S CLEAR AND UNAMBIGUOUS LANGUAGE GIVES BONHOMME STANDING TO COMMENCE A CIVIL ACTION ON HIS OWN BEHALF.

A. The Terms of the Clean Water Act Citizens' Suit Provision are Clear and Unambiguous; Therefore the Statute Must be Enforced as Written.

Pursuant to 33 U.S.C. § 1365(a), "any citizen may commence a civil action on his own behalf." The statute defines a "citizen" as being "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). A "person" is further defined as meaning an individual. 33 U.S.C. § 1362(5). It is a well-established rule of statutory construction that where "the terms of a statute [are] unambiguous, judicial inquiry is complete." *Rubin v. U. S.*, 449 U.S. 424, 430 (1981). Where a congressional statute is clearly defined, the court "shall not read in additional conditions." *Devine v. United States*, 202 F.3d 547, 552 (2d Cir. 2000) (citing *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994)).

In this case, Congress has defined a "citizen" as a person (33 U.S.C. § 1365(g)), which is further defined as an individual (33 U.S.C. § 1362(5)). There is no requirement in the statute that requires the individual to be a citizen of the United States. Any ambiguity, which may have arisen from the use of the word "citizen" within the statute, is clearly resolved upon reading the definitions therein. The Defendant-Appellant in this matter would have the court read in an

additional condition, which is not present in the statute but this is not permitted. *Devine, supra*, 202 F.3d 547, 552.

While Bohnomme is not a citizen of the United States, he does own property within its borders which has been adversely affected by Maleau's activities. (R. at 5). It has not been contested that the Plaintiff-Appellant has a concrete and particularized injury that is fairly traceable to the Defendant-Appellant's actions, or that this injury could be redressed by a favorable decision of the Court. *Laidlaw*, 528 U.S. 167, 180-81. Furthermore, Bonhomme meets the definition of a citizen for purposes of the CWA. 33 U.S.C. § 1365(g). Accordingly, Bonhomme does have prudential standing to maintain this claim.

B. The Word "Person" Must be Taken at Face Value and Read Broadly in the Context of the Statute, Warranting a Literal Interpretation.

A citizen is defined as a "person" in the statute (33 U.S.C. § 1365(g)), and the word person must be interpreted literally in the context of environmental legislation. *See Bennett v. Spear*, 520 U.S. 154 (1997). In *Bennett,* the issue presented was whether the plaintiffs had standing to sue pursuant to the citizens' suit provision of the Endangered Species Act (hereinafter ESA) of 1973. 520 U.S. 154 at 161. The *Bennett* Court held that under the language of the statute authorizing "any person" to maintain a claim, the plaintiff would have prudential standing to maintain a citizen suit. *Id*. at 166.

In its analysis of the citizens' suit provision of the ESA, the court held that the term "any person" as used in the statute should "be taken at face value." *Id*. at 165. The court gave great weight to the nature of the statute – environmental protection legislation, and the fact that the purpose of the statute was to encourage private persons to enforce the regulatory scheme:

> Our readiness to take the term "any person" at face value is greatly augmented by two interrelated considerations: that ***the overall subject matter of this legislation is the environment (a matter in which it is common to think all persons have an interest)*** and

> that the obvious purpose of the particular provision in question is to encourage enforcement by so-called "private attorneys general"—***evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees)…*** *Id*. at 165 (emphasis added).

The CWA is virtually identical to the ESA. Several courts have explicitly recognized this. (*See Our Children's Earth Found. v. EPA,* 527 F.3d 842, 847 (9th Cir.2008) (explicitly pointing out that the EPA citizen-suit provision is "parallel" to the CWA citizen-suit provision); *Cross Timbers Concerned Citizens v. Saginaw,* 991 F.Supp. 563, 567 (N.D.Tex.1997) (holding that "the *Bennett* decision is equally applicable to the nearly identical 'citizen suit' jurisdictional provision of the CWA."); *Stewart v. Potts,* 983 F.Supp. 678 (S.D.Tex.1997) (applying the Bennett decision to a controversy arising under the CWA).

