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
Civ. No. 155-2012; 165-2012

BRIEF FOR SHIFTY MALEAU

Intervenor-Plaintiff-Appellant, Cross-Appellee

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STATEMENT OF JURISDICTION

This case involves an appeal following the issuance of an Order from the United States District Court for Progress in which Shifty Maleau ("Maleau") prevailed on five of six issues. (R. at 1.) The district court had proper subject matter jurisdiction to hear the case under the Clean Water Act ("the CWA" or "the Act"), 33 U.S.C. §§ 1251-1387 (2012). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision issued by the United States District Court for the District of Progress pursuant to 28 U.S.C §1291 (2012).

STATEMENT OF THE ISSUES

I. Whether Jacques Bonhomme ("Bonhomme") is the real party in interest under Rule 17 of the Federal Rules of Civil Procedure to bring a citizen suit against Maleau for violating § 301(a) of the CWA when the arsenic pollution only directly affects Precious Metals International?

II. Whether the term "citizen," found in the citizen suit provision of the CWA, be construed so expansively as to permit Bonhomme, a foreign national, from initiating a lawsuit against Maleau?

III. Whether piles of mining overburden and slag, which were situated near an agriculture ditch, are "point sources" under the CWA § 502(12) (14) even when the piles neither collected nor channeled polluted water?

IV. Whether Ditch C-1, which is on average three feet wide and one foot deep, is a "navigable water/water of the United States" under CWA Section 502(7),(12) when it only intermittently flows for no more than nine months?

V. Whether Reedy Creek, a waterway that does not impact interstate commerce can be a navigable water under the CWA when it flows into a non-navigable wetland?

VI. Whether Bonhomme can escape culpability for discharging arsenic into Reedy Creek from a culvert on his property, despite the CWA's lack of a causation requirement?

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of Progress dismissing Bonhomme's CWA Citizen Suit. Bonhomme brought a civil action under the Clean Water Act's Citizen Suit provision, 33 U.S.C. §1365 (2012), seeking civil penalties and injunctive relief requiring Maleau to obtain a § 402 permit or cease placing mining burden near Ditch C-1. (R. at 4) Following the initiation of Bonhomme's citizen suit against Maleau, the State of Progress ("Progress") initiated a CWA Citizen Suit against Bonhomme for discharging arsenic through a culvert under his farm road into Reedy Creek, which Progress claims is a navigable water under the CWA. (R. at 5). Subsequently, Maleau intervened in Progress' action against Bonhomme pursuant to CWA § 505(b)(1)(B), 33 U.S.C. 1365 (2012), and following Maleau's intervention Maleau and Progress moved to consolidate the two cases because the facts and the law are identical. (R. at 5).

On July 23, 2012, the district court held that (1) Bonhomme is not the real party in interest, (2) Bonhomme is not a "citizen" as defined by § 505(g) of the CWA, (3) that the overburden and slag piles are not "point sources", (4) that Ditch C-1 is not a navigable water, (5) that Reedy Creek is a navigable water, and (6) Bonhomme is liable for discharging arsenic into Reedy Creek through a culvert under his farm without a permit. (R. at 1-2).

At the conclusion of the case, all three parties filed an appeal. (R. at 1). Maleau only appeals the district court's ruling that the Reedy Creek is a navigable water under CWA § 502(7)(12). (R. at 7). And Progress only challenges the district court's ruling that Ditch C-1 does not constitute a water of the United States under the CWA § 502(7)(12). (R. at 7). Whereas Bonhomme challenges five of the six rulings by the district court, the only ruling not challenged

by Bonhomme is with regards to the Reedy Creek ("the Creek") being a navigable water. (R. at 7).

STATEMENT OF THE FACTS

Bonhomme, a French national as well as the President and largest shareholder of Precious International, Inc. ("PMI"), initiated this CWA citizen suit against Maleau. (R. at 7-8). Bonhomme's suit alleges that Maleau is adding pollutants into navigable waters by situating piles of mining overburden and slag near an agricultural ditch that eventually flows into an interstate creek, which is hydrologically connected to a wetland. (R. at 5).

Maleau is the operator of an open-pit gold mining and extraction operation in Lincoln County, Progress. (R. at 5). Maleau's operation is adjacent to the Buena Vista River and therefore requires CWA permits, a requirement with which Maleau is in compliance. (R. at 5). Despite Maleau's CWA's compliance, Bonhomme alleges that Maleau trucks overburdened slag from his mining operation and dumps the piles on his property in Jefferson County to avoid certain regulations under the CWA. (R. at 5). The parties do not dispute that arsenic is a pollutant, or that traces of it can be found in both Ditch C-1 and Reedy Creek. (R. at 5). Whether or not Maleau is responsible for the contamination is highly disputed. (R. at 6). Specifically, Bonhomme claims that when it rains, water flows down and percolates through the piles of overburden and slag, creating natural channels through which the polluted rainwater is then discharged into Ditch C-1. (R. at 5). Ditch C-1 is a one-hundred year-old ditch that is used to drain the surrounding land in order to make it compatible for agriculture. Ditch C-1 is three feet across and one foot deep; primarily consists of groundwater; and only flows intermittently. (R. at 5).

