Team 3

C.A. No. 13-01234

In the United States Court of Appeals
for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

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

BRIEF FOR JACQUES BONHOMME

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JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Progress dated July 23, 2012. The district courts have jurisdiction over actions arising under federal law, 28 U.S.C. § 1331 (2006), and this case arises under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006) ("Clean Water Act"). This Court has jurisdiction to hear appeals of final judgments of the district courts under 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether Bonhomme is the real party in interest under Federal Rule of Civil Procedure 17 to bring suit against Maleau for violating section 301(a) of the Clean Water Act.

II. Whether Bonhomme, a foreign national, is a "citizen" under section 505 of the Clean Water Act who may bring suit against Maleau.

III. Whether Maleau's mining waste piles are "point sources" under section 502(12), (14) of the Clean Water Act.

IV. Whether Ditch C-1 is a "navigable water/water of the United States" under section 502(7), (12) of the Clean Water Act.

V. Whether Reedy Creek is a "navigable water/water of the United States" under section 502(7), (12) of the Clean Water Act.

VI. Whether Bonhomme violates the Clean Water Act by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

Jacques Bonhomme filed a citizen suit under section 505 of the Clean Water Act ("CWA"), seeking both civil penalties and injunctive relief. (R. 4). He alleged that Shifty Maleau is violating the CWA by discharging arsenic from his mining waste piles into Ditch C-1. (R. 5). The State of Progress ("Progress") brought a citizen suit against Bonhomme, alleging that he is violating the CWA by discharging arsenic from his culvert into Reedy Creek. *Id.* Maleau

intervened as a matter of right in Progress's action against Bonhomme. *Id.* The district court granted Progress's and Maleau's motions to consolidate their cases. *Id.*

The district court dismissed Bonhomme's suit without prejudice, (R. 10), holding that Bonhomme is not the real party in interest and is not a citizen under section 505 of the CWA. (R. 8). The court also denied Bonhomme's motion to dismiss because it found Progress adequately stated a cause of action. (R. 10). The court did not rule on the merits of the suit but suggested it would have found that Maleau's mining waste piles are not point sources, that Ditch C-1 is not a navigable water/water of the United States, that Bonhomme is violating the CWA, and that Reedy Creek is a navigable water/water of the United States. (R. 8–10).

Bonhomme, Maleau, and Progress each filed a Notice of Appeal. (R. 1). Bonhomme challenges the district court's holdings that he is not a real party in interest and not a citizen under section 505 of the CWA, and the court's findings that Maleau's mining waste piles are not point sources, that Ditch C-1 is not a navigable water, and that he is violating the CWA. (R. 1–2). Maleau challenges the district court's finding that Reedy Creek is a navigable water. (R. 2). And Progress challenges the district court's finding that Ditch C-1 is not a navigable water. *Id.*

STATEMENT OF THE FACTS

Reedy Creek flows for about fifty miles through the states of New Union and Progress and is integral to the recreational and economic prosperity of the region. (R. 5). The Creek ends in Wildman Marsh, "an extensive wetlands and a stopover essential to over a million ducks and other waterfowl." *Id.* Much of the wetlands lies within the Wildman National Wildlife Refuge and is "a major destination for duck hunters from Progress, New Union, and five neighboring states." (R. 6). Interstate hunters contribute over $25 million to the local economy. *Id.*

Ditch C-1 is a man-made tributary that flows directly into Reedy Creek. (R. 5). The Ditch has a permanent, defined channel that measures three feet across and one foot deep and contains a continuous flow of running water for at least nine months of the year, running dry only during periods of drought. *Id.* Ditch C-1 primarily derives its water from groundwater discharge, though rainwater runoff also contributes some flow. *Id.*

Jacques Bonhomme owns property along Wildman Marsh, and he is an avid recreational duck hunter. (R. 6). Bonhomme hosts several annual hunting parties at his lodge, which sits at the confluence of Reedy Creek and the Marsh. *Id.* His property is accessible via a farm road that crosses over Ditch C-1. (R. 5). The water in the Ditch flows through a culvert beneath Bonhomme's farm road before entering the Creek. *Id.*

Bonhomme, a French national, is the president, a director, and a shareholder of Precious Metals International, Inc. ("PMI"). (R. 7). PMI, which is paying Bonhomme's expert witness and attorney fees, is a Delaware corporation that operates two gold mines in the United States—neither of which is located in Progress or New Union—and three abroad. *Id.* In addition to hosting friends and acquaintances at the lodge, Bonhomme entertains PMI clients and associates. (R. 7–8). As such, Bonhomme enjoys the recreational hunting opportunities offered at Wildman Marsh with both social and business parties. (R. 6, 8).

Shifty Maleau runs a competing open pit gold mining and extraction operation along the Buena Vista River in Lincoln County, Progress. (R. 5). Maleau trucks the mining overburden and slag from his Lincoln County property and disposes of it along Ditch C-1 on his Jefferson County property, just three miles upstream from Reedy Creek. *Id.* He arranges his waste piles such that "rainwater runoff flows down the piles and percolates through them, eventually

discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying arsenic from the piles into the water in the Ditch." *Id.*

Bonhomme, concerned about the water quality in Wildman Marsh, tested the water in Ditch C-1 and Reedy Creek and found arsenic—a pollutant that is "commonly associated with gold mining and extraction and is a well-known poison"—in both water bodies. (R. 6). The tests, paid for by PMI, reveal a "pattern of arsenic concentration" that "strongly suggests the arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles." *Id.* In Ditch C-1, arsenic is undetectable upstream of Maleau's property but is present in "high concentrations" just below his property. *Id.* In Reedy Creek, arsenic is undetectable upstream of Ditch C-1 but is present in "significant concentrations" below the Ditch. *Id.* The poisonous pollutant "is also detectable at lower levels throughout Wildman Marsh" and was detected in three Blue-winged Teal by the United States Fish and Wildlife Service. *Id.* Consequently, Bonhomme fears using the Marsh and has significantly decreased his annual hunting parties by 75%. *Id.*

STANDARD OF REVIEW

This Court reviews *de novo* the district court's ruling on a motion to dismiss for failure to state a claim. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 981 (9th Cir. 2013).

SUMMARY OF THE ARGUMENT

Bonhomme is entitled to bring this suit as the real party in interest and as a "citizen" under section 505 of the CWA. Bonhomme is the real party in interest because he holds an interest under the CWA that is independent of PMI. The broad language of section 505 abrogates prudential standing and requires that a party demonstrate only the minimum constitutional requirements of Article III. Bonhomme has Article III standing because he has a recreational interest in Wildman Marsh that has been injured by Maleau's arsenic pollution, and the injury is

redressible in this litigation. His injury is direct and personal and, thus, independent of PMI. Bonhomme is a "citizen" under section 505 because he is an "individual" with Article III standing. Under the CWA, any individual with Article III standing is a "citizen." This broad reading encourages citizen enforcement and supports the CWA's goal to restore the integrity of the nation's waters.

Maleau's mining waste piles are "point sources" because the piles collect and channel polluted stormwater, and Maleau's mining activity is not exempt from CWA permitting requirements. Courts broadly interpret the definition of point source and generally find point sources where piles of industrial debris collect and channel pollutants into navigable waters. Because Maleau has configured his waste piles such that stormwater "flows down the piles and percolates through them, eventually discharging through channels eroded by gravity," his waste piles are point sources. Furthermore, only mining activities that result in nonpoint source pollution are exempt from CWA regulation. Maleau's waste piles are point sources and are thus subject to CWA permitting requirements.