Thus, *Bennett* is controlling precedent in this case. Like the ESA, the CWA is a statute whose overall subject matter is the environment – a matter in which all persons have an interest. Further, the CWA also contains a provision which allows the plaintiff to recover the costs of litigation, including expert witness fees under 33 U.S.C. § 1365(d) much like the ESA. Under *Bennett*, the word "person," as used to define a citizen under § 1365(a), must be interpreted at face value. *Id*. at 165. Accordingly, the court may not read in a requirement that the plaintiff be an American citizen, where Supreme Court precedent demonstrates that in context of this type of statute, the term any person should be interpreted literally at face value.

Therefore, the District Court erred in ruling that Bonhomme is not a citizen for purposes of the CWA. (R. at 8). By stating that the CWA "does not expressly authorize foreign nationals to commence citizen suits," the lower court defies Supreme Court controlling precedent in

Bennett.[1] (R. at 8). As a person with an interest which has been adversely affected, Bonhomme is entitled by statute to challenge Maleau as a citizen attorney general. 33 U.S.C. § 1365.

III. MALEAU'S WASTE PILES FALL WITHIN THE DEFINITION OF POINT SOURCE UNDER THE CLEAN WATER ACT § 502(12), (14), 33 U.S.C. § 1362(12), (14).

A. The District Court Abused its Discretion in Granting Maleau and Progress' Motion to Dismiss as there is a Genuine Dispute of a Material Fact as to Whether Maleau's Waste Piles Constitute a Point Source under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

In *Anderson v. Liberty Lobby, Inc.*, the Supreme Court stated that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. 242, 248 (1986). To overcome a motion for summary judgment, the party opposing the motion "must set forth specific facts showing that there is a genuine issue for trial." *Id*. In the present case, there is a genuine dispute as to the material fact of whether Maleau's waste piles constitute a point source under the CWA. Specific evidence in support of the factual contention includes the statutory language, Circuit Court precedent, as well as the stated objective of the CWA.

Maleau's dirt piles constitute point sources as defined by CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14). The Supreme Court has interpreted the principal provision of the CWA to prohibit the discharge of any pollutant to navigable waters from any point source. *Rapanos v. United States*, 547 U.S. 715, 723 (2006). The relevant portion of the statute defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *Id*. at 735-36 (Citing 33 U.S.C.A. § 1362(14)). Although waste piles are not

[1] 520 U.S. 154. at 166.

explicitly stated as conveyance mechanisms under the act, the piles would nonetheless fall under the classification of a point source when considered along with the statutory language in its entirety.

Considering the natural meaning of the language comprising the statute, it is clear that Maleau's waste piles should be considered a point source. As stated previously, 33 U.S.C.A. § 1362(14) defines a point source as "any discernible, confined and discrete conveyance." Discernible is commonly defined as something that is recognized as separate and distinct, confined is commonly defined as of a space or area, and discrete is defined as constituting a separate entity.[2] Maleau's waste piles are separate and distinct entities that are limited to a specific area. (R. at 5). As such, the waste piles would fall within the "any discernible, confined and discrete" statutory requirement. 33 U.S.C.A. § 1362(14). Furthermore, 33 U.S.C.A. § 1362(14) goes on to define point source as a "conveyance from which pollutants are or may be discharged." It is undisputed fact that rainwater flows down and through the piles picking up and carrying the pollutant arsenic into the water of the Ditch C-1. (R. at 5). As a result of this action, the waste piles would undoubtedly be the "conveyance from which the pollutants are… discharged." 33 U.S.C. § 1362(14).

As stated by the Supreme Court, "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme." *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1223-24 (11th Cir. 2009) (Citing *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000). Looking at just the unmodified term point source, it is possible to conclude like the District Court did, that "point source" includes only the explicitly stated conveyance mechanisms of the act. However, Congress included in the

[2] Merriam Webster Dictionary, available at: http://www.merriam-webster.com/dictionary.

definition of "point source" the modifying terms "any," and "including but not limited to." U.S.C. § 1362(12). When the statutory language is clear, a court is "not to add nor to subtract, neither to delete nor to distort [the words] Congress has used." *Friends of Everglades*, 570 F.3d at 1225. Therefore, if Congress desired to be restrictive in its definition of point source, the modifying term any would not have been used. Additionally, including within the definition of "any point source" waste piles containing the extremely hazardous material arsenic, better meets the objective of the Clean Water Act. The stated objective of the Clean Water Act being "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a).