It is Bonhomme's contention that water contaminated with arsenic flows in Ditch C-1 from Maleau's property and through Bonhomme's land before being discharged into the Creek through a culvert that undisputedly is contained within Bonhomme's property. (R. at 5). The Creek is a 50 mile waterway that begins in the state of New Union and ends in the State of Progress. (R. at 5). The Creek is diverted for agricultural irrigation use along its path to Wildman Marsh ("the Marsh") in Progress where the Creek empties. (R. at 5). Using PMI's money and resources, Bonhomme has conducted tests on the water quality throughout the area. The tests found no detectable levels of arsenic in Reedy Creek upstream from the culvert, but found significant levels present below where the culvert discharges into the Creek. In addition, the tests found no arsenic contamination in Ditch C-1 upstream of Maleau's property but found arsenic to be present below. Finally, the tests found arsenic in Wildman Marsh. (R. at 6).

Additionally, Bonhomme claims that arsenic has contaminated the wildlife residing in the Marsh. (R. at 5-6). Much of the Marsh is contained within the boundaries of the Wildman National Wildlife Refuge. (R. at 6). The Marsh is a popular destination for duck hunters—it is a migratory stop for millions of ducks—from surrounding states and is recognized for contributing to the local economy. (R. at 6). Bonhomme owns a property that fronts part of the Marsh which includes a hunting lodge. This property is used almost exclusively for PMI's benefit, hosting approximately eight duck hunting parties a year to attract and retain clients. (R. at 6). Recently, however, use of the property has decreased four-fold (R. at 6). Bonhomme boldly asserts that this decline is a direct result of the arsenic pollution, despite zero changes to the flora and fauna surrounding the hunting lodge, even in areas of high arsenic concentration. (R. 5-6). However, given the state of the declining economy and PMI's profits, Maleau simply suggests that factors other than pollution may be responsible for a declining use of Bonhomme's property. (R. at 6).

STANDARD OF REVIEW

The United States District Court for the District of Progress issued six rulings regarding the CWA in this case and on appeal an appellate court reviews questions of federal law and statutory interpretation *de novo*. *Lindley v. F.D.I.C.*, 733 F.3d 1043 (11th Cir. 2013).

SUMMARY OF THE ARGUMENT

The district court was correct in ruling that Bonhomme is precluded from bringing this CWA Citizen suit against Maleau because Bonhomme is not the real party in interest as required by the Federal Rules of Civil Procedure. Rule 17 of the Federal Rules of Civil Procedure requires the complainant to be the real party in interest in order to establish the *res judicata* effect and protect the defendant from multiple lawsuits. Bonhomme has a three percent share in PMI and is therefore prohibited from bringing an action under the "shareholder rule" because any harm he personally suffers is an indirect harm through the decreasing value of PMI. Furthermore, Bonhomme does not possess the substantive right to be enforced because the only allegation here is that PMI's hunting parties have been affected by the arsenic pollution, and there are no allegations that Bonhomme has suffered a separate harm. Finally, Bonhomme has waived his right to join PMI in this action because upon judicial notice of a Rule 17(a) defect Bonhomme did not rectify the mistake in a timely fashion.

The district court was correct in ruling that "citizen" under the CWA's Citizen Suit provision does not encompass foreign nationals, thus prohibiting Bonhomme, a French national, from bringing suit against Maleau. In other environmental citizen suit provisions, Congress allows for "any person" to bring suit, but in the CWA it only allows for a "citizen," which is defined as a person who may be affected by the pollution but is ambiguous with regards to the

boundaries of who may qualify as a citizen. The plain meaning of the word "citizen" refers to only American citizens, which precludes Bonhomme's suit. Furthermore, the legislative history supports a narrow reading that also supports prohibiting Bonhomme from bringing suit against Maleau.

The district court was correct in ruling that the piles of dirt on Maleau's property were not point sources under the CWA. The CWA regulates polluted water that is discharged through a point source, which is defined as any "discernible, confined, and discrete conveyance" that pollutants may discharge through. 33 U.S.C. § 1362(14). The piles of dirt do not meet the definition of a point source under the CWA and therefore are not subject to its regulation. The piles neither function to collect nor channel polluted water into Ditch C-1. Instead the introduction of the arsenic into Ditch C-1 is the result of storm water from a mining site and the Code of Federal Regulations does not regulate such runoff. Additionally, the channels were not a man-made creation for the purpose of transporting pollutants from one place to another and therefore fall outside the regulation of the CWA.

The district court was also correct in ruling that Ditch C-1 is not a "navigable water" or a "water of the United States" under the CWA. The CWA's jurisdiction extends to non-wetland waters that are navigable in fact or are tributaries of navigibale in fact waters. Ditch C-1 is not a navigable in fact water because it is a wholly intrastate waterway with an average width of three feet and a depth of one foot that has never been used and never could be used for interstate commerce purposes. Also, if one assumes the Creek is a navigable in fact water, Ditch C-1 does not become subject to CWA regulation as a tributary because Ditch C-1 consists primarily of groundwater, which is beyond the scope of CWA jurisdiction. Given that Ditch C-1 consists primarily of groundwater and is outside the regulation of the CWA, Justice Kennedy's sufficient

nexus test is inapplicable here. And finally, if Ditch C-1 were to be found under the regulation of the CWA it would be as a point source and not a "water of the United States" because the definition of point source explicitly lists ditches as a point source.

