Team 30

C.A. No. 13-01234

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee

v.

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,
DEFENDANT-APPELLANT, CROSS-APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

<u>District Court Opinions</u>

JURISDICTIONAL STATEMENT

Defendant-Appellant Jacques Bonhomme filed a complaint in the United States District Court for the District of Progress pursuant to 33 U.S.C. §§ 1251-1387 (2012). On July 23, 2012, the district court granted the motion to dismiss in favor of Defendant, Shifty Maleau, for issues one through four and issue 6. The court dismissed in favor of Jacques Bonhomme on issue five. Bonhomme, challenges the rulings in favor of Maleau on appeal. The district court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Whether Jacques Bonhmme is the real party in interest under FRCP 17 to bring suit against Shifty Maleau for violating § 301(a) of the Clean Water Act, 33 U.S.C. § 1331(a).

2. Whether Bonhomme, a foreign national, is a "citizen" under Clean Water Act § 505, 33 U.S.C. § 1365, who may bring suit against Maleau.

3. Whether Maleau's mining waste piles are "point sources" under Clean Water Act § 502(12), (14), 33 U.S.C. § 1362(12), (14).

4. Whether Ditch C-1 is a "navigable water/ water of the United States" under Clean Water Act § 502(7), (12), 33 U.S.C. § 1362(7), (14).

5. Whether Reedy Creek is a "navigable water/ water of the United States" under Clean Water Act § 502(7), (12), 33 U.S.C. § 1362(7), (14).

6. Whether Bonhomme violated 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

A. Statement of Facts

Shifty Maleau operates a gold mining business located in Lincoln County in the State of Progress adjacent to the Buena Vista River, a navigable waterway. R. at 5, 7. Maleau trucks the overburden from the gold mining production to his property in Jefferson County, Progress, where he piles the slag adjacent to Ditch C-1. R. at 5. The piles are arranged in such a way that channels have eroded between intersections of the piles and between the piles intersections with Ditch C-1. R. at 5. Rainwater runoff flows down the piles and into the running water of Ditch C-1, carrying with it the pollutants from the piles. R. at 5. Arsenic is added to Ditch C-1 through these channels. R. at 5.

Ditch C-1 ("The Ditch") is a drainage ditch constructed in 1913 by an association of landowners. R. at 5. Current landowners are required to maintain the ditch due to a restrictive covenant in the deeds. R. at 5. The Ditch contains running water for most of the year and is only dry during annual droughts lasting from several weeks to three months. R. at 5. The Ditch is three feet across and one foot deep on average R. at 5 but will likely never be able to float a boat. R. at 9. From Maleau's property and the point of pollution, the Ditch runs three miles through several agricultural properties before it discharges into Reedy Creek through a culvert on Jacques Bonhomme's property. R. at 5.

Jacques Bonhomme maintains a hunting lodge located on a tract of land adjacent to Ditch C-1 on one side and Reedy Creek along another side. R. at 5. The hunting lodge sits on the property on the edge of a marsh near the point where the creek flows into the marsh. R. at 6. Reedy Creek is about 50 miles long and runs from the State of New

Union, through the State of Progress, and ends at Wildman Marsh. R. at 5. The creek serves as a water supply for a service station on I-250, a federally funded highway, and is also used for agricultural purposes. R. at 5. Wildman Marsh, the creek's endpoint, is an extensive wetland contained within the Wildman National Wildlife Refuge. R. at 6. The area is a major destination for interstate hunters from around the nation, and even foreign countries. R. at 6. Hunting activities in the wetlands generates $25 million for the local economy of Progress. R. at 6. Bonhomme uses his property adjacent to the creek to host hunting parties for social friends and business acquaintances. R. at 6. Typically, Bonhomme hosts these parties about eight times a year. R. at 6.

After becoming aware of the arsenic pollution, Bonhomme further investigated the cause through water testing. R. at 6. As the president and board member of Precious Metals International "PMI", Bonhomme enlisted the financial help of the corporation in conducting the tests. R. at 7. Bonhomme first tested the water both upstream and downstream of Maleau's property. R. at 6. He found that arsenic is undetectable upstream of the property, but arsenic is present in significant concentrations just downstream of the property. R. at 6. Bonhomme then tested the water in Reedy Creek upstream of where Ditch C-1 discharges and then downstream of the same point. R. at 6. Again, Bonhomme found that upstream of the discharge arsenic is not detectable, but just below the discharge point of Ditch C-1 arsenic is found in significant concentrations. R. at 6. This pattern of arsenic concentration strongly suggests that the arsenic in Reedy Creek and Ditch C-1 originated from Maleau's property. R. at 6. United States Fish and Wildlife Services have already found traces of arsenic in three Blue-winged Teal in the Wildman National Wildlife Refuge. R. at 6. Because the arsenic is fouling the waters of

Reedy Creek and Wildman Marsh, Bonhomme has decreased his hunting parties from eight a year to only two a year. R. at 6.

B. Course of Proceedings

Jacques Bonhomme filed a complaint against Shifty Maleau in the United States District Court for the Twelfth Circuit under the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012) under the jurisdiction of the citizen suit provision, CWA § 505, U.S.C. § 1365. R. at 4. After proper notice, the State of Progress filed a citizen suit against Bonhomme alleging a violation of the Clean Water Act ("CWA") by discharging the polluted water from his culvert into Reedy Creek. R. at 5. Maleau intervened as a matter of right in Progress's action under CWA § 505(b)(1)(B). R. at 5. Progress and Maleau moved to consolidate the cases because the law and facts are the same. R. at 5.

On July 23, 2012, the district court granted summary judgment in favor of Maleau on five of the six counts, holding that Bonhomme is not the real party in interest because he is a front for Precious Metals International R. 1; Bonhomme is not a "citizen" entitled to file a citizen suit under CWA § 505, 33 U.S.C. § 1365, because he is a foreign national R. at 1; Maleau's mining waste piles are not "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1365(12), (14), because piles are not conveyances R. at 1; Ditch C-1 is not a navigable water because it is a point source R. at 2; and Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert, a "point source". R. at 2. Bonhomme takes issue with each of these holdings. The district court also held that Reedy Creek is a water of the United States under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12). R. at 2. Maleau takes issue with this holding.