Ditch C-1 is a "navigable water" and "water of the United States" because it is a relatively permanent tributary with a significant nexus to Reedy Creek, a traditional navigable water. Water bodies that contain "relatively permanent, standing or flowing" water and connect to traditional navigable waters are waters of the United States. Courts find relatively permanent ditches—natural or man-made—that are tributaries of traditional navigable waters to be waters of the United States. Ditch C-1 is a relatively permanent man-made tributary of Reedy Creek because it contains a continuous flow of running water in a permanent channel for at least nine months of the year. Additionally, water bodies with a significant nexus to traditional navigable waters are also waters of the United States. The "requisite nexus" exists if one water body

significantly affects the integrity of another. Ditch C-1 has a significant nexus to Reedy Creek because it contributes water flow and carries arsenic to the Creek.

Reedy Creek is a "navigable water" and "water of the United States" because EPA and Corps regulations reasonably define traditional navigable waters to include interstate waters. Under *Chevron*, an agency's interpretation of a statute is entitled to deference so long as the interpretation is reasonable and not contrary to Congress's expressed intent. The Supreme Court repeatedly has granted *Chevron* deference to the EPA's and Corps' interpretations of CWA terms, including "waters of the United States." Reedy Creek flows from New Union to Progress and is therefore an interstate water, falling within the agencies' definitions of waters of the United States. Such waters spread pollution beyond borders. The interstate nature of water pollution makes the agencies' interpretation reasonable and entitled to *Chevron* deference.

Bonhomme is not violating the CWA because his culvert is not a point source, nor is it discharging a pollutant. When finding a point source, courts assess the function of a structure to determine whether it actively transports polluted water from one water body to another in a way that alters the water's natural flow. Courts find culverts to be point sources only when they artificially divert stormwater runoff away from roads or properties. Bonhomme's culvert is not a point source because it is merely carrying a road over Ditch C-1 and is not altering its natural flow. Furthermore, Bonhomme's culvert is not discharging a pollutant. A structure is not discharging a pollutant if it transfers already polluted water from one body to another without adding new pollutants. As Bonhomme's culvert is merely transferring Maleau's polluted water, it is not discharging a pollutant. Such a holding is consistent with the CWA's enforcement goals and will not produce the untenable result of subjecting numerous passive structures along navigable waters to CWA liability.

ARGUMENT

I. BONHOMME IS THE REAL PARTY IN INTEREST BECAUSE HE HAS ARTICLE III STANDING TO BRING A SUIT UNDER SECTION 505 OF THE CWA AND HAS SUFFERED A DIRECT, PERSONAL INJURY INDEPENDENT OF PMI.

Federal courts require that every action be "prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). The party "must actually possess, under the substantive law, the right sought to be enforced," *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010), but the holder of that right is "not necessarily the person who will ultimately benefit from recovery." *In re Signal Intern, LLC*, 579 F.3d 478, 487 (5th Cir. 2009) (citation omitted). A party authorized by statute under the substantive law may bring a suit in his own name "without joining the person for whose benefit the action is brought." Fed. R. Civ. P. 17(a)(1)(G).

Section 505 of the CWA, the law governing this suit, authorizes any person "having an interest which is or may be adversely affected" to "commence a civil action on his own behalf." 33 U.S.C. § 1365(a), (g). As long as Bonhomme possesses an interest—i.e., an enforceable right—under the CWA, he is expressly authorized by the statute to bring a suit in his own name without joining PMI. The fact that PMI ultimately may benefit from a favorable holding does not preclude Bonhomme from acting on his own behalf. As Bonhomme alleges facts sufficient to demonstrate (1) that he has an interest that is or may be adversely affected and (2) that the interest is independent of PMI, he is the real party in interest and is entitled to bring this suit.

A. Bonhomme has an interest under the CWA because he has Article III standing.

A party holds an interest under the CWA if he meets the threshold standing requirements of Article III of the United States Constitution. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). To satisfy this constitutional minimum, a plaintiff must allege facts that demonstrate (1) he has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the defendant's

challenged action; and (3) the injury is redressible by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Courts find that "environmental plaintiffs adequately allege injury 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." *Natural Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 994 (9th Cir. 2008) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)); *see, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182 (2000) (finding injury where individuals were no longer able to engage in recreational activities along river due to concern about harmful effects of pollutants).

First, Bonhomme alleges facts sufficient to demonstrate he has a recreational interest in Wildman Marsh that the arsenic has injured. In the past, he regularly hunted ducks at the Marsh with friends and acquaintances, but the degraded water quality has forced him to cease most of his hunting parties. (R. 6). He fears not only the arsenic in the water itself but also the contamination's effect on wildlife—particularly waterfowl—that visit the Marsh. *Id.* As such, Bonhomme's injury is *concrete and particularized*, in that it is specific to hunting, and *actual*, in that it has prevented Bonhomme from participating in this recreational activity.

Next, Bonhomme's injury is fairly traceable to Maleau's point source discharge. Maleau operates a gold mining and extraction business and disposes of the overburden and slag along Ditch C-1 on his Jefferson County property. (R. 5). Stormwater runoff flows through his piles and carries arsenic—a well-known poison associated with gold mining—into the Ditch. (R. 5–6). The pattern of arsenic pollution detected in the waters of Ditch C-1, Reedy Creek, and Wildman Marsh strongly suggests the pollutant originates from Maleau's waste piles. (R. 6).

Finally, Bonhomme's injury will be redressed by a favorable decision in this litigation. Bonhomme seeks to enjoin Maleau from discharging arsenic into Ditch C-1. (R. 4). As Maleau's

discharge is linked to the arsenic in Wildman Marsh, if he ceases the polluting activity, the Marsh's water quality will be restored. (R. 6). The degraded water quality prevents Bonhomme from using the Marsh, and once the arsenic is eliminated and the water quality is improved, Bonhomme can resume the recreational activities he enjoyed in the past. *Id.* As such, Bonhomme has Article III standing and an interest under section 505 of the CWA.

B. Bonhomme's interest is independent of PMI because he suffered a direct, personal injury.

"[A] shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). A shareholder qualifies as a real party in interest if he has suffered a "direct, personal injury independent of the derivative injury common to all shareholders." *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008).

Here, Bonhomme's property fronts Wildman Marsh, and his hunting lodge sits at the edge of the Marsh. (R. 6). Bonhomme not only entertains business associates at the Marsh, but also enjoys duck hunting with his friends and acquaintances. *Id.* As such, the arsenic in Wildman Marsh is directly affecting Bonhomme's personal hunting activities, and this recreational interest is independent from any economic injury that PMI may have suffered. Accordingly, Bonhomme is entitled to bring this suit because he is the real party in interest.

II. BONHOMME IS A "CITIZEN" UNDER SECTION 505 OF THE CWA BECAUSE HE IS AN INDIVIDUAL WITH ARTICLE III STANDING TO BRING THIS SUIT.

Section 505(a) of the CWA entitles "any citizen" to "commence a civil action on his own behalf." 33 U.S.C. § 1365(a). Section 505(g) defines "citizen" as "a person or persons having an interest which is or may be adversely affected," *id.* § 1365(g), and section 502(5) further broadens the definition of "person" to encompass "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate

body." *Id.* § 1362(5). In interpreting the reach of "citizen," this Court must look at the plain language of the CWA to find that *any individual*—including a foreign national—may bring a suit to enforce a violation. Such a broad reading confers standing to the full extent of Article III and reinforces Congress's goal in implementing the CWA to eliminate pollution in the nation's waters. Therefore, as Bonhomme is an individual with Article III standing, he qualifies as a citizen within the meaning of section 505 and is entitled to bring this suit.