The district court erred in ruling that the Creek fell under the jurisdiction of the CWA. The creek is not a navigable water under the CWA, because it is neither traditionally navigable or a tributary of a traditionally navigable water. The creek is not traditionally navigable because it is not, has never been, or could not be used as a channel of interstate commerce. The creek also fails to qualify as an instrumentality of commerce for the purposes of federal jurisdiction under the Commerce Clause. Furthermore, any activity involving the river does not have a significant effect on interstate commerce. Finally, because Wildman Marsh is not a navigable water, under the CWA, federal jurisdiction cannot be established even if the Creek is a tributary of the marsh.

The district court was correct in ruling that Bonhomme and not Maleau is liable for discharging pollutants in the Creek because the polluted waters enter and exit through a culvert on Bonhomme's property. Courts have held that culverts, like the one found on Bonhomme's property, are point sources and subject to regulation under the CWA because they transport water from one place to another. Furthermore, the CWA is not concerned with the fact that the pollutants do not originate with Bonhomme; rather, the sole concern is with Bonhomme's culvert discharging the pollutant into the Creek. Additionally, the CWA does not require a causation element because the statute takes on the perspective of the water, and from the water's point of view it makes no difference who initially polluted the water. Finally, it would be against the purpose of the CWA to require a discharger to be the sole source of a pollutant.

ARGUMENT

I. BONHOMME IS PROHIITED FROM BRINGING THIS CITIZEN SUIT AGAINST MALEAU BY RULE 17 OF THE FEDERAL RULES OF CIVIL PROCEDURE BECAUSE BONHOMME IS NOT THE REAL PARTY IN INTEREST

Bonhomme is not the "real party in interest" as required by Rule 17(a) of the Federal Rules of Civil Procedure and therefore Bonhomme is precluded from bringing this citizen suit action against Maleau. Bonhomme is not the real party in interest for two distinct, yet related reasons: (1) the "shareholder rule" prohibits Bonhomme, a shareholder of PMI, from bringing an action that indirectly harms him through the value of his shares, and (2) Bonhomme does not possess the right to be enforced. Additionally, Bonhomme has waived his right to cure a Rule 17(a) defect by not timely joining PMI to this action.

a. *Bonhomme Is A Shareholder of PMI And Is Thus Prohibited By the Shareholder Rule to Bring An Action That Only Indirectly Affects Him*

The shareholder-standing rule prevents Bonhomme from suing on behalf of PMI. The shareholder rule prohibits a shareholder from bringing an action for an "indirect harm he suffers as a result of an injury to the corporation." *Rawoof v. Texor Petroleum Co., Inc.,* 521 F.3d 750, 757 (7th Cir. 2008). Here, this is what precisely what Bonhomme is doing. Bonhomme holds a three percent share of PMI, (R. at 7), and is alleging that arsenic pollution has caused him to decrease the number of hunting parties he hosts, primarily for the benefit of PMI, from eight to two a year. (R. at 6). Assuming that Bonhomme's allegations are true, it is PMI that is harmed by the arsenic pollution, and Bonhomme is only harmed indirectly as a shareholder.

Classifying Bonhomme as an indirect victim and thus rejecting the argument that he is the real party in interest falls in line with some state court decision that have held Rule 17(a) of the Fed. R. Civ. P. is only satisfied when the party is directly harmed because only then is that

party entitled to the fruits of the action. *See Harris v. Jackson*, 192 S.W.3d 297 (Ky. 2006). Here again, it is PMI that is directly affected and Bonhomme only indirectly. PMI and Maleau are in direct competition with one another. (R. at 7). This is evidenced in part by the accusations Bonhomme, the President of the Board of Directors, made on behalf of PMI against Maleau—that Maleau was an "unfair business competitor, artificially lowering his cost of production by ignoring environmental protection requirements, and hiring undocumented aliens at minimum wage and housing them in abandoned chicken coops." (R. at 6-7). PMI is fully aware that Maleau is a business competitor which is why PMI has taken an active role in the litigation process by paying for all of Bonhomme's attorney and expert witness fees, as well as conducting and paying for the water samples and analysis required to prevail in this litigation. (R. at 7-8). These facts make clear that it is PMI that benefits from a favorable decision, while also demonstrating that if PMI were subjected to an unfavorable result Bonhomme would only suffer harm indirectly as a shareholder of the company.

b. *Bonhomme Neither Possesses the Right to Be Enforced Nor Does He Qualify As One of the Exceptions Under Rule 17 And Thus He Cannot Be the Real Party In Interest*

Rule 17(a) of the Federal Rules of Civil Procedure requires every action to be prosecuted in the name of the real party in interest so that the defendant is protected against subsequent action by the party actually entitled to relief, and to ensure the judgment's *res judicata* effect. *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*, 485 F.2d 78 (4th Cir. 1973). In order for a party to satisfy that requirement, the party must actually possess, under substantive law, the right to be enforced. *Curtis Lumber Co., Inc. v. Louisiana Pacific Corp.*, 618 F.3d 762 (8th Cir. 2010). However, the rule does allow for some individuals with specific roles such as executors, administrators, guardians, bailees, trustees, contractual parties, and parties authorized by statute, to bring a suit in their own name. Fed. R. Civ. P. § 17(a)(1)(A)-(G).