Following the issuance of the district court's order, Bonhomme, Maleau, and the State of Progress each filed a Notice of Appeal.

STANDARD OF REVIEW

This appeal was taken from the district court's grant of summary judgment. This Court reviews a district court's grant of summary judgment *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

SUMMARY OF THE ARGUMENT

The district court incorrectly granted the motion to dismiss in favor of Maleau on counts 1-4 and count 6. The district court correctly granted the motion to dismiss in favor of Bonhomme on issue 5. Specifically, the district court failed to recognize that Bonhomme was the proper plaintiff in this case because he meets the requirements of Article III standing. Precious Metals International would not be able to bring suit against Bonhomme because they are not the real party in interest under Federal Rule of Civil Procedure 17. The district court also failed to recognize that Bonhomme is a "citizen" for purposes of the CWA because the text of the statute does not prohibit foreign nationals from bringing suits. A broad interpretation of this term is favored in order to achieve the purpose of the Act.

Additionally, the district court was incorrect in finding that Maleau's slag piles are not point sources, because the court failed to recognize that the piles are discrete conveyances that fit the broad definition of "point source." The district court was also incorrect in determining that Ditch C-1 is not a navigable water/water of the United

States because the waterway retains a significant nexus to the navigable water of Reedy Creek. Ditch C-1 also retains a relatively permanent flow of water for most of the year, and qualifies as a navigable water under the plurality opinion in *Rapanos*. The district court correctly determined that Reedy Creek is a navigable water/water of the U.S. because it crosses state lines, and is therefore an interstate waterway.

Finally, the district court was incorrect in determining that Bonhomme was in violation of the Clean Water Act for allowing the water of Ditch C-1 to discharge into Reedy Creek via the culvert on his property. The district court did not recognize that the word "addition" as defined in EPA regulations does not include simple water transfers. Bonhomme's actions are a water transfer, and do not qualify as an addition.

ARGUMENT

I. AS THE PARTY IN INTEREST, BONHOMME HAS STANDING TO BRING SUIT AGAINST MALEAU FOR VIOLATING THE CLEAN WATER ACT.

A. Bonhomme is the real party in interest, so he has constitutional standing to bring suit against Maleau.

Federal Rule of Civil Procedure 17(a) states "An action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). "The real party in interest principle is a means to identify the person who possesses the right sought to be enforced." 6 Wright & Miller, Federal Practice & Procedure: Civil **§** 1542 (3d ed.) (citing "Real Party in Interest" **§** 1543). To allege that a plaintiff is a real party in interest, he or she must meet the requirements of standing in order to ensure he has a "concrete stake in the outcome." *Friends of the Earth v. Laidlow*, 528 U.S. 167, 170 (2000). To meet the requirements of standing, the plaintiff must allege facts sufficient to show he has suffered

an injury in fact, that the injury was the direct cause of the defendant's illegal conduct, and the injury could be redressed by a favorable ruling in the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If an "injury in fact" is shown, then the plaintiff is presumed to be a "real party in interest." 6 Wright & Miller, Federal Practice & Procedure: Civil § 1542 (3d ed.) (citing "Real Party in Interest" § 1543). When a defendant moves for dismissal of the claim under FRCP 12(b)(6), the plaintiff need only show that the facts alleged, if proven, would confer standing. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

1. Bonhomme has suffered an injury in fact.

Bonhomme has suffered an invasion of his legally protected interest, which is an injury in fact. For purposes of standing in environmental cases, the court does not look to the injury to the environment, but rather the personal injury to the plaintiff. *Laidlow*, 528 U.S. at 181 (2000). The Supreme Court has held that environmental plaintiffs adequately allege injury when they assert that they use the affected area, and the challenged illegal activity will decrease the "aesthetic and recreational values of the area." *Id*. at 183 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (5th Cir. 1980)). In *Laidlow* , defendant bought a hazardous waste incinerator facility and began dumping materials, including mercury, into the North Tyger River. *Id.* at 167. Plaintiffs submitted affidavits stating they were no longer able to use the area for fishing, camping, and swimming due to the hazardous discharges to show injury. *Id.* at 169. The Supreme Court found these allegations to be sufficient to constitute injury in fact. *Id.* at 183.

Similarly, in this case Bonhomme's recreational use of Wildman Marsh has been negatively impacted by the illegal activity of Maleau. Bonhomme's property fronts one

of the affected areas, Wildman Marsh. R. at 6. Bonhomme has generally used the property in the past for duck hunting activities with friends and business associates. R. at 6. However, Bonhomme has decreased his hunting activities from eight parties a year to two a year because of the increase in arsenic. R. at 6. The recreational value of Wildman Marsh has decreased, which constitutes an injury in fact to Bonhomme. The fact that Bonhomme once used the area, and has decreased his recreational use of that area, is enough to meet the threshold requirement of proving an injury in fact.

Even if this court finds that the injury suffered by Bonhomme is not a present "injury in fact," the threat of a future injury is enough to meet that qualification. The Supreme Court of the United States has consistently recognized that a threatened, future injury can satisfy standing requirements. *Friends of the Earth v. Gaston Copper Recycling Corp*., 204 F.3d 149, 160 (4th Cir. 2000). If the alleged illegal activity continues, it is possible that Bonhomme will be required to completely stop his hunting activities. There is also the threat of a decrease in the aesthetic value to Wildman Marsh if the alleged pollution causes irreversible damage to the plant and wildlife of the wetland. U.S. Fish and Wildlife Services has found evidence that arsenic is present in the wetlands. R. at 6. Traces of arsenic have been found in Blue-winged Teal located within the Refuge. R. at 6. Because Bonhomme's property is conveniently located near the marsh, a decrease in the wetlands recreational and aesthetic value may also result in a decrease of Bonhomme's property value. The current injury faced by Bonhomme coupled with the possibility of further future damage is enough to show injury in fact for purposes of standing.