Therefore, considering the statutory language of the CWA, "a reasonable jury could return a verdict" finding that Maleau's waste piles constitute a point source under the CWA. *Liberty Lobby, Inc.*, 477 U.S. at 248. As such, the district court abused its discretion in granting Maleau and Progress' motion for summary judgment as there is a genuine dispute of a material fact as to whether Maleau's waste piles constitute a point source under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

B. Circuit Court Precedent as well as the Stated Objective of the CWA, Support Finding that Maleau's Waste Piles Constitute a Point Source.

In *Sierra Club v. Abston Const. Co., Inc.*, the Fifth Circuit held that "[a] point source of pollution may be present where …spoil piles from discarded overburden [are collected] such that, during periods of precipitation, erosion of spoil pile walls results in discharges into navigable water by means of ditches, gullies and similar conveyances, even if the [polluters] have done nothing beyond the mere collection of rock and other materials." 620 F.2d 41, 45 (5th Cir. 1980). Applying this holding to the present case, it is clear that Maleau's waste piles fall within the 5th Circuits definition of point source. Maleau's mining activities in Lincoln County

result in the accumulation of overburden waste rock and dirt. (R. at 5). The waste is then transported from Lincoln County to property in Jefferson County, where the waste is placed into piles adjacent to Ditch-C-1. *Id*. In the same manner as *Abston Const. Co., Inc.*, during periods of precipitation, runoff flows down the piles and percolates through them resulting in the discharge of arsenic into the water in the ditch. *Id*. Under the 5th Circuit's definition of point source, Maleau's waste piles would be considered a point source simply by their collection. However, Maleau not only collected the rock and materials, he placed the waste into piles which by the piles configuration, resulted in the discharge of arsenic into the water in the Ditch. *Id*. Therefore, Maleau's piling of waste would exceed the definition of point source in *Abston Const. Co., Inc.*, and thus amount to a point source under the CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

Maleau references *Consolidated Coal Co. v. Costle*, and *Appalachian Power Co. v. Train* in support of his contention that waste piles are not point sources under the Clean Water Act. 604 F.2d 239, 249 (4th Cir. 1979); 545 F.2d 1351 (4th Cir. 1976); *see also* (R. at 9). However, the Fourth Circuit's decision in *Consolidated Coal Co.* was reversed by the Supreme Court in *E.P.A. v. Nat'l Crushed Stone Ass'n*.. 449 U.S. 64 (1980). In the original *National Crushed Stone Ass', Inc.*, and *Appalachian Power Co.*, the Fourth Circuit stated that the Environmental Protection Agency's regulation placing limits on the discharge of pollutants from crushed stone and construction sand and gravel was invalid for lack of support and technical data. 604 F.2d 239, 249 (4th Cir. 1979); *see also* 601 F.2d 111, 119-22 (4th Cir. 1979). Not only was the Fourth Circuit's decision in *National Crushed Stone Ass', Inc.*, and *Consolidated Coal Co.* reversed, the holdings do little to provide a definition of point source. *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). In reference to the Fourth Circuit's holding, the Supreme Court stated that "[t]he plain language of the statute does not support the position taken by the Court of Appeals." *Id*. at

73. Instead, the Supreme Court found that Congress had the "broad goal of eliminating the discharge of pollutants into navigable waters," and that "exceptions to pollution cleanup can …mean[ ] further tragic delay in stopping the destruction of our environment." *Id*. at 69, 81. Consequently, Maleau's reliance on a reversed Circuit Court's decision that fails to properly address the definition of point source is misguided. Therefore, considering the Fifth Circuit's interpretation of point source, as well as the stated objective of the CWA, Maleau's waste piles would constitute a point source under the CWA.

IV. DITCH C-1 IS A NAVIGABLE WATER OF THE UNITED STATES BECAUSE IT IS RELATIVELY PERMANENT AND HAS A SIGNIFICANT NEXUS WITH A NAVIGABLE WATER.