A. The plain language of sections 505(g) and 502(5) of the CWA authorizes any individual to bring a citizen suit.

"The starting point for interpreting a statute is the language of the statute itself." *Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987) (citation omitted). Courts find the CWA's terms so commanding and clear that any construction beyond the ordinary meaning is a "judicial amendment in abrogation of explicit, unconditional statutory language." *Wash. Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995) (citation omitted). Notably, courts adhere to a strict plain language interpretation of the citizen suit provision, stressing that "[i]t is highly unlikely that Congress would so obliquely signal an extreme departure from [section 505's] plain language." *Atchafalaya Basinkeeper v. Chustz*, 682 F.3d 356, 359 (5th Cir. 2012).

Recognizing that sections 505(g) and 502(5) unambiguously define both "citizen" and "person," courts refuse to look beyond the four corners of the CWA to determine whether a party can maintain a citizen suit. *See, e.g., Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608, 609–10 (D. Ariz. 1993) (looking only at CWA provisions to determine that Native American tribes are "persons" and that broad definition of person abrogates tribal sovereign immunity). Moreover, courts squarely reject attempts to constrain the meaning of "individual" under section 502(5). *See, e.g., United States v. Curtis*, 988 F.2d 946, 948 (9th Cir. 1993) (finding federal employees "individuals" and stressing that "[n]othing in the

CWA indicates that Congress intended to depart from this principle"); *United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (finding city employees "individuals" and noting that no language in any other section limits definition of individual under section 502(5)). Importantly, the broad definition of person applies to parties *bringing* citizen suits, as well as those being sued. *See, e.g.*, *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 616 (1992) (holding that state is person authorized to bring citizen suit under CWA).

Here, Bonhomme is an individual, a term plainly enumerated within section 502(5)'s definition of "person." 33 U.S.C. § 1362(5). As a person, Bonhomme qualifies as a citizen under section 505(g). *Id.* § 1365(g). Maleau and Progress claim that Bonhomme is barred from bringing this suit because a foreign national is not a citizen. (R. 8). Their argument rests on the assumption that the term "citizen" as used in section 505(a) is limited to United States citizens. *Id.* § 1365(a). Yet, nothing in the language of the CWA limits the definition of "individual" to anything other than its ordinary meaning. As such, an ordinary understanding of the term individual undoubtedly encompasses foreign nationals, like Bonhomme.

B. <u>The broad any "person" language of section 505(g) confers full Article III standing.</u>

By incorporating the term "person" into the citizen suit provisions of environmental statutes, Congress abrogated prudential standing requirements. *Bennett v. Spear*, 520 U.S. 154, 164 (1997). The CWA's legislative history reveals that the language "a person or persons having an interest which is or may be adversely affected" confers standing to the limits of Article III. *Middlesex Co. Sewerage Auth.*, 453 U.S. at 16; *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011) ("If a plaintiff asserting an interest under the Clean Water Act meets the constitutional standing requirements to satisfy Article III, then the plaintiff satisfies the statutory threshold as well."). Article III establishes the minimum a

party must demonstrate to access the federal courts. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Absent an express limitation by Congress, a party needs to present only a "case or controversy" and "allege such a personal stake in the outcome of the controversy as to warrant . . . invocation of federal-court jurisdiction." *Id.* at 498–99 (citation omitted).

Here, Bonhomme has Article III standing to bring this suit. *Supra* Part I.B. As this constitutional minimum requires only a "case or controversy," *Warth*, 422 U.S. at 499, he need not establish any particular citizenship. Moreover, because Congress abrogated prudential standing under the CWA, *Bennett*, 520 U.S. at 164, Bonhomme need not establish any additional injury or interest in this enforcement action beyond what he has demonstrated under Article III.

C. A narrow reading of "citizen" in section 505(a) undermines the broad goals of the CWA.

The CWA seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251, through "a comprehensive long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 95 (1971). To effectuate these broad goals, Congress incorporated the citizen suit provision to ensure greater citizen participation, expand enforcement, and ease administrative burden. *See id.* at 80–81 (noting that "citizens would be performing a public service" and should be "unconstrained to bring these actions"); H.R. Rep. No. 92-911, at 134 (1972) (noting that citizens are "private attorney[s] general" and that citizen suit "provides an open door for those who have legitimate interests in the courts, and encourages more meaningful participation in the administrative processes"). In fact, citizen suits "reflect[] a deliberate choice by Congress to widen citizen access to the courts." *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974).

Here, the arsenic threatens the integrity of Ditch C-1, Reedy Creek, and Wildman Marsh. (R. 6). If this Court narrowly interprets "citizen" to require United States citizenship for the

purpose of enforcing violations under the CWA, Bonhomme will be barred from taking action to prevent Maleau from polluting these significant water bodies—water bodies that are critical to the economic and recreational prosperity of the region. (R. 5–6). Congress clearly did not anticipate such a circumscribed citizen enforcement provision when it established this comprehensive program for restoring the nation's waters. Accordingly, Bonhomme is entitled to bring this suit because he is a citizen under section 505 of the CWA.

III. MALEAU'S MINING WASTE PILES ARE "POINT SOURCES" BECAUSE THEY ARE DISCERNIBLE, CONFINED, AND DISCRETE CONVEYANCES FROM WHICH POLLUTANTS ARE DISCHARGED.

Section 502(14) of the CWA defines "point source" as "any discernible, confined and discrete conveyance" capable of discharging pollutants, 33 U.S.C. § 1362(14), and "embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 188 (2d Cir. 2010) (citation omitted). Courts often find point sources beyond those listed in section 502(14). *See, e.g.*, *id.* at 188–89 (finding "apparatus . . . attached to trucks and helicopters" that sprays pesticides point source); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d. Cir. 1994) (finding "manure spreading vehicles" point sources); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) (finding "airplane fitted with tanks and mechanical spraying apparatus" point source); *United States v. Holland*, 373 F. Supp. 665, 668 (M.D. Fla. 1974) (finding "dump trucks, drag lines, and bulldozers" point sources).

Courts accept that the definition "cannot be interpreted so broadly as to read the point source requirement out of the statute," *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 219 (2d Cir. 2009), but generally find a point source when the effluent is collected and channeled. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Maleau's mining waste piles fit this commonly accepted definition of point source because they collect and channel

stormwater polluted with arsenic. Furthermore, the waste piles are not exempt from CWA permitting requirements merely because they are associated with Maleau's mining operation.

A. Maleau's mining waste piles collect and channel stormwater polluted with arsenic.

The definition of point source "excludes unchanneled and uncollected surface waters." *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979), *rev'd on other grounds sub nom. EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). However, "when storm water collects in piles of industrial debris and eventually enters navigable waters," courts have found the piles to be a point source. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983)). Indeed, "[a] point source of pollution may also be 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, gullies, and similar conveyances." *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980).

In *Abston Construction Co.*, the defendant construction company argued that it was not liable under the CWA for discharges of polluted stormwater from its mining operation. 620 F.2d at 44. As part of its operation, the company disposed of overburden from its mining pits into nearby piles. *Id.* at 43. These piles were "highly erodible" and, as a result, rainwater created gullies and ditches along the sides of the piles and channeled polluted water into a nearby creek. *Id.* The Fifth Circuit rejected the construction company's argument that point sources cannot be created by natural erosion and rainfall, and held that the mining piles were point sources because "[g]ravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials." *Id.* at 45.