Here, the substantive right is conferred by the CWA § 505(a), "any citizen may commence a civil action on his own behalf." 33 U.S.C. § 1365(a). However "citizen" is a term of art that is statutorily defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The only allegation in the record is that the arsenic pollution has and will continue to affect and limit the number of PMI hunting parties. (R. at 6). Thus, it is clear that the CWA grants a legal right of enforcement to PMI; however, Bonhomme does not retain the same benefit. If the hunting parties, which are for the benefit of PMI, are removed from the equation, Bonhomme must then demonstrate that he "is or may be adversely affected." 33 U.S.C. § 1365(g). The record does not indicate that Bonhomme would suffer any harm unconnected to the hunting parties. Rather the record indicates the opposite, that the arsenic pollution has had no effect on him as the flora and fauna around the lodge have been unaffected to date, (R. at 6), and anything that suggests that this will change in the future is speculative.

Additionally, Rule 17(a)(1)(A)-(G) grants exceptions to Rule 17(a), however Bonhomme does not fall within the exceptions whether he acts as President, a board member, or a shareholder of PMI. Therefore, while PMI can be said to have the substantive right under the CWA because it has arguably been affected by arsenic pollution, the same cannot be said about Bonhomme.

c. *This Case Should Be Dismissed Because Bonhomme Waived His Right to Cure Any Pleading Defect Under Rule 17 of the Federal Rules of Civil Procedure By Failing to Join PMI After Judicial Notice of the Defect*

The lower court ruled that Bonhomme was not the real party in interest, but a "court may not dismiss an action for failure to prosecute in the name of the real party in interest until … a reasonable time has been allowed for the party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. § 17(a)(3). However, if after judicial notice of a defect in the named party and a reasonable amount of time, if the proper party is not ratified, joined or substituted then the

suit should be dismissed. *See Gardner v. State Farm Fire and Casualty Co.*, 544 F.3d 553, 562 (3d Cir. 2008).

Here, the lower court ruled that Bonhomme was not the real party in interest after Maleau raised the issue in his answer to Bonhomme during the pleading stage. (R. at 7). This case has now proceeded to the appellate stage and Bonhomme has not taken the necessary action to correct his pleadings by adding PMI. The order of the District Court was made July 23, 2012, nearly sixteen months ago and approximately twelve months past what a court has determined to be a reasonable amount of time to amend pleadings. *See Killmeyer v. Oglebay Norton Co*., 817 F. Supp. 2d 681 (W.D. Pa. 2011) (ruling that four months is a reasonable amount of time for a plaintiff to amend its pleadings to include the real party in interest). *See also United HealthCare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563 (8th Cir. 1996); *Whelan v. Abell*, 953 F.2d 663 (D.C. App. 1992); Bonhomme's failure to amend his pleadings to include PMI in a timely fashion as the real party in interest prohibits Bonhomme from curing the defect in the pleadings at this point in the litigation and therefore necessitates the dismissal of his citizen suit because he is not the real party in interest.

II. BONHOMME DOES NOT QUALIFY AS A "CITIZEN" UNDER § 505(a) OF THE CWA BECAUSE IT DOES NOT ENCOMPASS FOREIGN NATIONALS UNDER A PLAIN MEANING INTERPRETATION NOR IS IT SUPPORTED BY THE CWA'S LEGISLATIVE HISTORY

Bonhomme is a French national and therefore is prohibited from bringing a citizen suit under the CWA. Section 505(a) of the CWA states in relevant part, "any citizen may commence a civil action of his own behalf." 33 U.S.C. § 1365(a). Congress defined the term "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2012). Additionally, Congress defined "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate

body." 33 U.S.C. § 1362(5) (2012). Below Bonhomme argued that, given Congress' definitions, he was authorized to initiate a citizen suit even though he is a foreign national. (R. at 8). And while Bonhomme is correct in looking to the language of the CWA to determine whether a foreign national may bring a citizen suit, his conclusion that he was permitted to do so was wrong.