As part of its mission to fulfill the obligations of the CWA, the EPA has found it necessary to define "navigable waters" as "the waters of the United States, including the territorial seas." *33 U.S.C. §1362(7)*. A divided Supreme Court has held that while the CWA gives the EPA the authority to cover more than waters that are "navigable in fact" (*The Daniel Ball*, 77 U.S. 557 (1870)), the statute does not cover all the water in the United States. *Rapanos v. United States*, 547 U.S. 715, 730-32 (2006). A plurality of the *Rapanos* Court ruled navigable waters "include only relatively permanent, standing or flowing bodies of water." *Id.* at 732. Furthermore, 33 C.F.R. §328.3(a)(1) states that waters of the United States includes "[a]ll interstate waters including interstate wetlands." *Id*.

While Supreme Court Justice Kennedy's concurrence in *Rapanos* is often held up as the deciding opinion, a plurality of that Court held that "navigable waters" must be "relatively permanent" and not "ordinarily dry channels through which water occasionally or intermittently flows." *Id.* at 732-33. The plurality rejected the argument that "navigable waters" in 33 U.S.C. §1362(7) included all the "water of the United States," but agreed that it "includes something

more than traditional navigable waters." *Id.* at 731-32. Further Courts and EPA regulations have refined the "something more" holding in *Rapanos* to include tributaries of interstate waters. *Id*.

Ditch C-1 is a navigable water of the United States as it fulfills the definition of such based on the terms of 33 U.S.C. §1362 as well as that of the plurality in *Rapanos*. The district court incorrectly states that C-1 cannot be "a navigable water because it has never floated a boat and is too small to do so in the future." (R. at 9). However, this judgment is unsupported by case law, statute or legislative intent. This Court should reverse the District Court's holding and find that Ditch C-1 is a navigable water of the United States as defined by statute and the Supreme Court in *Rapanos*.

A. Ditch C-1 Is A Navigable Water As Defined By EPA Rules And Court Precedent.

In *Rapanos*, a plurality held that the CWA Section 502(7) definition of the term "navigable waters," while not including all the water of the United States, did include "something more than traditional navigable waters." 547 U.S. at 731. The Court held that navigable waters included "relatively permanent, standing or flowing bodies of water." *Id.* at 732. The plurality decision adds to this definition to include as navigable waters "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," as well as possibly including "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at n. 5. The holding's footnotes define a stream as "[a current or course of water or other fluid, flowing on the earth, as a river, brook, etc." *Id.* at n. 6. Lastly, while the plurality held that a man made channel through which water usually flows is "ordinarily described as a 'stream,'" it does not preclude the possibility of such a body of water being called a ditch, and yet still being defined as a navigable water of the United States. *Id* at n. 7.

In a decision affirmed by the Ninth Circuit, in *United States v. Vierstra*, the District Court of Idaho used the plurality's reasoning in *Rapanos* to hold that a man made canal could meet "the definition of 'waters of the United States.'" 803 F. Supp. 2d 1166, 1171 (D. Idaho 2011) *aff'd*, 492 F. Appx 738 (9th Cir. 2012). In *Vierstra*, the Defendant argued that the Low Line Canal was not a water of the United States. *Id*. at 1167. However, the Court, citing the footnotes in *Rapanos*, agreed with the State that the canal, although man made and flowing with water only six to eight months per year, was a navigable water under the CWA if it was found to be a tributary to a navigable water. *Id* at 1170-71.

The C-1 Ditch running through the properties of both Maleau and Bonhomme flows with water throughout the year other than during times of drought which can last "from several weeks to three months." (R. at 5). Constructed in 1913, the C-1 has remained in existence for one hundred years in its current form; indeed, restrictive covenants require that the current landowners maintain the Ditch. (R. at 5). Furthermore, C-1's main source of waterflow springs from naturally occurring groundwater that drains from the saturated soil and only incidentally carries agricultural runoff and rainwater. (R. at 5). The C-1 then travels three miles before meeting up with Reedy Creek, which in turn flows into the Wildman Marsh, a federal wetland. (R. at 5-6). As such, the C-1 Ditch meets the requirements for a navigable water under both CWA Section 502 and the plurality holding in *Rapanos*. The Ditch is a permanent structure that flows with water relatively continuously, directly contributing to the flow of a river necessary for interstate commerce, before indirectly adding to the waters of a wetland with interstate commercial value. (R. at 5). While the *Rapanos* plurality does not explicitly state that a body of water titled a Ditch can be considered a navigable water, it does hedge by stating that man made

bodies of water that continuously hold water are "normally" called something else. 547 U.S. at n. 7.