In *Appalachian Power Co.*, a group of power companies challenged an EPA regulation that set limits on runoff from construction activity and material storage sites. 545 F.2d at 1372–73. The companies admitted that the definition of point source includes "contaminated runoff discharges from coal storage and chemical handling areas," but argued that the regulation was outside the scope of the CWA because it attempted to regulate what the companies maintained was nonpoint source pollution—runoff that is "not normally routed into a 'point source' collection system." *Id.* at 1373. The Fourth Circuit agreed that the definition of point source does not include "unchanneled and uncollected surface waters," and directed the EPA to clarify the scope of its regulation to ensure it is limited to point sources. *Id.* at 1374.

Here, the lower court incorrectly stated that piles of dirt and stone cannot be point sources. (R. 9). As *Abston Construction Co.* and *Appalachian Power Co.* make clear, the proper inquiry is not what the conveyances are made from but whether they collect and channel polluted water. Unlike the runoff discussed in *Appalachian Power Co.*, which was dispersed and "not normally routed," the runoff here is collected and channeled by Maleau's waste piles such that it "flows down the piles and percolates through them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1." (R. 5). Rather, Maleau's waste piles are similar to the piles held to be point sources in *Abston Construction Co.* Maleau's waste piles do not occur naturally but were designed and constructed by Maleau himself, and the channels discussed in *Abston Construction Co.* and those at issue here were formed by erosion and gravity. *Id.* Therefore, Maleau's mining waste piles are point sources.

B. Maleau's mining activity is not exempt from CWA permitting requirements.

Although the CWA lists "mining activities" as an example of nonpoint source pollution, 33 U.S.C. § 1314(f)(2)(B), "mining activities . . . may also implicate point sources of pollution,

expressly covered by the [CWA's] effluent limitations." *Abston Constr. Co.*, 620 F.2d at 44. In *Trustees for Alaska v. EPA*, the Ninth Circuit explained that "point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance. Thus," the court continued, "when mining activities release pollutants from a discernible conveyance, they are subject to [National Pollutant Discharge Elimination System ("NPDES")] regulation, as are all point sources." 749 F.2d 549, 558 (9th Cir. 1984).

In *United States v. Earth Sciences, Inc.*, the defendant mining company violated the CWA by discharging a toxic leachate solution into a nearby creek. 599 F.2d 368, 370 (10th Cir. 1979). The company sprayed the solution on its piles of gold ore and collected excess solution in a sump. *Id.* Melting snow filled the sump and resulted in an overflow of leachate solution into the creek. *Id.* The mining company argued that it was not liable under the CWA because the mining activity that resulted in the discharge was a nonpoint source. *Id.* at 371. The Ninth Circuit reversed the district court's holding that all mining activities are exempt from point source regulation and held "[w]e have no problem finding a point source here." *Id.* at 374. In reaching its decision, the circuit court was persuaded by legislative history showing that Congress rejected an amendment to the CWA that would have subjected mining activities to regulation "as being based upon the view mining was already covered by the proposed Act." *Id.* at 372.

Here, the arsenic-polluted water is a product of mining activity, similar to the leachate solution in *Earth Sciences, Inc.* (R. 5). And just as the leachate solution was collected and channeled into a nearby waterway, so too is the arsenic-polluted water that Maleau's mining waste piles discharge. *Id.* Accordingly, Maleau's waste piles are point sources regardless of whether they are associated with mining activity.

IV. DITCH C-1 IS A NAVIGABLE WATER AND A "WATER OF THE UNITED STATES" BECAUSE IT IS A RELATIVELY PERMANENT TRIBUTARY POSSESSING A SIGNIFICANT NEXUS TO REEDY CREEK, A TRADITIONAL NAVIGABLE WATER.

Section 502(7) of the CWA defines navigable waters as "the waters of the United States," 33 U.S.C. § 1362(7), but it does not, however, further define this term. *Id.* §§ 1251–1387. In *Rapanos v. United States*, a plurality decision, the Supreme Court articulated three different approaches to determine what constitutes a water of the United States: the plurality test; the significant nexus test; and *Chevron* analysis. 547 U.S. 715, 810 (2006). While the Court previously stated that a fractured decision's holding may be viewed as the opinion resting "on the narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977), it has since recognized that "[t]his [rule] is more easily stated than applied." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)). It is not "useful to pursue the *Marks* inquiry to the utmost logical possibility," *id.* (quoting *Nichols*, 511 U.S. at 745–46), when "a simple and pragmatic way to assess what grounds would command a majority of the Court" exists. *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011) (quoting *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006))*; see also United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (finding *Marks* "unworkable as applied to *Rapanos*").

In *Rapanos*, the Justices who advocated for *Chevron* analysis also supported finding a water of the United States under either the plurality test or the significant nexus test. 547 U.S. at 810. Thus, there is "no basis for disregarding the Supreme Court's directive that [both] tests should apply." *Donovan*, 661 F.3d at 183–84; *see Johnson*, 467 F.3d at 66 (following Court's instruction); *Bailey*, 571 F.3d at 799 (same); *United States v. Cundiff*, 555 F.3d 200, 208 (6th Cir. 2009) (finding CWA jurisdiction "under each of the primary *Rapanos* opinions").

A. Ditch C-1 is a relatively permanent tributary of a traditional navigable water.

Under the plurality test, a water body is a "water of the United States" if it satisfies two requirements. *Rapanos*, 547 U.S. at 732–33. First, the water body must be a "relatively permanent, standing or flowing [body] of water." *Id.* Relatively permanent "connotes a continuous flow of water in a permanent channel." *Id.* at 733. Second, the water body must connect to traditional navigable waters. *Id.* The plurality standard excludes "channels containing merely intermittent or ephemeral flow" from waters of the United States. *Id.* However, it does not exclude water bodies that dry up in "extraordinary circumstances," such as drought, because "common sense and common usage" guide this analysis. *Id.* at 732 n.5.

The Court recognizes that "[the] term 'navigable waters' includes something more than traditional navigable waters." *Id.* at 731 (citing *United States v. Riverside Bayview Homes, Inc.*, 464 U.S. 121, 133 (1985); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001)). This "something more" encompasses ditches that are relatively permanent tributaries of traditional navigable waters. *Id.* at 732, 800. While conduits, channels, and ditches *generally* carry intermittent flow, if they have relatively permanent flows they are navigable waters and waters of the United States. *Id.* at 739. In *Rapanos*, the Court considered whether wetlands near ditches and drains that eventually empty into navigable waters were waters of the United States. *Id.* at 729. The Court concluded that it was unclear from the record whether the ditches and drains contained "continuous or merely occasional flows" and instructed the lower court to determine if the flows were relatively permanent. *Id.* at 729, 757. This instruction indicates that relatively permanent ditches are waters of the United States.[1]

[1] Although section 502(14) of the CWA includes "ditches" as an example of a point source, point sources and navigable waters are not "separate and distinct categories." *Rapanos*, 547 U.S. at 772 (citing 33 U.S.C. § 1362(14)). As long as a water body meets the continuous flow