2. <u>Maleau is the direct cause of Bonhomme's injury.</u>

Maleau's activity is the direct cause of Bonhomme's injury. Standing requires that the injury is fairly traceable to the challenged illegal activity and not the result of an independent action by some third party. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). In *Allen v. Wright*, parents sued the IRS for inadequately implementing federal laws denying tax benefits to racially discriminatory private schools. *Allen v. Wright*, 468 U.S. 737, 752 (1984). The plaintiffs claimed that failing to receive a fully integrated public school education injured their children. *Id*. at 756. The Supreme Court held that although the injury might be real, the IRS was not the cause of such injury because even if the laws were properly implemented, students might still attend private school. *Id.* at 758. The Court reasoned that the links in the chain of causation were far too weak to sustain standing. *Id.* at 759.

This case is distinguishable from the *Allen* case. If Maleau were to discontinue polluting Ditch C-1 with arsenic, Bonhomme would no longer suffer his injury of loss in recreational value. Bonhomme has decreased his use of Wildman Marsh due to the fact that arsenic is poisoning the wetland. Arsenic is listed as a known pollutant by the Environmental Protection Agency and can create a myriad of painful symptoms, ultimately leading to death. *United States v. Ottati & Goss, Inc*., 630 F.Supp 1361, 1383 (D.N.H. 1985) (citing 33 U.S.C. § 1317(a)). Consumption of arsenic can occur by drinking poisoned water but also through the process of bioaccumulation and ingestion of food. *See* Shubhankar Dam, *Green Laws for Better Health: The Past That Was and the Future That May Be - Reflections from the Indian Experience,* 16 Geo. Intl Envtl. L. Rev. 593 (2004). Poisoned water is absorbed by plant life, which is in turn eaten by animals, and when a human consumes those affected animals, he or she may be exposed to

arsenic. *See* Thomas Martin, *Great Lakes Water Quality Initiative*, Nat. Resources & Env't, Summer, at 15 (1999).

As the Supreme Court stated in *Laidlow* "…we see nothing improbable about the proposition that a company's continuous and pervasive illegal discharge of pollutants into a river would cause nearby residents to curtail their recreational use of the waterway and would subject them to other economic and aesthetic harms." *Laidlow* 528 U.S. at 739 (1972). In this case, Bonhomme is protecting himself and his hunting partners from possibly ingesting or consuming the contaminants. Bonhomme has limited his hunting parties from eight a year to only two parties a year. R. at 6. Maleau's pollution is the direct cause of Bonhomme's injury. Bonhomme has curtailed his use of the wetlands because of Maleau's arsenic pollution.

The decrease in Bonhomme's use of Wildman Marsh is not a result of the decline in the economy. Maleau argues that the hunting parties have been held to benefit Precious Metals International "PMI" and the decline in the economy, which is mirrored by PMI's declining profits, is the real reason the hunting parties have decreased. R. at 6. However, Maleau's argument doesn't consider the real purpose of the hunting parties. The hunting parties are held to benefit PMI in order to allow potential or current clients to socially interact with members of PMI's corporate structure, specifically Bonhomme, the company's president. Businesses often use parties such as this to benefit themselves by allowing clients to cultivate relationships with potential clients while enjoying the recreational benefits of local areas. Numerous business deals are created in social settings, and PMI would potentially hold even more hunting parties to secure business. However, the pollution caused by Maleau has left Bonhomme truly afraid of the

contamination. The decline in the economy has not caused Bonhomme's injury-in-fact, the cause comes directly from Maleau's pollution. But for Maleau's pollution, Bonhomme would still be able to conduct his hunting parties.

3. Bonhomme's injury could be redressed by this court.

Bonhomme's injury would be redressed with a favorable decision by this court. The standard required by courts when considering redressability is one of likelihood. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)(stating that it must be "likely", as opposed to "merely speculative" that the injury will be redressed by a favorable decision.) *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561. If the Court requires Maleau to discontinue his arsenic pollution and apply for a permit with the EPA, the permit will likely be denied. As mentioned, arsenic is a listed pollutant by the EPA, and is prohibited from being discharged into waterways. *United States v. Ottati & Goss, Inc.*, 630 F.Supp 1361, 1383 (D.N.H. 1985) (citing 33 U.S.C. § 1317(a)). Maleau will then be required to discontinue his pollution completely, and the Wildman Marsh wetland system will hopefully return to its pre-pollution state. Then Bonhomme will be able to resume his hunting activity at pre-pollution levels because he will no longer fear being poisoned. A favorable ruling will give Bonhomme redress for his injury. By meeting all three of the requirements, it is clear that Bonhomme has standing to bring this suit and is the real party in interest

B. PMI cannot be the real party in interest because the corporation does not have standing to sue on their own behalf, nor does PMI have standing to sue as an organization on behalf of Bonhomme.

PMI does not have standing to bring a citizen suit against Maleau for violating the Clean Water Act because the company fails to meet the standing requirements, and

therefore Maleau is incorrect to suggest that PMI is the real party in interest. To sue in its own right, the plaintiff association must demonstrate that it has suffered injury in fact, including such concrete and demonstrable injury to its activities, with a consequent drain on its resources, constituting more than simply a setback to its abstract social interests. *Natl Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir.1995) In this case, PMI has not suffered an injury in fact. Nor can PMI show that there has been a drain on its resources. Nothing in the record suggests that PMI has been substantially injured by the fact that Bonhomme has decreased his hunting parties from eight a year to only two a year. Although this constitutes an injury in fact to Bonhomme, for PMI this would merely be a "setback to its abstract social interest" of entertaining clients for a possible future investment.

PMI does not have standing to bring a suit on behalf of Bonhomme. An association has standing to bring suit on behalf of a members when: its members would otherwise have standing in their own right, the interests it seeks to protect are germane to the organizations purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the law suit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Although the first and third requirements are met in this case, PMI would not have standing based on the second requirement.