Maleau argues that the C-1 cannot be considered "a navigable water because it has never floated a boat and is too small to do so in the future." (R. at 9). Yet, the Supreme Court in *Rapanos* rejected such an understanding of navigable waters, instead defining navigable waters as including tributaries of navigable waters such as Reedy Creek and Wildman Marsh. 547 U.S. at 730-31. The District Court further holds that because ditches are listed under 33 U.S.C. § 1362(14) as possible point sources, they cannot be navigable waters because "a ditch cannot be simultaneously two elements in the water pollution offense." (R. at 9). However, the District Court misstates the core of this part of the *Rapanos* holding. While the Court does find that the "definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories," it continues by stating that the term "ditch" is "ordinarily" used to describe "watercourses through which intermittent waters typically flow." *Rapanos*, 547 U.S. at 735-36. As the C-1 flows with water for nearly the entire year, it is not the intermittent water of which the *Rapanos* Court writes. (R. at 5).

B. Ditch C-1 Has A Significant Nexus with An Interstate Water.

A plurality in *Rapanos* ruled that normally a ditch cannot be a navigable water as ditches are generally non-permanent or hold flows of water only intermittently. 547 U.S. at 733-34. However, most circuits have followed the holding in Justice Kennedy's concurrence, which found that any body of water that "possess[es] a 'significant nexus' to navigable waters" is covered under the Clean Water Act. *Id.* at 759 (*J. Kennedy. Concurring*). Agreeing with the four minority Justices, Justice Kennedy invoked the objective behind the CWA "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." *Id.* The

concurrence looked to the reasoning of the Court's ruling in *United States v. Riverside Bayview Homes, Inc.*, which held that a "significant nexus between wetlands and 'navigable waters'… informed [the Court's] reading of' the CWA. 474 U.S. 121, 167 (1985).

In *U.S. v. Vierstra*, the Ninth Circuit affirmed the lower Court ruling that a man-made canal fit within the definition of a tributary to a navigable water not only under the plurality's reasoning in *Rapanos*, but under that of the concurrence as well[3] based on the canal's significant nexus with a traditionally navigable water. *Vierstra*, 474 U.S. at 739-40. The District Court held that the discharge into the canal was a violation of the CWA even during periods in which no water flowed in the canal due to its hydrological connection with a navigable water.[4] Likewise, the First Circuit found the significant nexus theory to be compelling reasoning when it held, directly after the *Rapanos* decision, that CWA jurisdiction could be decided using either the plurality's or the concurrence's reasoning.[5] Similar rulings have followed in the Third Circuit,[6] Fourth Circuit,[7] and Sixth Circuit,[8] all holding Justice Kennedy's concurrence as binding precedent.

Therefore, even if Ditch C-1 is not found to be a tributary to a navigable water based on the holding of the plurality in *Rapanos*, it still meets the significant nexus test as described in Justice Kennedy's binding concurrence. 547 U.S. at 759. The District Court has assumed as fact for summary judgment purposes, that arsenic, after being leached from Maleau's property, is deposited into Reedy Creek. (R. at 6). The lower Court has also rightly decided that Reedy

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[3] *U.S. v. Vierstra*, 803 F.Supp.2d 1166 (D. Idaho 2011).
[4] *U.S. v. Vierstra*, 803 F.Supp.2d 1166, 1172-73 (D. Idaho 2011).
[5] *U.S. v. Johnson*, 467 F.3d 56, 59-60 (1st Cir. 2006).
[6] *U.S. v. Donovan*, 661 F.3d 174, 184 (3rd Cir. 2011).
[7] *Precon Development Corp., Inc. v. U.S. Army Corp of Engineers*, 633 F.3d 278, 291 (4th Cir. 2011).
[8] *U.S. v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009).

Creek is a navigable water. (R. at 9-10). Bonhomme has provided test results showing that the level of arsenic in Ditch C-1 rises after flowing past Maleau's property and that arsenic is being carried from Ditch C-1 into Reedy Creek. (R. at 6). From Reedy Creek, the arsenic is being carried into Wildman Marsh, another navigable water under the CWA. (R. at 6). These facts present *prima facie* evidence that there exists a hydrologically significant nexus between Ditch C-1 and Reedy Creek.