Additionally, courts have held that relatively permanent tributaries of traditional navigable waters are waters of the United States. A tributary is "a non-navigable water body whose waters flow into a traditional navigable water either directly or indirectly." U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (2008) ("Guidance Memo 2008"). In *Donovan*, the Third Circuit concluded that the tributary channels at issue were relatively permanent because they were "perennial in nature," flowing throughout the year. 661 F.3d at 185. In *Precon Development Corp. v. U.S. Army Corps of Engineers*, the Fourth Circuit upheld the Army Corps of Engineers' ("Corps") determination that a 2,500-foot man-made ditch connected to a traditional navigable water was a water of the United States because it was a relatively permanent tributary, flowing seasonally from February through April. 633 F.3d 278, 284, 293 (4th Cir. 2011)*; see also United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007) (finding seasonally intermittent, non-navigable tributary water of the United States). In *Cundiff*, the Sixth Circuit held that a channel and two creeks were all "relatively permanent bodies of water connected to a traditional interstate navigable water [because] water flow[ed] through the channel into [the creeks] for all but a few weeks a year." 555 F.3d at 211–12. In *United States v. Vierstra*, the court concluded that the Low Line Canal, a man-made tributary of a traditional navigable water, was a water of the United States because the canal's flow, "though seasonal, [was] recurring, regular, perennial, and substantial." 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011), *aff'd*, 492 F. App'x 738 (9th Cir 2012). This finding reflected common sense and common usage because water flowed through the canal for six to eight months of the year. *Id.* Furthermore, the court emphasized that excluding such waters from CWA jurisdiction made

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requirement, it "could conceivably constitute both a point source and a [navigable] water." *Id.* Thus, the lower court incorrectly concluded that Ditch C-1 could not be a navigable water.

"little practical sense" under the CWA's purpose because relatively permanent tributaries can "spread[] environmental damage." *Id.* at 1170–71 (quoting *Moses*, 496 F.3d at 989)*; see also United States v. Brink*, 795 F. Supp. 2d 565, 577–79 (S.D. Tex. 2011) (finding seasonal creek relatively permanent tributary); *ONRC Action v. U.S. Bureau of Reclamation*, No. 97-3090-CL, 2012 WL 3526833, at *22 (D. Or. Jan. 17, 2012) (finding man-made Klamath Drain relatively permanent tributary of Klamath River and thus water of the United States).

Here, Ditch C-1 is a relatively permanent tributary of Reedy Creek because it contains a continuous flow of running water in a permanent channel for at least nine months of the year. (R. 5). This reflects common sense and common usage of the term "relatively permanent." Although Ditch C-1 occasionally dries up during drought, this is an "extraordinary circumstance" and does not negate its relative permanence. *Id.* Ditch C-1 contains water for *at least* nine months of the year, more months than the tributary ditches found to be waters of the United States in *Moses*, *Vierstra*, and *Precon Development Corp*., and almost as many as the channel and creeks in *Cundiff*. Moreover, like many of these water bodies, Ditch C-1 is a man-made tributary, consisting of a defined channel that measures three feet wide and one foot deep. (R. 5). Finally, Ditch C-1 has a hydrological connection to a traditional navigable water, Reedy Creek, because its water flows directly into the Creek. *Id.* Accordingly, Ditch C-1 is a water of the United States because it is a relatively permanent tributary of a traditional navigable water.

B. Ditch C-1 has a significant nexus to Reedy Creek because it significantly affects the Creek's chemical, physical, and biological integrity.

Water bodies that possess a significant nexus to traditional navigable waters are "waters of the United States." *Rapanos*, 547 U.S. at 767. The "requisite nexus" exists if the water body "significantly affect[s] the chemical, physical, and biological integrity" of a traditional navigable water. *Id.* at 779–80. Water bodies with "speculative or insubstantial" effects on water quality

are not waters of the United States. *Id.* The "significant nexus test does not require laboratory analysis" or other quantitative, physical evidence to establish the existence of the nexus. *Precon Dev. Corp.*, 633 F.3d at 293 (internal quotation marks omitted) (quoting *Cundiff*, 555 F.3d at 210–11). "[S]ome measure" of impact on downstream water quality is sufficient. *Rapanos*, 547 U.S. at 784. Importantly, the Court applies the significant nexus test "in terms of the [CWA's] goals and purposes." *Id.* at 779 (citing 33 U.S.C. § 1251).

In *Rapanos*, the Supreme Court considered whether wetlands near ditches and drains had a significant nexus to traditional navigable waters. *Id.* at 759. The Court conducted a fact-based inquiry, examining the water bodies' hydrological and ecological relationship to determine whether the requisite nexus existed. *Id.* at 784. Such facts included the ditches' and drains' surface-water connection to the wetlands, as well as the wetlands' role in providing wildlife habitat and affecting water quality. *Id.* at 786. Although the Court remanded the case, it noted that the "record contain[ed] evidence suggesting the possible existence of a significant nexus." *Id.* at 783*; see also Donovan*, 661 F.3d at 186, 188 (finding significant nexus because upstream water performed important functions for downstream water quality and discharged groundwater downstream, "maintaining stream flow and preserving . . . wildlife habitats").

Since *Rapanos*, courts have applied the significant nexus test to a variety of water bodies, including tributaries of traditional navigable waters. *See United States v. Robinson*, 505 F.3d 1208, 1222 (11th Cir. 2007) (adopting significant nexus test to determine whether tributary of traditional navigable water is water of the United States). In *Vierstra*, the court held that the Low Line Canal, a tributary, had a significant nexus to Snake River, a traditional navigable water. 803 F. Supp. at 1172. First, the canal had a direct, open water connection to the river via a perennial stream. *Id*. Second, evidence showed that the canal "significantly contribut[ed]" sediment and

bacteria to the river, affecting the river's integrity. *Id.* The court held that the Low Line Canal was a water of the United States, a finding "consistent with the *Rapanos* decision." *Id.*; *see also Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 822–23 (N.D. Cal. 2007) (applying significant nexus test to analyze CWA jurisdiction over tributaries of traditional navigable water). In *ONRC*, the court held that the man-made Klamath Drain had a significant nexus to Klamath River, a traditional navigable water, because it contributed "millions of gallons of water a day" to the river. 2012 WL 3526833, at *22–23 ("There can be no reasonable argument that the Drain . . . lacks a sufficiently significant nexus with the River.").

Additionally, the EPA and the Corps consider tributaries with a significant nexus to traditional navigable waters to be waters of the United States. The agencies will assert jurisdiction[2] over a tributary if it has the requisite nexus based on hydrological and ecological factors. Guidance Memo 2008. These factors include the tributary's flow as well as the "potential of the tributary to carry pollutants . . . to traditional navigable waters." *Id.*

Here, Ditch C-1 has a significant nexus to Reedy Creek, a traditional navigable water, because it significantly affects the Creek's chemical, physical, and biological integrity. First, Ditch C-1 flows directly into Reedy Creek, contributing to the Creek's water quantity and flow. (R. 6). This regular flow occurs at least nine months of the year. (R. 5). Additionally, some of the water Ditch C-1 contributes to the Creek consists of groundwater discharge that helps "maintai[n] stream flow and [preserve downstream] wildlife habitats," including Wildman Marsh

[2] The agencies have also recommended asserting CWA jurisdiction over relatively permanent non-navigable tributaries "if a fact-specific analysis determines they have a significant nexus to [a traditional navigable water such as an] interstate water." U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* (2011) (internal quotation marks omitted) (explaining that "it is reasonable to utilize the [significant nexus test] for tributaries").

into which the Creek flows. *Donovan*, 661 F.3d at 188; (R. 5). Second, Ditch C-1 carries arsenic to Reedy Creek, (R. 6), significantly affecting the Creek's integrity by degrading its water quality. Arsenic is undetectable in Reedy Creek above its confluence with Ditch C-1. *Id.* "However, just below the discharge of Ditch C-1 into Reedy Creek, arsenic is present in the Creek in *significant concentrations*." *Id.* (emphasis added). This fact evidences Ditch C-1's substantial hydrological and ecological connection to Reedy Creek. Arsenic, like any pollutant, harms water quality. Ditch C-1 degrades Reedy Creek's water quality by carrying "significant concentrations" of arsenic to the Creek. *Id.* For these reasons, Ditch C-1 significantly affects Reedy Creek's chemical, physical, and biological integrity. Accordingly, Ditch C-1 has a significant nexus to Reedy Creek and therefore is a water of the United States.