While statutory definitions generally control the meaning of statutory words, they do not if it leads to incongruities in the law. *Lawson v. Suwanee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949). And when there is an ambiguous word in the text of the statute, as is the case here, it is the court's role to "prescribe [the] extent and limitations" of the statute's meaning. *City of Chicago v. Morales*, 527 U.S. 41, 60 (1999). The starting point for the statutory interpretation of ambiguous legislative language is the plain meaning of the word. *See United States Savings Ass'n v. Timbers of Inwood Forest Ass'n.*, 484 U.S. 365, (1988); *United States v. Boisdoré's Heirs*, 49 U.S. 113 (1850). If, after exhausting the tools of statutory interpretation the language is still unclear, then courts will look to the legislative history of the statute to discern a non-ambiguous meaning. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (stating, "we do not resort to legislative history to cloud a statutory text that is clear").

Here, when the cannons of statutory construction are applied the plain meaning of the word "citizen" becomes apparent and it means an American citizen, thus precluding Bonhomme, a French national, from initiating a citizen suit under the CWA. In the alternative, if this court proceeds to an examination of the legislative history, it is clear that Congress' intent was to narrowly construe "citizen" and therefore deny foreign nationals, like Bonhomme, the privilege and authority to initiate a citizen suit under the CWA.

a. *The Plain Meaning Of the Word "Citizen" Is Narrower Than the Literal Text Of Its Statutory Definition And Refers Only to American Citizens*

There is a judicial presumption that "Congress legislates with knowledge of [the court's] rules of statutory construction." *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991). Given this presumption, Congress drafted the ambiguous word "citizen" and its accompanying statutory definition with full knowledge that a court interprets a statute so as not to be superfluous, *see Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); to compare the text of the citizen suit provision in the CWA to similar provisions in other statutes; and that legislation is presumed to apply only to the United States' jurisdiction. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). These time-tested cannons of construction yield a definition of "citizen" that includes only American citizens, thus prohibiting Bonhomme's suit.

Failing to narrowly construe "citizen" to mean American citizen renders all uses of the word citizen in 33 U.S.C. § 1365 to be superfluous and mere surplusage. "Citizen" is defined as "a person or persons," 33 U.S.C. § 1365(g), but merely two provisions before that definition, the CWA reads, "[n]othing in this section shall restrict any right of *any person*…" 33 U.S.C. § 1365(e) (emphasis added). So if the meaning of "citizen" is conflated with the meaning of "any person" the citizen suit statute has an entire provision, 33 U.S.C. § 1365(g), that is mere surplus because Congress could have just used the words 'any person.' Given that statutes should be construed "so as to avoid rendering superfluous" any statutory language, *Astoria Federal Savings & Loan v. Solimino*, 501 U.S. 104, 112 (1991), they should not be equated. Furthermore, given that "courts must presume that a legislature says in a statute what it means and means in a statute what it says," *Connecticut Ntl. Bank v. Germain*, 503 U.S. 249, 253-54 (1992), the use of the word "citizen" should not be set aside as a harmless error in the drafting of the statute. The

word "citizen" should be read to mean something narrower than the all encompassing "any person" language and the most appropriate interpretation is to limit it to American citizens.

The purpose of a citizen suit provisions is to create "private attorney generals," *Sierra Club v. Morton*, 405 U.S. 727, 737-38 (1972), and the CWA's citizen suit provision was modeled off of the Clean Air Act of 1970, but the two are not identical. *See* Martin J. McMahon Jr., *The Federal Water Pollution Control Act Amendments of 1972*, 14 B.C. L. REV. 672, 709 (1973). The Clean Air Act citizen suit provision begins, "any person may commence a civil action on his own behalf,"42 U.S.C. § 7604(a) (2012); as opposed to "any citizen…" Similarly the citizen suit provisions of the Safe Drinking Water Act, 42 U.S.C. § 300j-8(1) (2013), the Endangered Species Act, 16 U.S.C. § 1540(g) (2002), the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(a) (2013), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (2012), all omit the term "citizen" and use the phrase "any person." This indicates that Congress made a conscious decision to use non-uniformed language across the various environmental statutes, which further indicates that Congress must have meant something different in the CWA than it did in the other statutes. That different meaning of citizen must be something narrower because there is no broader interpretation of the words "any person." Instead, Congress must have meant something closer to the dictionary definition of "citizen" which is "a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all of its civil rights and protections; a member of the civil state, entitled to all of its privileges." Blacks Law Dictionary (9th Ed. 2009). The term "citizen" as used in § 1365(a) must therefore mean an American citizen which then restricts Bonhomme's ability to bring this suit.

Legislation is presumed to only apply to the territorial jurisdiction of the United States unless there is clear legislative intent to the contrary. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Although here there is no suggestion the CWA will fall outside the territorial jurisdiction of the United States, allowing the term "citizen" to be expanded to encompass foreign nationals would open the door to application beyond such territorial jurisdiction. Furthermore, courts are to avoid statutory construction that leads to absurd results. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226-29 (11th Cir. 2001). Encompassing foreign nationals into the term citizen would lead to absurd results because a person in Brazil, India, or South Africa, who has never stepped foot on American soil but who drinks American bottled water would be permitted to initiate a citizen suit under the CWA. This surely cannot be Congress' intent and the presumption of United States only jurisdiction should extend to "citizen." Therefore, Bonhomme should be prohibited from bringing this suit against Maleau.

b. *The CWA's Legislative History Indicates That Congress Intended "Citizen" To Be Construed Narrowly*