V. REEDY CREEK IS A NAVIGABLE WATER OF THE UNITED STATES DUE TO ITS USE IN INTERSTATE COMMERCE.

The Supreme Court has long held that "[t]he power of Congress to regulate [navigable] waters is not expressly granted in the Constitution, but is a power incidental to the express 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;'' *Leovy v. U.S.*, 177 U.S. 621, 632 (1900).[9] More recently, as stated by the plurality in *Rapanos*, the Court has found that "the meaning of 'navigable waters' in the [Clean Water] Act is broader than the traditional understanding of that term." 547 U.S. at 731. Though traditionally the Court had taken a narrower view of what could be considered "navigable in fact,"[10] Congress and the courts have long since understood the term to encompass a broader range. *Id*. In *U.S. v. Riverside Bayview Homes, Inc.*, the Supreme Court held that in drafting the CWA Congress "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. 121, 133 (1985). As such waters with interstate

[9] Citing *Gibbons v. Ogden*, 22 U.S. 1, 60 (1824).
[10] *The Daniel Ball*, 77 U.S. 557, 563 (1871) "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

commercial implications have generally been understood to be navigable waters that can be regulated under the CWA.

A. Reedy Creek Is Navigable In Fact Because It Is Used In Interstate Commerce.

To be determined a navigable water, a body of water must have a [p]ast, present, or potential presence of interstate or foreign commerce;… [p]hysical capabilities for use by commerce;… and [d]efined geographic limits of the waterbody." 33 C.F.R. § 329.5. Furthermore, as noted in Justice Kennedy's concurrence in *Rapanos*, 33 U.S.C. § 1344(g)(1) covers navigable waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce…)." 547 U.S. at 768.

Due to the commercial implications of the term 'navigable waters,' courts have generally looked to the Commerce Clause of the Constitution which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, Sec. 8, clause 3. In *U.S. v. Lopez*, 514 U.S. 549 (1995), the Supreme Court provided a three prong test as to whether an activity can be regulated by Congress under the Commerce Clause.

> First, Congress may regulate the use of the channels of interstate commerce… [s]econd, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities… [and] [f]inally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. *Id* at 558-59.

Therefore, to be considered navigable in fact water for purposes of the CWA and the Commerce Clause, a waterbody must either act as a highway for interstate or foreign commercial transportation, be part of a chain of such highways, and/or must have a substantial effect on interstate commerce. *Id*. The Tenth Circuit preceded the *Lopez* test when it held that extending the definition of navigable waters "was within Congress'

constitutional powers under the commerce clause." *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979).

Although the District Court rightly decided that Reedy Creek is a navigable water, it did so based on an erroneous understanding of law by stating that "waters of the United States" included any body of water owned by the federal government regardless of its navigability in fact or law. (R. at 10). The lower Court also erred in dismissing Bonhomme and Progress' claim that Reedy Creek is a navigable water based on interstate commerce. (R. at 9-10). It is uncontested that Reedy Creek is an interstate body of water as the record shows it begins its fifty mile trek in the State of New Union before terminating at Wildman Marsh in the State of Progress. (R. at 5). Before entering Progress, Reedy Creek serves 'as the water supply for Bounty Plaza, a service area on [federally funded] Interstate 250." *Id*. Both in New Union and Progress, farmers who sell their products in interstate commerce divert Reedy Creek's water for commercial agricultural use. (R. at 5). While it is admitted that Reedy Creek is not traditionally navigable and does not fit within the first prong of the *Lopez* test, these interstate commercial applications fit within the third prong of the *Lopez* test as Reedy Creek is used for the irrigation of crops sold in interstate commerce. (R. at 5). If the Creek is made unfit for such use, it will have a substantial effect on that commercial activity. Reedy Creek also fits within the second prong of *Lopez* as it is a part of the chain that creates the greater interstate highway, I-250. (R. at 5). Without the clean water supplied by the Creek, the rest area in New Progress would suffer either a lack of services or be required to expend greater resources to import water from other locations. The District Court holds that *Rapanos* rejected the second and third prongs of the *Lopez* test (R. at 9-

10), yet this claim is not supported in the record and the *Rapanos* holding never mentions the *Lopez* test or even the *Lopez* case. Instead, the lower Court holds up *Earth Sciences* as being overturned by *Rapanos*, but that Court decided what constitutes a water of the United States, and explicitly demurred on the prospect of redefining the commercial implications of "navigable." *Rapanos*, 547 U.S. at 731.