If PMI were to bring this suit, it would fail the second requirement because the interests being protected in this suit are not germane to the organization's purpose. PMI would need to show that the lawsuit bears a reasonable connection to the companies' knowledge and experience. *Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev. Inc.*, 448 F.2d 138, 149 (2d Cir. 2006). "A business corporation is organized and carried

on primarily for the profit of the stockholder", and such is the circumstance of PMI in this case. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919). As a mining corporation, the goal of PMI is to successfully remain in the market for mineral extraction. The process of mining is somewhat hazardous to the environment by nature and can be damaging even if practiced well within standards for government compliance. Although the record does not reflect the policies of PMI in regard to environmental protection, it is clear that the goal of PMI is not to protect natural resources that are not directly connected to PMI's business practices. Such goals are left to environmental organizations and likely not fulfilled by for profit corporations focused on revenue, such as PMI. The interests at issue in this case are not directly pertinent to the goal of PMI.

Bonhomme, as the real party in interest in this case, has standing to bring this suit because he has suffered an injury directly caused by Maleau's illegal activity. Bonhomme could be granted redress by a favorable ruling from this court. PMI is not the real party in interest, and does not have standing to bring this suit because protecting the waters of Wildman Marsh and Reedy Creek are not germane to the orgnization's purpose.

II. BONHOMME, A FOREIGN NATIONAL, IS A "CITIZEN" UNDER THE CLEAN WATER ACT FOR PURPOSES OF BRINGING A "CITIZEN SUIT" BECAUSE THIS INTERPRETATION IS CONSISTENT WITH LEGISLATIVE INTENT AND PUBLIC POLICY.

Although a foreign national, Bonhomme is a "citizen" for purposes of bringing a citizen suit under the CWA. A citizen is defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365. This definition is further elaborated on in 33 U.S.C. § 1362(5) by defining person to mean, "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state or interstate body". 33 U.S.C. § 1362(5). Bonhomme falls within

this definition because he is an individual - a person- who has an interest that is adversely affected. The definition does not call attention to the actual nation of citizenship of an individual and is therefore irrelevant. The sole question to consider is whether the individual has an adversely-affected interest, which is present here. This broad interpretation is supported by the legislative history of this provision:

> Section 505 establishes citizen participation in the enforcement of control requirements and regulations created in the act. *Anyone* may initiate a civil suit against any person who is alleged to be in violation of an effluent limitation…*anyone* may initiate a civil suit against the Administrator for failure to perform a non-discretionary act.

S. Conf. Rep. 92-1236 (emphasis added).

Congress interpreted this section broadly to encourage participation in enforcing the action. *See* 33 U.S.C § 1251 (Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged). If Congress had intended to limit citizen suits to only United States citizens, it would have included that specific limitation in the Act's language, or that limitation would be reflected in the legislative history.

This Court should defer to Congress when interpreting the language of Clean Water Act § 505, 33 U.S.C. § 1365. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc.*, 467 U.S. 837, 842-843 (1984). The legislative history shows that Congress intended for the term "citizen" to be broadly interpreted to encompass people other than United States citizens. Furthermore, the definitions of a "citizen" and "person" adopted in the

legislation demonstrate unambiguously that anyone may bring a citizen suit under the CWA regardless of their country of citizenship.

As a matter of public policy, a broad interpretation of the CWA that includes allowing foreign nationals to bring suit under the act should be favored. By defining citizen to encompass foreign nationals, the government is supporting a commitment to fairness and "enabling private parties to assist in enforcement efforts where the Federal and State authorities appear unwilling to act." *N. & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991). Interpreting the term "citizen" narrowly to mean only a United States citizen would go directly against the purpose of the Act and render a large population of people completely powerless to protect their interest by filing suit. If this court chooses to use Maleau's narrow interpretation of "citizen," it would be setting a precedent barring future claimants from bringing a claim and gaining redress, no matter how serious or extensive their injury. The goal of the judicial system is to allow people who suffer a wrong to gain redress, regardless of citizenship, and this applies to private landowners like Bonhomme.

Maleau's argument for a more narrow interpretation of the term "citizen" is misguided because it attempts to extend a bright line rule of narrow interpretation to the entire Clean Water Act simply because one particular phrase has been interpreted narrowly in the past. Maleau cites *SWANCC v. U.S. Army Corps of Engineers*, in which the court held that by defining the narrow phrase "navigable waters as the arguable broader concept of waters of the United States, Congress did not deprive the term navigable of all meaning." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 167 (2001).

Although this is true, the term "navigable waters" is distinguishable from "citizen." Interpreting the word "navigable" affects the substance of the claim, and determines whether a waterway is covered under the Clean Water Act. The term "citizen" affects the procedures of the Act by determining who can bring a claim in the first place. A narrow interpretation of a procedural word undercuts the purpose of the Act, which is already limited by narrow substantive interpretations. A narrow interpretation of a procedural word undercuts the purpose of the Act, which "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C §1251. Limiting the definition of who can bring a citizen suit would impede the central purpose behind the Clean Water Act, which is to protect our waters against the discharge of harmful pollutants.

III. MALEAU'S MINING WASTE PILES ARE POINT SOURCES UNDER THE CLEAN WATER ACT BECAUSE THEY ARE DISCRETE CONVEYANCES WHICH WERE INITIALLY COLLECTED BY MALEAU AND HAVE ALTERED THE FLOW OF WATER.

Maleau's mining waste piles are "point sources" under the Clean Water Act. The CWA defines a point source as a "discernible, confined and discrete conveyance". 33 U.S.C. § 1362(14). Although the EPA does not list piles as "point sources," the Fifth Circuit has reasoned that a discharge into a navigable water due to the flow of gravity may be a point source discharge if the party initially collected or channeled the water and other materials. *Sierra Club v. Abston Co. Inc.* 620 F.2d (5th Cir. 1980). Point sources may arise unintentionally, but a party is liable "so long as the conveyances are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* at 45. In *Abston*, the defendant miners created spoil piles that eroded because of rainwater runoff. *Id.* at 43. The runoff carried pollutants to adjacent streams

causing deposits of silt and acid to build up. *Id*. The court held that the piles were point sources because the mining company initially collected the materials, and they had made an effort to change the surface and direct water flow. *Id.* at 45.