V. REEDY CREEK IS A NAVIGABLE WATER AND A "WATER OF THE UNITED STATES" BECAUSE EPA AND CORPS REGULATIONS DEFINE TRADITIONAL NAVIGABLE WATERS TO INCLUDE INTERSTATE WATERS, A REASONABLE INTERPRETATION ENTITLED TO *CHEVRON* DEFERENCE.

When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to [clarify] . . . the statute." *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 843–44 (1984). In *Chevron*, the Supreme Court established a two-step analysis to determine whether an agency's interpretation is entitled to deference. *Id.* First, the statute must be "silent or ambiguous" as to Congress's intent. *Id.* at 843. Second, the agency's interpretation of the statute must be reasonable. *Id.* Therefore, an agency's interpretation of a statute is entitled to deference so long as the interpretation "is reasonable and not in conflict with the expressed intent of Congress." *Riverside Bayview Homes*, 474 U.S. at 131.[3]

[3] Notably, *Chevron* applies to agency regulations. *See United States v. Mead Corp.*, 533 U.S. 218, 219, 221 (2001) (holding that *Chevron* applies where Congress has delegated authority to agency generally to make "rules carrying the force of law," such as regulations).

Courts "have long recognized that considerable weight should be accorded to an [agency's] construction of a statutory scheme." *Id.* at 227–28 (quoting *Chevron*, 467 U.S. at 844). In *Chevron*, the EPA's definition of "stationary source" was a permissible construction of the Clean Air Act ("CAA") for two reasons. 467 U.S. at 866. First, the statute "[did] not explicitly define what Congress envisioned as a 'stationary source.'" *Id.* at 841. Second, the agency's interpretation did not conflict with the language, policies, or legislative history of the CAA. *Id.* at 841, 843–46 (citations omitted). Thus, the Court concluded that the interpretation clarified an ambiguity in a manner that reasonably reconciled the CAA's dual interests of accommodating "progress in reducing air pollution with economic growth." *Id.* at 866.

The Court grants *Chevron* deference to the EPA's and the Corps' interpretations of CWA terms, including "waters of the United States." In *Riverside Bayview Homes*, the Court addressed whether the Corps' interpretation of "waters of the United States" to include wetlands adjacent to navigable waters was a permissible construction of the CWA. 474 U.S. at 131. The Court applied *Chevron*, finding the statutory term ambiguous, and analyzed the agencies' interpretation "in light of the language, policies, and legislative history of the [CWA]" to determine its reasonableness. *Id.* The Court emphasized that Congress had recognized that "protection of aquatic ecosystems . . . demanded broad federal authority to control pollution, for water moves in hydrologic cycles [making it essential to control] the discharge of pollutants . . . at the source." *Id.* at 132 (quoting S. Rep. No. 92-414, at 77) (internal quotation marks omitted). Moreover, the Court determined that Congress had intended to remove limits on federal water pollution regulation by choosing to define navigable waters as waters of the United States, implying that CWA jurisdiction extends to "at least some waters that would not be deemed 'navigable' under the classical understanding of the term." *Id.* at 133 (quoting S. Conf. Rep. No. 92-1236, at 144

(1972); 118 Cong. Rec. 33756–57 (1972)). As such, the Court concluded, "Congress chose to define [waters of the United States] broadly" and recognized that the agencies' expertise provided adequate support for their "ecological judgment" about the relationships between water bodies in promulgating CWA regulations. *Id.* at 133–34.

In *Rapanos*, the Court "evaluated the validity of the very same regulations at issue" in *Riverside Bayview Homes*, specifically those interpreting "waters of the United States." 547 U.S. at 792 (citation omitted). Notably, these regulations define traditional navigable waters to include interstate waters. 33 C.F.R. § 328.3(a)(2) (2013); 40 C.F.R. § 230.3(s)(2) (2013). Following *Riverside Bayview Homes*, the Court applied *Chevron* to determine the reasonableness of the agencies' interpretation of "waters of the United States" to include wetlands adjacent to tributaries of navigable waters:

> [T]he proper analysis is straightforward. The [agencies have] determined that [these wetlands] preserve the quality of our Nation's waters by [performing essential hydrological and ecological functions]. The Corps' resulting decision to treat these wetlands as encompassed within the term 'waters of the United States' is a quintessential example of the [agencies'] reasonable interpretation of a statutory provision.

Rapanos, 547 U.S. at 788 (citing *Chevron*, 467 U.S. at 842–45). Furthermore, the Court emphasized that its "unanimous decision in [*Riverside Bayview Homes*] was faithful to [its] duty to respect the work product of the Legislative and Executive Branches of Government" by granting *Chevron* deference to the agencies' reasonable interpretation of the CWA. *Id.* (citing *Riverside Bayview Homes*, 474 U.S. at 131). Until "clean water is less important today than it was in the 1970's, [the Court] continue[s] to owe deference to regulations satisfying the 'evident breadth of congressional concern for protection of water quality and aquatic ecosystems.'" *Id.* at 799 (quoting *Riverside Bayview Homes*, 474 U.S. at 133); *see id*. at 811–12 (Breyer, J.,

dissenting) ("If one thing is clear, it is that Congress intended the [agencies] to make the complex technical judgments that lie at the heart of the present cases.").

Here, the EPA's and the Corps' interpretation of traditional navigable waters to include interstate waters is a permissible construction of the CWA entitled to *Chevron* deference because it reasonably clarifies the term "waters of the United States." First, the CWA is ambiguous as to what constitutes a water of the United States. The Court recognized this ambiguity in both *Riverside Bayview Homes* and *Rapanos*, and the agencies have enacted regulations to clarify it. Such regulations expressly define waters of the United States to include interstate waters, like Reedy Creek. 33 C.F.R. § 328.2(2); 40 C.F.R. § 230.3(s)(2). Reedy Creek originates in New Union and flows across the state border into Progress where it ends in Wildman Marsh. (R. 5). Reedy Creek is therefore an interstate water, falling within the agencies' definitions of waters of the United States. Next, the agencies' interpretation is reasonable as consistent with the CWA's goals. This interpretation furthers the CWA's purpose to "restore and maintain the . . . integrity of the Nation's waters" because it recognizes that water pollution does not stop at state borders. 33 U.S.C. § 1251. To find otherwise endangers the quality of our nation's waters. As Reedy Creek is an interstate water, it can carry pollutants—like arsenic—to other states. Furthermore, the agencies are the water pollution control experts, and this Court owes deference to their regulations. For these reasons, the agencies' interpretation is entitled to *Chevron* deference. Accordingly, Reedy Creek is a traditional navigable water and a water of the United States.