B. Reedy Creek Is Navigable At Law Because It Is A Tributary of Wildman Marsh.

Reedy Creek is also navigable in law as a tributary of Wildman Marsh, a body of water with interstate commercial applications. The EPA has defined "waters of the United States" to include "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 40 C.F.R. § 122(a). Under the Supreme Court's two part test for deference, the Court asks first, "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id* at 843. The Ninth Circuit found that the EPA's definition is a permissible construction because Congress has been presented the opportunity to change the statute but has declined. *U.S. v. Phillips*, 367 F.3d 846, 855-56 (9th Cir. 2004). The Court in Phillips held "that Congress intended that the longstanding court and agency interpretation of 'navigable waters' would govern." *Id* at 856.

Wildman Marsh is a wetland that lies partially within the boundaries of the Wildman National Wildlife Refuge, "which is owned and maintained by the United States Fish and Wildlife Service." (R. at 6). Hunters from around the country, and even the world, use the Marsh for hunting, a sport that brings over $25 million annually to the area from interstate commerce.

(R. at 6). The Marsh has a significant effect on commerce in the region, much of that being both interstate and foreign. As such, Wildman Marsh fits within the third prong of the *Lopez* test due to its "substantial relation to interstate commerce." *Lopez*, 514 U.S. at 558-59. Furthermore, the detrimental effect to interstate commerce by Maleau's release of toxins into the water has already manifested itself in Bonhomme's reluctance to bring potential clients to his property for duck hunting which, in turn, has cost the local community interstate commerce in tourism. (R. at 6). The reduction in the interstate tourist economy implicates the second prong of Lopez, which protects the instrumentalities of commerce. *Id*. While it is agreed that Wildman Marsh, like Reedy Creek "has never floated a boat,"[11] long standing precedent and agency deference by the Courts resoundingly hold waters with interstate commercial application are indeed navigable waters of the United States.

VI. PUBLIC POLICY SUPPORTS FINDING THAT THE CWA PROHIBITS MALEAU'S CONDUCT AND NOT THE CONDUCT OF BONHOMME.

The CWA aims to "eliminat[e] the discharge of pollutants into navigable waters." *Nat'l Crushed Stone Ass'n*, 449 U.S. at 69. Practically speaking, in order to achieve this goal, the CWA needs to stop the pollution at its actual source. If the court were to find Bonhomme in violation of the Act, Bonhomme would be required to prevent the flow of water through the culvert located on his property. (R. at 5). However, blocking the culvert would do little to actually prevent the discharge of Arsenic into navigable waters. As it currently stands, the culvert is the easiest pass through for the contaminated water. Therefore, blocking or removing the culvert, would simply cause the contaminated water to accumulate at the blocking point, and potentially find a different path to contaminate Reedy Creek.

[11] R. at 9

A. Maleau's Deliberate Attempts to Maximize Profits while Continuing to Contaminate Navigable Water through the Discharge of Arsenic Amounts to a Violation of the CWA.

In *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York*, the Second Circuit affirmed the relevant portion of the Northern District of New York's holding that "[t]o attain the goal of deterrence [the] Clean Water Act (CWA)…must… ensure that the violator does not profit from its violation of the law." 244 F. Supp.2d 41 (N.D. N.Y. 2003), *aff'd in part*, 451 F.3d 77, (2d Cir. 2006). In the present case, Maleau is the violator profiting from his willful violation of the law. This is evidenced by Maleau's utilization of trucks to carry overburden and slag from his mining operation in Lincoln County to property located in Jefferson County, Progress. (R. at 5). Transporting the mining waste is done to avoid complying with the requirements of the CWA. This is because Maleau's property in Lincoln County lies adjacent to the traditionally navigable Buena Vista River. (R. at 5). It is undisputed that if Maleau were to leave his waste piles directly adjacent to the Buena Vista River, the resulting arsenic contamination would be a direct violation of the CWA. Such a blatant violation would require Maleau to take costly corrective action in order to prevent the arsenic contamination of the Buena Vista River. Any corrective and preventative action taken by Maleau would likely significantly cut into his mining profits. Therefore, in order to continue to profit from his violation of the CWA, Maleau transports and stores his arsenic contaminated mining waste in Jefferson County Progress. (R. at 5). There, Maleau attempts to maintain profits and avoid liability under the CWA by shifting liability to Bonhomme, an innocent property owner who is unable to prevent the pollution of Reedy Creek. Bonhomme is also limited in his ability to prevent the pollution due to restrictive covenants in Bonhomme's property deed. (R. at 5). The restrictive covenants prevent the destruction and alteration of Ditch C-1, as it is necessary for