The Clean Water Act was originally known as the Federal Water Pollution Control Act of 1948 ("FWPCA"). In 1972, Congress made edits to the FWPCA, including § 505, 33 U.S.C. §1365, the citizen suit provision, because "[i]t is only with the public acting as a watch dog that the law will be fully enforced." *Hearing On Water Pollution Control Legislation Before the House Committee On Public Works*, 92d congress, 1st session, 858 (1971). Thus, the intent behind the citizen suit provision was to create "private attorney generals." *Morton*, 405 U.S. at 737. And to that end the Senate passed the bill with § 1365 stating: "(a) Except as provided in subsection (b) of this section, *any person* may commence a civil action on his own behalf." S. Rep. 2770 (emphasis added). However, when the House of Representatives considered the

proposed amendments passed by the Senate the language was changed from "any person" to "citizen." The reason behind this was to limit who was authorized to bring a citizen suit against an alleged polluter. S. Rep. 1236, 92d Cong., 2d Sess., 145-46 (1972).

Although neither the House nor the Senate explicitly stated that "citizen" does not encompass a foreign national; similarly, neither stated that the intent was for it have such a broad reach. What the legislative history makes clear is optimism that American citizens will begin to become engaged in the government's policing of polluters, but at the same time is tempered by the prospect of frivolous lawsuits. *See Morton*, 405 U.S. at 740. To combat the fear of frivolous lawsuits, Congress changed the all-encompassing phrase of "any person" to "citizen." The definition of citizen, again is silent on whether or not foreign nationals come under its umbrella, but given Congress' general feelings of a desire to limit the citizen suit provision, the term "citizen" should also be construed narrowly so as to mean only American citizens may bring a citizen suit. This narrow reading precludes Bonhomme from bringing this lawsuit against Maleau.

A plain text reading of the statute indicates that "citizen" is intended to have a narrow meaning, thus precluding Bonhomme from bringing this lawsuit. Similarly, the legislative history shows that Congress intended for the citizen suit to be narrowly applied, and for that reason it should not be construed to include foreign nationals.

III. MALEAU'S MINING OVERBURDEN PILES ARE NOT POINT SOURCES BECAUSE THEY WERE NOT INTENDED TO, NOR DO THEY IN FACT, COLLECT OR CHANNEL RAINWATER INTO DITCH C-1 AND BONHOMME DOES NOT HAVE JURISDICITON UNDER THE CLEAN WATER ACT TO REQUIRE PERMITS FOR ANY POLLUTANT RUNOFF THAT MAY OCCUR FROM THE PILES DURING RAIN EVENTS.

Bonhomme may prevail in his citizen suit only if Maleau has violated some effluent limitations under the Act. 33 U.S.C.A. § 1365(a)(1)(A). Those limitations, in turn, apply only to

"point sources" of pollution, as defined by the Act.[1] Piles of overburden and slag are not among the enumerated items that may be a "point source." Although the definition of "point source" is nonexclusive, the words and examples chosen by Congress to define the term "evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waters." *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643 (2d Cir. 1993). Diffuse piles of rock and dirt, on the other hand, do not channel or convey pollutants to navigable waters. Instead, pollution is caused when rainfall moves over and through them. (R. at 5). As the runoff moves, it picks up and carries away pollutants within the pile, finally depositing them into navigable waters. (R. at 5). Pollution of this type, nonpoint sources pollution, is not covered by the Act;[2] therefore, Bonhomme is precluded from bringing this citizen suit action against Maleau.

a. *Maleau's Piles Are Not Point Sources Because They Do Not Collect or Channel Rainwater to Ditch C-1 Through a Confined, Discrete Conveyance*

The piles of rock and dirt on Maleau's property are not point sources because they are not confined, discrete conveyances. More importantly, the piles do not collect or channel water to navigable water, nor were they designed for this purpose. While Congress designed the CWA to embrace the broadest possible definition for point sources, the text of the CWA and the case law is clear that some type of collection or channeling is required to classify an activity as a point

[1] 33 U.S.C. 1362 (14) defines "point source" as "any discernable, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.")

[2] The 1987 amendments to the Clean Water Act (CWA) established the § 319 "Nonpoint Source Management Program." Under Section 319, states, territories and tribes receive grant money that supports a wide variety of activities including technical assistance, financial assistance, education, training, technology transfer, demonstration projects and monitoring to assess the success of specific nonpoint source implementation projects.

source. The pollutants found in Ditch C-1 are not the result of a collection and conveyance of polluted water, but rather, are the result of nature, gravity, and surface runoff water.

Since the adoption of the CWA, courts have increasingly broadened the definition of what constitutes a point source in regards to mining operations. *See United States v Earth Sciences, Inc.*, 599 F2d 368 (10th Cir. 1979) ("liquid escaping from the closed circulating mining system is considered a point source regardless of the reason for the runoff.") Despite this trend however, parties seeking enforcement of the CWA have always been required to show that pollutants were discharged from a confined, discrete conveyance, such as a pipeline, tank, or some other structure. *See Sierra Club v. Abston Constr. Co.* (holding that "[t]he ultimate question is whether pollutants were discharged from discernible, confined, and discrete conveyances.", 620 F.2d 41, 45 (5th Cir. 1980). Piles of rock and dirt are by their very nature not confined or discrete. Instead, Maleau's piles are merely areas of higher topography through which water may percolate and from which sediment may erode.