The facts in this case are similar. Maleau relocates the spoils from his mining operation and disposed of them on his land adjacent to Ditch C-1. R. at 5. The piles are arranged in such a way that channels have eroded between intersections of the piles and between the piles intersections with Ditch C-1. R. at 5. Arsenic is added to Ditch C-1 through these channels. R. at 5. Although Maleau may not have intended for the piles to become point sources, these conveyances have become the source of pollutants, which are ultimately deposited into Ditch C-1, Reedy Creek, and Wildman Marsh.

Defining "point source" to include Maleau's slag piles is consistent with the text and purpose of the Act. The Clean Water Act defines point source as a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The Act then lists examples of point sources, but specifically states these examples are not limited to those listed. 33 U.S.C. § 1362(14). This language reflects the idea that Congress left "point source" open to including more than just typical conveyances. With the general purpose of the CWA in mind, the concept of a point source was designed to embrace the broadest possible definition of any identifiable conveyance from which pollutants might enter covered waters. *United States v. Earth Science, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). A broad definition of point source includes the piles on Maleau's property because they are a type of discernible, confined and discrete conveyance.

Furthermore, Maleau's slag piles more closely resemble the definition of a "point source" than the definition of a "non-point source". "Designation as "nonpoint source" of

pollution under Clean Water Act is limited to uncollected runoff water which is difficult to ascribe to single polluter." *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168 (D. Mont. 1995). These piles are also distinguishable from the runoff dealt with by the court *Appalachian Power Co. v. Train*, a case that Maleau relies on, which dealt with "unchanneled and uncollected surface waters" coming from a construction storage facility that were not considered a "point source." *Appalachian Power Co. v. Train* , 545 F.2d 1351 (4th Cir. 1976). Maleau's reliance on *Consolidation Coal Co. v. Costle,* 604 F.2d 239 (4th Cir. 1979) is also unavailing as that case was overturned in a subsequent Supreme Court decision. *See EPA v. Natl Crushed Stone Ass'n,* 449 U.S. 64, (1980).

In this case, it is easy to identify Maleau as the polluter as noted by the district court. A non-point source is limited to uncollected runoff, and as described above, the runoff in this case has been collected in the channels arising from erosion. Maleau has actively created the piles, and gravity flow of rainwater has eroded channels between the piles allowing for the arsenic discharge. Runoff coming from another facility, such as a construction storage facility, would be more difficult to test, control, and remedy due to the heterogeneous mixture of stored items. Maleau's slag piles are defined and discrete, easily tested, and identifiable as the source of arsenic pollution. Therefore, Maleau's pollution does not fit into the definition of a non-point source.

Therefore, this court should find that Maleau's piles are in fact a "point source" of the arsenic pollution. Maleau initially collected the materials and arranged the piles in a way to channel water flow. Arsenic flows into Ditch C-1 from this point source. This court's interpretation of the term "point source" to include the piles would be consistent with Congress's intent to allow the CWA to cover atypical conveyances. The piles

created by Maleau are discrete and confined conveyances, and this court should find that they are in fact "point sources" of the arsenic pollution.

IV. DITCH C-1 IS A NAVIGABLE WATER/WATER OF THE U.S. UNDER THE CLEAN WATER ACT BECAUSE IT MEETS THE REQUIRMENTS OF A TRIBUTARY UNDER *RAPANOS.*

Ditch C-1 is a navigable water/ water of the U.S as a tributary to Reedy Creek, a navigable water. The standard for what constitutes a navigable water has been deemed unclear because the Supreme Court majority could not agree on an applicable test. *U.S. v. Hamilton* 2013 WL 3326734, 3 (D. Wyoming 2013). The effect of that outcome is four justices reading a restrictive view, four justices reading a less restrictive view, with Justice Kennedy serving as the swing vote. *In Re Adams,* CWA-10-2004-0156, 2006 WL 3406321 (E.P.A. Oct. 18, 2006). The opinion in *Rapanos* demonstrates that ditches and drains can constitute waters of the U.S. *Hamilton,* 2013 WL 3326734 at 5. The plurality specifically instructed the lower court on remand to determine if ditches and drains were waters in the ordinary sense of containing a relatively permanent flow. *Id.* citing *Rapanos* at 757.

A. Ditch C-1 is a water of the United States because it possesses a significant nexus to waters that are or were navigable.

Justice Kennedy's test requires that a water of the United States be one which possesses a significant nexus to waters that are or were navigable in fact or that could reasonably be made so. *Rapanos v. United States*, 547 U.S. 715, 759 (2006). A significant nexus means that a water may be understood as "navigable" if the waterway or wetland either alone, or in combination with similarly situated land in the region, significantly affects the chemical, physical, and biological integrity of other navigable

waters covered by the CWA. *Id.* at 780. Applying this test, Ditch C-1 falls within the definition of a navigable water. The water from Ditch C-1 flows directly into Reedy Creek through a culvert located on Bonhomme's property. The surface water between the two waterways is unbroken, and they are directly connected. Arsenic is detectable in Ditch C-1 and Reedy Creek below the discharge points, establishing the fact that the two bodies of water are chemically, physically, and biologically connected. Under the significant nexus test, Ditch C-1 is a navigable water as a tributary to Reedy Creek.

As a matter of public policy, this court should apply the significant nexus test because it is better suited to accomplish the objective of the CWA. Justice Kennedy's test takes into consideration the impact that small streams and intermittent waters may have on traditionally navigable waterways. The significant nexus test prevents an overreaching interpretation of the CWA but takes into account the public interest in protecting wetlands and aquatic life. Therefore, this court should apply the significant nexus test and find that Ditch C-1 is a navigable water.