agricultural purposes. (R. at 5). As stated by the 4th Circuit, "[w]hen the language of a deed is 'clear, unambiguous, and explicit,' a court interpreting it 'should look no further than the four corners of the instrument under review." *Double Diamond Properties, L.L.C. v. Amoco Oil Co.*. 487 F. Supp. 2d 737, 744 (E.D. Va. 2007) *aff'd sub nom, Double Diamond Properties, LLC v. BP Products N. Am., Inc.*, 277 F. App'x 312 (4th Cir. 2008). Thus, finding Bonhomme to be in violation of the CWA would not only subvert the goal of the CWA by still allowing the pollution of navigable waters, but it would also frustrate long settled property law by eliminating the adherence to restrictive covenants.

B. The Discharge from the Culvert is not the Proximate Source from which the Arsenic is Introduced into the Destination Body of Water and thus Bonhomme is not in Violation of the CWA.

In their brief, Progress and Maleau cite *Dague v. Burlington*, and *South Florida Mgmt. Dist. V. Miccosukee Tribe of Indians* in support or their contention that owners of point sources do not have to initially add pollutants to water to be liable under the CWA so long as their point sources convey pollutants to navigable waters. 935 F.2d 1343, 1354-55 (2nd Cir. 1991) *rev'd on other grounds*, 505 U.S. 55 (1992); 541 U.S. 95, 105 (2004); *see also* (R. at 9). However, the Second Circuit that decided *Dague*, also stated in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, that the term point source "refers only [to] the proximate source from which the pollutant is directly introduced to the destination water body." 273 F.3d 481, 493 (2d Cir. 2001). Additionally, in *Rapanos*, the Supreme Court stated "[t]he Act does not forbid the 'addition of any pollutant directly to navigable waters from any point source,' but rather the addition of any pollutant to navigable waters." 547 U.S. at 743. The court went on to state "the discharge into intermittent channels of any pollutant *that naturally washes*

downstream likely violates [the Act] even if the pollutants discharged … do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.*

In the present case, detectable levels of arsenic were found not only near the culvert on Bonhomme's property, but also throughout Wildman Marsh. (R. at 6). Given the ordinary meaning of proximate, there must be a very close and direct relationship between the "point source" and the pollutants introduction to the destination water body.[12] Following this definition, Bonhomme's culvert would not be the proximate source from which the pollutant is introduced to the destination water body. This is because there are detectable levels of arsenic not only near the culvert located on Bonhomme's property, but also throughout Wildman Marsh. (R. at 6). Additionally, as stated by the District Court, "it would be difficult or impossible to prevent pollution of a navigable stream without preventing pollution of its tributaries." (R. at 10). Therefore, finding against Bonhomme would fail to prevent the pollution of navigable waters, as the arsenic discharged by Maleau would continue to pollute Wildman Marsh through other tributaries, as a result of the natural flow of water downstream. (R. at 6).

CONCLUSION

For the aforementioned reasons, Appellant, Bonhomme respectfully requests that this Court should both affirm and reverse its grant of summary judgment. Because Bonnhomme has demonstrated that he is a real party in interest, the lower court misapplied FRCP 17(a). The District Court also erred by overturning Court precedent holding that any person may file a challenge under the citizen suit provision of the CWA. The lower court also misinterpreted the CWA definition of a point source when it held that mining waste piles are not point sources. Similarly, the District Court improperly held that Ditch C-1 is not a navigable water despite

[12] Merriam Webster Dictionary, available at: http://www.merriam-webster.com/dictionary/proximate.

being a relatively permanent body of water. However, the District Court properly held that Reedy Creek is a navigable water of the United States. Lastly, the District Court erred in granting summary judgment holding that Bonhomme, and not Maleau, violates the CWA by discharging a pollutant into a navigable water.