Furthermore, the piles in question do not act as a conveyance of pollutants. In *Miccosukee*, the Supreme Court made clear that a point source must be of such a nature that it functions as a transporter of the pollutant from one place into the water. *S. Fla. Waste Mgmnt. Dist. V. Miccosukee Tribe of Indians*, 541 U.S. 95, 105. ("Tellingly, the examples of point sources listed by the [CWA] includes pipes, ditches, tunnels, and conduits, objects that…*transport*" pollutants into navigable waters). But a pile of dirt and rock cannot be said to function as a transporter of a pollutant from land into Ditch C-1. *Compare Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010) (holding that pits collecting overburden and slag are not point sources within the meaning of the CWA). Instead, Maleau's piles are pollution-neutral as they sit on Maleau's property. They do nothing to further the transport of

arsenic into the ditch. When it rains, the piles of overburden and slag do not carry the water into the ditch. Rather, the rainwater flows down the piles and percolates through them, becoming storm runoff that then travels into the ditch. Therefore, Maleau's piles of dirt should be classified as nonpoint sources. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). ("[P]oint 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."

b. *Bonhomme's Suit Should Be Dismissed Because Natural Storm Water Runoff and Seepage Are Not Covered by the Act*

Maleau neither collected nor channeled the storm water runoff and thus his piles are not point sources. Only when runoff water "is collected or channeled by man" does it become a point source, *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2nd Cir. 2009). Here, Maleau did not collect or channel the runoff water at all. Rather, the runoff water eroded the piles in such a way that channels were created naturally, thereby draining excess water into Ditch C-1. However, according to the Second Circuit, in *Cordiano*, this natural occurrence does not transform the piles of dirt into a point source. 575 F.3d at 221. Such a transformation occurs only when a human manipulates nature by implementing "pipes, ditches, tunnels, and conduits," *Miccosukee Tribe*, 541 U.S. at 105. In contrast, attempted enforcement of the CWA for natural seepage or surface runoff from mining sites has been wholly unsuccessful. *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995); *Greater Yellowstone Coalition v. Lewis*, 2010 WL 5191370 (9th Cir. 2010).

Here, the record is devoid of any manmade manipulation other than the placing of the piles themselves. However, Bonhomme has not asserted at any time that the placing of the piles itself constitutes a point source. *Cf. Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897,

922 (5th Cir. 1983) (holding bulldozers and backhoes to be point sources). Furthermore, the placing of the piles was not done for the purpose of collecting or channeling pollutants into Ditch C-1; the record simply states that Maleau "placed" piles of slag and overburden on his property. (R. at 5) Unlike the mining company in *Earth Sciences,* Maleau did not construct a combination of drainage tools to channel the polluted water into Reedy Creek nor did Maleau attempt to direct the water flow or otherwise impede its progress as was the case in *Abston*. 599 F.2d at 374; 620 F.2d at 45. Rather, rainfall landed on the piles and ran down them. Eventually, nature eroded the piles into a channel that then conveyed polluted water into Ditch C-1.

Even if Maleau's piles are the source of the pollutants in Ditch C-1, they enter by natural erosion, runoff and seepage and are thus not subject to the permit requirements of the CWA. According to the Ninth Circuit, rainwater must first be confined or contained in some way for its percolation through mining waste to be considered a point source. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010) (citing *N.W. Envtl. Def. Ctr. v. Brown,* 617 F.3d 1176, 1181–82 (9th Cir. 2010) ("Stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source."). Because Maleau has made no effort to divert, collect, impede or channel the water at any time, his piles are not point sources under the CWA.

IV. DITCH C-1 IS NOT A NAVIGABLE WATER OR WATER OF THE UNITED STATES AND IS THEREFORE NOT SUBJECT TO CWA REGULATION

Ditch C-1 does not fall under the jurisdiction of the CWA because: (1) it is not navigable in fact, (2) a tributary comprised primarily of groundwater does not fall under the CWA's jurisdiction , (3) and Ditch C-1 cannot be both a point source and a water of the United States.

a. *Ditch C-1 Is Not Navigable In Fact Because It Is An Intrastate Agricultural Draining Ditch With An Average Width of Three Feet And A Depth of One Foot*

Traditionally, a navigable water of the United States is required to be navigable in fact. *United States v. Riverside Bayview Homes Inc*., 474 U.S. 121, 124 (1985). In order for a body of water to be navigable in fact it must be "susceptible of being made, in its natural condition, a[n interstate] highway for commerce, even though that trade may be nothing more than the floating of lumber in rafts or logs." *The Daniel Bell*, 77 U.S. 557, 560 (1870). *See also Loving v. Alexander*, 745 F.3d 861, 864-65 (4th Cir. 1984). While a boat does not need float on a waterway for it to be deemed "navigable", the Supreme Court has been very specific that the term "navigable" still has some effect. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (where the Court indicated "that the term 'navigable' is of limited import"). And while Congress meant to give the term "navigable water" the broadest possible constitutional determination, calling Ditch C-1 a navigable waterway would produce absurd results. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159,172 (2001) ("it is one thing to give a word limited effect and quite another to give it no effect whatever.")