B. Alternatively, Ditch C-1 still qualifies as navigable water because it is a relatively permanent, flowing body of water connected to traditional interstate navigable water

Ditch C-1 still qualifies as a navigable water under the most restrictive standard promulgated by Justice Scalia in *Rapanos*. Under that test, a tributary is covered under the CWA only if it is a relatively permanent, flowing body of water connected to traditional interstate navigable water. *Id*. This test does not necessarily "exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" *Id.* at 732. But rather, the CWA would not include channels through which water flows "intermittently or ephemerally" or channels providing drainage for rainfall events. *Id.* at

739. Ditch C-1 is a water of the U.S. under this test because it is a relatively permanent, flowing body of water connected to Reedy Creek, a traditional navigable water. The ditch has contained flowing water since its construction in 1913 and a restrictive covenant in the deeds of the property held by the landowners requires the ditch to be maintained as such (R. 5). Ditch C-1 contains running water throughout the year and on a permanent basis except for annual periods of drought. As pointed out by Justice Scalia in the plurality opinion, periods of drought do not exclude Ditch C-1 from being deemed a water of the U.S. Ditch C-1 qualifies as a navigable water/water of the U.S. under both the significant nexus test and Justice Scalia's "relative permanence" test.

Maleau argues that Ditch C-1 is not a navigable water because it has never floated a boat and is too small to do so in the future. R. at 9. However, the Supreme Court stated in *United States v. Riverside Bayview Homes, Inc*. that the term "navigable" is of limited importance, and Congress had intended the CWA to "regulate at least some waters that would not be deemed navigable under the classical understanding of the term". *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Navigability in fact is not required in order for a water to be covered under the CWA, but rather the effect on water quality of adjacent rivers, lakes, and streams.

Maleau also argues that because ditches are listed as point sources in the CWA, a ditch cannot simultaneously be two elements in a water pollution offense. However, the plurality opinion in *Rapanos* established that the terms "navigable waters" and "point sources" do sometimes overlap. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Enigneers*, 699 F.Supp.2d 209 (D.D.C. 2010), *vacated* 663 F.3d 470 (D.C. Cir. 2011) citing *Rapanos* at 735. The Supreme Court in *Rapanos* noted that usually, ditches are not

navigable, and most of the time the classifications of a "point source" and "navigable water" do not overlap. However, the Court actively chose not to declare that a point source could never be a navigable water under the CWA. *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Enigneers*, 699 F.Supp.2d 209 (D.D.C. 2010) *vacated* 663 F.3d 470 (D.C. Cir. 2011). There is nothing in the CWA nor in any controlling precedent that states that a point source cannot be a water of the United States.

Maleau advocates for this Court to adopt a bright line rule that ditches may never be navigable waters. However the CWA itself supports an opposite conclusion. The Act lists examples of what may constitute a point source, and this list includes "any channel from which pollutants may be discharged". 33 U.S.C. § 1362(14). A channel is defined as "a bed where a natural stream of water runs", and "the deeper part of a river, harbor, or strait." Merriam Webster's Collegiate Dictionary 206 (11th ed. 2003). Therefore, a channel may be a point source and a navigable water in different cases or at the same time.

Ditch C-1 is a navigable water because it has a significant nexus to the navigable waterway Reedy Creek. This court should apply the significant nexus test because it is better suited to accomplish the objective of the CWA. Alternatively, Ditch C-1 qualifies as a navigable water because it is a relatively permanent flowing waterway connected to an interstate water. Therefore, this court should find that Ditch C-1 is a navigable waterway as a tributary to Reedy Creek.

V. REEDY CREEK IS A NAVIGABLE WATER/WATER OF THE UNITED STATES UNDER CLEAN WATER ACT BECAUSE IT IS AN INTERSTATE WATERWAY AND HAS A SIGNIFICANT NEXUS TO WILDMAN MARSH, A COVERED WATER.

A. Reedy Creek is a navigable water because it affects interstate commerce and crosses state lines.

Reedy Creek is a navigable water/water of United States under the Clean Water Act. A waterway is subject to CWA jurisdiction if it is "currently used, or was in the past, or may be susceptible to use in interstate of foreign commerce" or if the waterway is an "interstate water." *See, e.g.*, 33 C.F.R. § 328.3(a)(1)(2); 40 C.F.R. § 230.3(s)(1)(2); 40 C.F.R. § 122.2 (a)(b). Reedy Creek is used in interstate commerce as a water supply for a service station on the federally funded highway I-250. R. at 5. The service station sells gasoline and food to travelers who may be moving from state to state. R. at 5. Therefore, Reedy Creek is currently used in interstate commerce, and falls within the jurisdiction of the CWA as a navigable water/water of the United States.

Maleau argues that in order for Reedy Creek to be considered a navigable water, it must fall within the first prong of *Lopez* as a "channel of interstate commerce." *United States. v. Lopez,* 514 U.S. 549, 558 (1995). The plurality in *Rapanos* was concerned with the overreaching jurisdiction of the CWA because the Army Corps of Engineers interpreted it to include nearly every type of water body. Although the Supreme Court did place a limit on what could be "a navigable" water, the Court did not place as narrow of a restriction on this definition as Maleau suggests. In essence, Maleau claims that in order for Reedy Creek to be deemed as "navigable", it must be an actual highway of interstate commerce, as opposed to merely effecting interstate commerce. This argument goes directly against the precedent of the *Rapanos* plurality.

To satisfy the first prong of *Lopez*, the waterway must necessarily be used in the transportation of goods or instruments of commerce. However, this would require that a waterway be "navigable in fact" in order to fall under the jurisdiction of the CWA.

Justice Scalia stated in the *Rapanos* opinion, "this provision shows that the Act's term 'navigable waters' includes something more than traditional navigable waters. We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term." *Rapanos v. United States*, 547 U.S. 715, 731 (2006). Thus, Maleau is attempting to limit the reach of the CWA further than is permissible even under the most restrictive view of navigability under the Supreme Court plurality standard. This Court should not be distracted by mere distinctions upon definitions of a word from the core purpose of the CWA to protect our nations water. The fact remains that the CWA, which the plurality in *Rapanos* still viewed as expansive, does not allow our important waterways to be negatively impacted.