VI. BONHOMME IS NOT VIOLATING THE CWA BECAUSE HE IS NOT DISCHARGING A POLLUTANT FROM A POINT SOURCE.

The CWA requires a permit for the "discharge of a pollutant" from a "point source" into a "navigable water." 33 U.S.C. §§ 1342, 1362(7), (12), (14). Bonhomme is not violating the CWA because (1) his culvert is not a point source and (2) the culvert's transfer of polluted water

does not constitute a "discharge of a pollutant." Furthermore, the goals of the CWA will not be furthered if Bonhomme is held liable for the pollutants entering Reedy Creek.

A. Bonhomme's culvert is not a point source because it does not convey pollutants into a navigable water, and a proper reading of the statute would not allow this result.

Section 502(14) of the CWA defines point source as a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). As this definition is nonexclusive, *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993), courts subscribe to a "highly fact-based inquiry" that assesses the ability of each structure to function as a conveyance. *Pac. Lumber Co.*, 469 F. Supp. 2d at 822. While not necessarily a narrow reading, the definition "cannot be interpreted so broadly as to read the point source requirement out of the statute." *Cordiano*, 575 F.3d at 219. To determine the scope of the definition, this Court must look at the function of Bonhomme's culvert to find that it is not a point source. Such a finding is consistent with the requirement that point sources *actually convey pollutants* and does not create the untenable result of exposing any physical structure along a navigable waterway to CWA liability.

1. Bonhomme's culvert does not convey pollutants.

Point sources are "physical structures and instrumentalities that systematically act as a means of conveying pollutants." *Plaza Health Labs, Inc.*, 3 F.3d at 646. Courts easily identify point sources that *generate* pollutants, but the inquiry into intervening conduits—structures that convey *existing* pollutants—is more nuanced. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004) (remanding to district court to develop factual record and determine whether pump station *actually conveys* existing pollutants into navigable water). As such, courts look for structures that actively transport polluted water from one body to another in a manner that alters the water's natural flow. *See Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000) ("The . . . definition of 'point source' . . . connotes the terminal end of an artificial system

for moving water, waste, or other materials."); *accord, e.g.*, *Parker*, 386 F.3d at 1009 (finding point source where industrial debris piles channeled runoff into stream); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d. Cir. 2001) (finding point source where tunnel artificially diverted water from reservoir and deposited it into creek); *Southview Farm*, 3 F.3d at 119 (finding point source where manure was intentionally drained from field through swales and into stream); *Earth Sciences, Inc.*, 599 F.2d at 374 (finding point source in water circulation system that served mining operation).

Culverts are not enumerated within the CWA's definition of point source, 33 U.S.C. § 1362(14), and do not themselves generate pollutants. *See Miccosukee*, 541 U.S. at 104–05 (noting that structures through which waters merely *pass* do not create pollutants). In fact, many culverts are components of runoff management systems that transport water away from road surfaces or properties and deposit it into nearby streams.[4] As the "[CWA] and the case law are clear that some type of collection or channeling is required to classify an activity as a point source," a culvert is rarely a point source if does not alter the natural flow of stormwater and transform it from nonpoint to point source pollution. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010); *accord Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 508 (9th Cir. 2013) (stating that stormwater is point or nonpoint source "depending on whether it is allowed to run off naturally . . . or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances" (citation omitted)).

[4] Stream crossing culverts, like bridges, carry roads over existing waterways without disrupting the "continuity of flow." Choctawhatchee, Pea & Yellow Rivers Watershed Mgmt. Auth., *Recommended Practices Manual: A Guideline for Maintenance and Service of Unpaved Roads* 15–16 (2009), http://water.epa.gov/polwaste/nps/unpavedroads.cfm. Runoff management culverts are "strategically placed to manage and route roadway runoff along, under, and away from the roadway." *Id.* at 15. This Court should take judicial notice of the definition of culvert, which is "not subject to reasonable dispute" and is endorsed by the EPA. Fed. R. Evid. 102(b).

Courts find culverts point sources in limited circumstances in which the structures artificially divert water away from roads or properties and into navigable waters. *See, e.g.*, *Driscoll v. Adams*, 181 F.3d 1285, 1287 (11th Cir. 1999) (finding point source where developer built culverts and dams to channel stormwater away from properties); *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d. Cir. 1992) (finding point source where landfill leachate was artificially funneled through culvert and into wetland); *Wisc. Res. Prot. Council, Ctr. for Biological Diversity v. Flambeau Mining Co.*, 903 F. Supp. 2d 690, 649 (W.D. Wisc. 2012) (finding point source where stream was re-routed through culverts and away from mining site); *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 301 F. Supp. 2d 1102, 1104 (N.D. Cal. 2004) (finding point source where culverts, gullies, and channels diverted stormwater away from industrial site); *Alt v. EPA*, No. 2:12-CV-32, 2013 WL 452030, at *6 (N.D.W.V. Apr. 22, 2013) (finding point source where culverts and channels "facilitate[d] stormwater away from the poultry houses" and towards stream).

Here, Bonhomme's culvert carries a farm road over Ditch C-1. (R. 5). The culvert does not disrupt the natural flow of the water within this tributary but merely serves as a bridge to provide access to Bonhomme's property. *Id.* Moreover, unlike the culverts previously held to be point sources, Bonhomme's culvert does not transform otherwise nonpoint source stormwater runoff into point source pollution. The arsenic discharged by Maleau's waste piles would flow into Reedy Creek with or without Bonhomme's culvert because the structure does nothing to artificially divert the polluted water from Ditch C-1 into Reedy Creek.

The district court erroneously relied on *Dague* to determine that Bonhomme's culvert is a point source. (R. 9). *Dague* is an outlier in finding a culvert a point source that is *not* part of a runoff management system and cannot be used to stand for the proposition that culverts are

"well-established point sources." *Id.* Moreover, *Dague* is distinguishable because the culvert at issue was not merely crossing a stream undisturbed but was channeling water through a man-made railroad embankment and funneling leachate into a wetland in a manner that was not naturally occurring. 935 F.2d at 1354. As Bonhomme's culvert is not actually conveying pollutants, it is not a point source.

2. Finding Bonhomme's culvert a point source would produce untenable results.

Courts avoid statutory interpretations that produce "absurd results." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). The Ninth Circuit applied this rule in *Ecological Rights Foundation* when it held that utility poles are not point sources. 713 F.3d at 513. The court reasoned that if utility poles are conveyances then "so are playground equipment, bike racks, mailboxes, traffic lights, billboards, and street signs." *Id.* Regulating runoff from "commonplace things," stressed the court, would "lead to untenable results." *Id.* at 513, 517.

Bonhomme's culvert is analogous to the "commonplace things" cited in *Ecological Rights Foundation*. *Id.* at 513. The culvert functions as a bridge, carrying the road over Ditch C-1 and interacting only passively with the water. (R. 5). If this Court finds that culverts like Bonhomme's are point sources, many bridges and other passive structures that cross navigable waters may be subject to CWA liability just by making contact with polluted water. Attaching liability to such everyday objects and regulating all water that comes into contact with these objects would read the "conveyance" requirement out of the statute and lead to untenable results.

B. <u>The culvert's transfer of polluted water does not constitute a "discharge of a pollutant" under the EPA's Water Transfers Rule because the culvert itself does not add any pollutants when it transfers water from one navigable body to another.</u>

Section 502(12) of the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). In response to uncertainty regarding whether the transfer of already polluted water from one navigable water to

another constituted an "addition of any pollutant to navigable waters," the EPA issued the Water Transfers Rule in 2008. *See* National Pollutant Discharge Elimination System Water Transfers Rule, 73 Fed. Reg. 33,697, 33,703 (June 13, 2008) (codified at 40 C.F.R. pt. 122) ("EPA believes that this action will add clarity to an area in which judicial decisions have created uncertainty . . . ."). Under the Water Transfers Rule, Bonhomme is not violating the CWA because his culvert's transfer of polluted water from one navigable water to another does not constitute a "discharge of a pollutant." Furthermore, the Water Transfers Rule is subject to *Chevron* deference because it is a permissible construction of an ambiguous statute.

1. The Water Transfers Rule is entitled to *Chevron* deference.

When faced with an agency's interpretation of a statute that it administers, a court must first determine whether "Congress has directly spoken to the precise question at issue," for if it has then the court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. "[I]f 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. Courts greatly defer to an agency's interpretation, as "[t]he power of an administrative agency to administer a congressionally created . . . 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).

a. The CWA's definition of "discharge of a pollutant" is ambiguous.

For an ambiguity to exist, "there must be two or more reasonable ways to interpret the statute." *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009). The Supreme Court most recently discussed the ambiguity of "discharge of a pollutant" in *Miccosukee*, which involved the pumping of water from a polluted canal into a nearby wetland

to maintain the water table and prevent flooding. 541 U.S. at 100, 104–09. The respondents argued that the water management district required a NPDES permit for the pumping because the transfer constituted a "discharge of a pollutant." *Id.* at 102. The United States as *amicus curiae*, however, argued that all navigable waters should be viewed unitarily and that "permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body." *Id.* at 106. The United States also urged that this "unitary waters" theory be upheld "out of deference to a longstanding EPA view that the process of 'transporting, impounding, and releasing navigable waters' cannot constitute an 'addition of pollutants' to 'the waters of the United States.'" *Id.* at 107 (citation omitted).

The Court did not resolve the ambiguity but left "the unitary waters argument . . . open to the parties on remand." *Id.* at 109. With regard to whether the Court should defer to the unitary waters theory, the Court stated that the United States did "not identify any administrative documents in which EPA has espoused that position." *Id.* at 107. With the passage of the Water Transfers Rule in 2008, however, the EPA has now promulgated a regulation that espouses the unitary waters theory. 40 C.F.R. § 122.3(i) (2013).

b. The Water Transfers Rule is based on a permissible construction of the CWA.

When deciding whether an agency's regulation is a permissible construction of a statute, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.

Recently, in *Friends of Everglades*, the Eleventh Circuit held that the Water Transfers Rule is a reasonable interpretation of the CWA's ambiguous definition of "discharge of a pollutant." 570 F.3d at 1228. The court acknowledged that it previously had ruled against the

unitary waters theory—prior to the passage of the Water Transfers Rule—and suggested that the theory might not "comport with the broad, general goals of the Clean Water Act," but the court ultimately accepted that its role is to "interpret and apply statutes, not congressional purposes." *Id.* at 1218, 1226 (quoting *In re Hedrick*, 524 F.3d 1175, 1188 (11th Cir. 2008)). The court held that the EPA's construction of "any addition of any pollutant to navigable waters from any point source" was permissible and stated that "[u]nless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." *Id.* at 1228.

2. The Water Transfers Rule exempts the culvert's transfer of polluted water from CWA permitting requirements.

The Water Transfers Rule embraces the unitary waters theory and exempts from CWA permitting requirements any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). The EPA explained that when a tunnel conveys water from one river into another, "[t]his release constitutes a water transfer under the scope of this rule because it conveys water from one water of the U.S. to another water of the U.S. without subjecting the water to an intervening industrial, municipal or commercial use." 73 Fed. Reg. at 33,699–700. Therefore, "unless this conveyance itself introduces pollutants into the water being conveyed, the release will not require an NPDES permit." *Id.*

In *Friends of Everglades*, the plaintiffs argued that the water management district required a NPDES permit for pumping water from a polluted canal into Lake Okeechobee because the pumping constituted a "discharge of a pollutant." *Id.* at 1214–15. In light of the Water Transfers Rule, the Eleventh Circuit disagreed and held that because the pump transferred water from one navigable water to another without introducing pollutants, the transfer did not

constitute a "discharge of a pollutant" and was therefore exempt from CWA permitting requirements. *Id.* at 1228.

Similar to the transfer of water in *Friends of Everglades*, Bonhomme's culvert transfers water from one distinct body of water to another—from Ditch C-1 to Reedy Creek. (R. 4–5). Although the water that the culvert transfers to Reedy Creek is polluted with arsenic, there is no evidence that the culvert itself adds pollutants or subjects the water to industrial, municipal, or commercial use. *Id.* Thus, the culvert's transfer of water does not constitute a "discharge of a pollutant" and is therefore exempt from CWA permitting requirements.

C. The CWA's goals will not be furthered if Bonhomme is held liable for the pollutants entering Reedy Creek.

To achieve the CWA's broad goals, Congress enacted the NPDES program, 33 U.S.C. § 1342, whereby dischargers must obtain permits that limit "the type and quantity of pollutants that can be released into the Nation's waters." *Miccosukee*, 541 U.S. at 102. Because the program imposes obligations on individual dischargers to maintain water quality standards, *EPA v. Cal. ex rel. State Water Res. Ctrl. Bd.*, 426 U.S. 200, 205 (1976), a critical component of the permitting scheme is the requirement that dischargers reduce pollution. *Citizens Coal Council v. EPA*, 385 F.3d 969, 972 (6th Cir. 2004). Appropriate remedial measures include ceasing the polluting activity or adopting technologies aimed at improving water quality. *Id.* If complying with a particular water quality standard is "factually impossible," the discharger cannot be held liable for the pollutant. *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996).

Here, the arsenic originates in Maleau's waste piles. (R. 5). If Maleau complies with the effluent limitations at his point source three miles upstream from Bonhomme's culvert, nothing will remain for Bonhomme to regulate and the NPDES program will be ineffectual. Yet, if Bonhomme is held liable for the discharge, he will be obligated to obtain a permit and regulate

the arsenic at his culvert three miles downstream from the source—Maleau's waste piles. *Id.* The CWA's goals cannot be met if the arsenic in Ditch C-1 remains unregulated between the two properties. Moreover, Bonhomme cannot abate the arsenic by removing his culvert because the water from Ditch C-1 will still flow into Reedy Creek. *Id.* Bonhomme can reduce the arsenic only by adopting costly technology-based solutions to improve water quality, an undue burden that is more punitive to Bonhomme than it is restorative of the nation's waters. Accordingly, Bonhomme is not violating the CWA because his culvert is not a point source and does not discharge pollutants into navigable waters, and finding Bonhomme liable for the pollution will hinder the goals of the CWA.

CONCLUSION

This Court should hold that Bonhomme is entitled to bring this suit as a real party in interest and as a "citizen" under section 505 of the CWA, that Maleau's waste piles are point sources, that Ditch C-1 and Reedy Creek are navigable waters and waters of the United States, and that Bonhomme is not liable for the arsenic entering Reedy Creek. Accordingly, this Court should reverse the district court's decision to dismiss Bonhomme's suit.

Respectfully submitted,

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Counsel for Jacques Bonhomme