Reedy Creek is an interstate water, and therefore is a navigable water/water of the U.S. Interstate waterways include all "rivers, lakes, and other waters that flow across, or form a part of, State boundaries." 33 C.F.R. § 328.3(a)(1)(2). This requirement is separate from the issue of whether or not the waterway is a channel of interstate commerce. The 50 mile long creek begins in the state of New Union, flows through the state of Progress, and ends in Wildman Marsh. R. at 5. The waterway clearly crosses state lines, and is therefore considered a water of the U.S.

B. Reedy Creek has a significant nexus to Wildman Marsh, a navigable water/water of the U.S.

Reedy Creek has a significant nexus to Wildman Marsh, a water of the U.S., and therefore, Reedy Creek would be deemed a navigable water. A waterway is subject to CWA jurisdiction if it is "currently used, or was in the past, or may be susceptible to use in interstate or foreign commerce" *See, e.g.*, 33 C.F.R. § 328.3(a)(1)(2); 40 C.F.R. § 230.3(s)(1)(2); 40 C.F.R. § 122.2 (a)(b). Wildman Marsh is located within the Wildman

National Wildlife Refuge, a federally maintained property. R. at 6. It attracts hunters from five neighboring states, as well as foreign countries. R. at 6. These hunters are traveling interstate, purchasing goods, and substantially impacting commerce. The state of Progress has brought over $25 million into the local economy from these interstate hunters. R. at 6. A change in activity in Wildman Marsh would have a substantial impact on the economy of Progress. In sum, Wildman Marsh is a navigable water/water of the United States because it is currently used in interstate commerce.

Furthermore, classifying Wildman Marsh as a water of the U.S. is true to the plain meaning of the statute. The Wildman Marsh National Wildlife Refuge is owned and maintained by the United States Fish and Wildlife Service. R. at 6. Nationally protected wetland areas would fall within the scope of the Clean Water Act. It would make little sense to protect our nation's waters without preventing the pollution of waterways that flow into those areas. Wildman Marsh is subject to substantial water pollution if it were not within the jurisdiction of the CWA.

Reedy Creek has a significant nexus to Wildman Marsh, and would therefore be considered a navigable water/water of the United States. In Justice Kennedy's *Rapanos* opinion, he concluded when tributaries' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory terms "navigable waters" under the Clean Water Act (CWA). *Rapanos* 547 U.S. at 780. The Creek flows directly into the marsh and the two areas merge as one wetland. R. at 6. The two are hydrologically and chemically connected. The effects of Reedy Creek's water quality on Wildman Marsh are not speculative in this case. For example, U.S. Fish and Wildlife Service has already detected arsenic in three blue-winged teal in Wildman

Marsh. R. at 6. The evidence reflects the fact that Reedy Creek is significantly connected to the marsh.

As a matter of public policy, deeming Reedy Creek a navigable water/water of the U.S. furthers the purpose of the Clean Water Act to prevent pollution of the nation's waterways, and hold polluters like Maleau accountable for their actions. Maleau purposely moves his overburden piles from his gold mining operation adjacent to the navigable Buena Vista River in order to avoid applying for a permit. R. at 7. If this court decides that Reedy Creek is not a navigable water, Maleau and other polluters will have found a way around the CWA, and will continue discharging poisons into an important waterway with potentially devastating affects.

This court should find that Reedy Creek is a navigable water/water of the United States. Reedy Creek is an interstate waterway, and serves as a water source for purposes of interstate commerce. Under the CWA, Reedy Creek falls within the Act's jurisdiction. Alternatively, Reedy Creek has a significant nexus to Wildman Marsh, a water covered by the CWA. Reedy Creek could be considered a tributary to Wildman Marsh because the two are hydrologically, biologically, and chemically connected. Classifying Reedy Creek as a navigable water is consistent with public policy and the purpose of the CWA. Therefore, this court should find tat Reedy Creek is a navigable water.

VI. BONHOMME DOES NOT VIOLATE THE CLEAN WATER ACT BY TRANSFERRING ARSENIC POISONED WATER INTO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY, BECAUSE HE DOES NOT INITIALLY ADD THE POLLUTANT TO THE WATER.

A. Bonhomme does not violate the Clean Water Act because he does not "add" anything to the waters of Ditch C-1.

Bonhomme does not violate the Clean Water Act by allowing the polluted waters to enter Reedy Creek through the culvert on his property. The Clean Water Act requires a permit for the "discharge of any pollutant" into covered waters. 33 U.S.C. § 1362(12). The term discharge is defined as "any addition of any pollutant to navigable waters from any point source". *Id.* The term "addition" is not defined in the CWA and has been a source of controversy in the circuit courts. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009). However, in 2008 the EPA adopted a regulation to clarify what constitutes an "addition" into a navigable water. *Id.* at 1219. The regulation clarifies that:

> Water transfers are not subject to regulation under the [CWA] permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.

73 Fed. Reg. 33,697, 33,697 (June 13, 2008).

Therefore, it is not an "addition to navigable waters" to move existing pollutants from one water to another. *Friends of the Everglades* 570 F.3d at 1217. Bonhomme does not subject the water of Ditch C-1 to any industrial, municipal, or commercial use. He does not "add" anything to the water that moves into Reedy Creek. The polluted water flows from Maleau's property, uninterrupted, through Bonhomme's culvert, into Reedy Creek. Because there is no "addition" by Bonhomme, he has not violated the Clean Water Act.

B. The EPA's regulation and interpretation of "addition" is entitled to *Chevron* deference.

This Court should defer to the EPA's interpretation of "addition" because this regulation is entitled to *Chevron* deference. *Id*. at 1219. A court will typically defer to an agency's regulation if it is "a reasonable construction of an ambiguous statute."

Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 842 (1984). The first step is to interpret the guiding statute to determine whether Congress has the specific intent on this question. *Id.* at 843. If the intent of Congress is clear, then there is no ambiguity, and the court will not defer to the agency. *Id.* The CWA prohibits "addition" into a covered waterway. This language does not allow for a clear interpretation. Addition could mean simply adding a pollutant into a waterway once, and allowing the water to naturally wash downstream. Under this interpretation, there would only be one initial addition, and if the waterway eventually enters another covered water, there would be no new "addition."

However the term could be interpreted to mean the "addition" of a pollutant into each distinct and separate covered water. If interpreted this way, a pollutant is added at its initial point source, but then is added to a new body of water at the point the two waterways meet, allowing for multiple sites of "addition." Because the statute could reasonably be interpreted either way, it qualifies as ambiguous. The very existence of two competing interpretations of "addition" is the very definition of ambiguity. *Friends of the Everglades*, 570 F.3d at 1227 (citing *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004)). The specific intent of Congress as to what "addition" means is not clear, so the court should proceed to the next step of the *Chevron* analysis.

The court must determine whether the EPA's interpretation of "addition" to exclude "water transfers" is a reasonable construction. *Chevron* 467 U.S. at 843. To consider connected covered waters as one unitary body is reasonable. The Supreme Court explained this reasonable construction stating "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything

else to the pot". *S. Fla. Water Mgmt. Dist. V. Miccosukee Tribe*, 541 U.S. 95 at 110. (2004) (citing *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001), *adhered to on reconsideration*, 451 F.3d 77 (2d Cir. 2006)). The EPA has reasonably interpreted "addition". *Friends of the Everglades* 570 F.3d at 1228 ("Because the EPA's construction is one of the two readings we have found as reasonable we cannot say it is "arbitrary, capricious, or manifestly contrary to the statute.") Both steps of the *Chevron* analysis have been met, and therefore this court should defer to the agencies interpretation as listed in the 2008 regulation. By simply transferring the water from Ditch C-1, through the culvert, into Reedy Creek, Bonhomme does not violate the Clean Water Act because he has not added anything to water.

C. Maleau violates the Clean Water Act because his behavior constitutes an "addition" into covered waters.

Maleau violates the CWA by "adding" the arsenic pollution to Ditch C-1. Ditch C-1 is a navigable water, and Maleau adds the pollution, via a point source, to the waterway. This is a clear violation of the CWA, and Maleau's action qualifies as an "addition" to a covered water. But, even if this Court finds that Ditch C-1 is not a navigable water, Maleau would still be held responsible for the point source arsenic pollution. The plurality opinion in *Rapanos* directly addressed this issue by stating that the "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." *Rapanos* 547 U.S. at 743 (emphasis added). Lower courts have held that there is a violation when there is a discharge of a pollutant into intermittent channels, which naturally wash downstream into covered waters. This is true even if the polluted water must pass through conveyances in between. *Garland v. Central Valley Regional Water Quality Control Bd.,*

210 Cal.App. 4th 557 (2012), citing *United States v. Velsicol Chemical Corp.,* 438 F.Supp. 945 (W.D.Tenn. 1976). Maleau's discharge of arsenic into Ditch C-1 is a violation of the CWA, whether or not the Ditch is a navigable water. The arsenic-polluted water travels through the ditch, through Bonhomme's culvert, and into the navigable waters of Reedy Creek.

Although the water passes through the culvert on Bonhomme's property, the *Rapanos* opinion does not foreclose the Act from applying to waters passing through man made conveyances. *Garland v. Cent. Valley Reg'l Water Quality Control Bd.,* 210 Cal.App. 4th 557 (2012). The water must simply "naturally wash downstream". *Rapanos* 547 U.S. at 743. Here, the connection between Ditch C-1 and Reedy Creek is subject to the natural flow of the two waterways.

Furthermore, even if this Court finds that neither Ditch C-1 nor Reedy Creek are navigable waters, Maleau would still be violating the CWA and Bonhomme would not be in violation. Applying the same *Rapanos* standard stated above, the arsenic-polluted water naturally washes downstream from Ditch C-1 into Reedy Creek, and then into Wildman Marsh, a water of the United States. The pollution passes through these intermittent channels and eventually enters covered waters.

As a matter of public policy, it is appropriate to hold Maleau liable for this pollution, and not Bonhomme, because this Court would be transforming the Clean Water Act into a statute of affirmative actions instead of requiring restraint from the initial actor. The purpose of the Clean Water Act is to protect the waters of the United States. Holding polluters accountable for their actions is the appropriate method to accomplish this goal. In this case, Bonhomme has acted within the requirements of the Clean Water

Act by not polluting Ditch C-1 or Reedy Creek. If this Court holds Bonhomme liable for the actions of Maleau, citizens similar to Bonhomme will now be required to affirmatively prevent the pollution of their neighbors by modifying their own property. This will place economic strain on citizens and corporations alike who live near a careless citizen like Maleau. Such a holding from this Court would open up the door to endless litigation and disputes between neighbors. Therefore, Bonhomme should not be held responsible for the pollution caused by Maleau.

This court should find that Bonhomme's water transfer does not violate the CWA. Congress left the definition of the term "addition" ambiguous, and therefore *Chevron* deference is appropriate. The EPA has specifically stated that water transfers, like Bonhomme's, do not constitute an "addition" into navigable waters. This interpretation is reasonable, and this court should defer to the agency. Maleau is in violation of the CWA because his behavior constitutes an "addition." Therefore, this court should find that Bonhomme's transfer of water does not violate the CWA, and Maleau's addition into Ditch C-1 does violate the CWA.

CONCLUSION

This Court should hold that Bonhomme is the real party in interest in this case because Bonhomme has standing, and that he is a "citizen" for purposes of bringing a "citizen suit" because the CWA does not prevent foreign nationals from acting. This Court should also hold that Maleau's piles are point sources because they are identifiable discrete conveyances. This Court should hold that Ditch C-1 and Reedy Creek are navigable waters/waters of the United States because each has a "significant nexus" to a covered water, and Reedy Creek is an interstate waterway. Finally, this Court should hold

that Bonhomme has not violated the Clean Water Act because the EPA's definition of "addition" is due *Chevron* deference and under this interpretation Bonhomme did not "add" any pollutants to Reedy Creek. Therefore, we respectfully request that the Court reverse the district courts grant of the motion to dismiss on counts one through four and six, and affirm the motion to dismiss on count five.

Respectfully submitted,

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Counsel for Jacques Bonhomme