The record provides no indication that Ditch C-1 is capable of serving as a highway for interstate commerce. In fact, the ditch's narrow width (3 feet) and low average depth (1 foot), (R. at 5), dispels any notion that it is used, could be used, or has been used with reasonable improvements for interstate commerce purposes. *See*, *Loving*, 745 F.3d at 864 (noting three ways navigability may be established under the Commerce Clause: (1) present use or suitability for use, (2) suitability for future use with reasonable improvements, and (3) past use or suitability for use).

Additionally, Ditch C-1 is a wholly intrastate agricultural ditch that flows intermittently for no more than nine months, (R. at 5), which further indicates that it is not and cannot be rendered a navigable in fact water. Following the CWA's enactment, the US Army Corps of

Engineers, through the Secretary of the Army, expanded "waters of the United States" to include tributaries of navigable waters. 33 U.S.C. § 1344(a) (2012); 40 C.F.R. § 122.2. However, this expansive reading was curtailed in *Rapanos* when the Supreme Court established the boundaries for which non-traditionally navigable bodies of water fell under the jurisdiction of the CWA. 547 U.S. at, 757. Justice Scalia, author of the plurality, limited the CWA's jurisdiction to "only those relatively permanent or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as stream[s] … oceans, rivers, [and] lakes." *Id.* at 739. Ditch C-1 is neither relatively permanent nor continuously flowing and does not resemble in any way a navigable in fact waterway.

Because *Rapanos* is a plurality, questions of law must also take into account Justice Kennedy's concurring opinion. Justice Kennedy's opinion required that an adjacent tributary "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 779-80. The principle considerations for this test require that the volume, duration, and frequency of flow be taken into consideration. USACE, Guidance on Clean Water Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (2008) ("the USACE Guidance") at 10. However, nothing in the record supports a conclusion that a "significant nexus" exists between Ditch C-1 and Reedy Creek. Therefore, using either Justice Kennedy or Scalia's interpretation of what waterways fall under the CWA's jurisdiction, Ditch C-1 is outside the scope of the Act.

b. *Assuming the Creek Is A Navigable Water, Ditch C-1 Is Still Outside the Jurisdiction of the CWA Because It Is Primarily Filled With Groundwater Because Groundwater Regulation is Left to the States.*

Assuming *arguendo* that the Creek is a navigable water, Ditch C-1 is still outside the jurisdiction of the CWA. Here, Ditch C-1 does not maintain a relatively permanent and continuous flow as the ditch only flow intermittently for no more than nine months a year. (R. at

5). However, if it is determined that it does have a relatively permanent and continuous flow, it should nonetheless be found to be outside the federal jurisdiction of the CWA due to its hydrology—because it is primarily fed by groundwater and therefore its management should be left to the State of Progress. Federal case law has stated that groundwater is beyond the scope of the CWA and therefore should remain with the state. *See, e.g.*, *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994), cert. denied, 513 U.S. 930 (1994) and *Umatilla Waterquality Protective Ass'n. Inc. v. Smith Frozen Foods, Inc*., 962 F. Supp. 1312 (D. Or. 1997).

By its very nature, groundwater is not navigable. Allowing it to be regulated under the CWA would move the term, "waters of the United States," beyond the edge of constitutional federal jurisdiction. Such an extreme position would require Congress' express statement of such intentions. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568 (1988). This requirement is a heightened concern when it may shift the balance of power between federal and state power. *United States v. Bass*, 404 U.S. 336 (1971). If Congress intends to upset the balance of federal and state responsibility it must make it "unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

Here, Congress did not make such an intention clear in the CWA, but instead provided the opposite. The Supreme Court in *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, emphasized this principle by quoting §101(b) of the CWA, which states that "Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." 531 U.S. at

166-67 (quoting 33 U.S.C. § 1251(b) (2012). Section 510 also supports this principle by stating that "[e]xcept as expressly provided in [the CWA], nothing in [the CWA] shall... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including the boundary waters) of such States." 33 U.S.C. § 1370 (2012). Therefore, courts should respect the limitations of the CWA and leave the jurisdiction of groundwater to the states.

Furthermore, any additional flow in the Ditch C-1 resulting from rainfall in addition to the groundwater is not enough for jurisdiction under the CWA. As the plurality explains in *Rapanos*, tributaries with flow that is "coming and going at intervals" are not subject to regulation under the Act. *See Rapanos*, 547 U.S. at 732 n. 5. As the United States Army Corp of Engineers explains in its guidance for the application of *Rapanos*, waters that flow only in response to precipitation are not "relatively permanent" and therefore outside the jurisdiction of the CWA. USACE Guidance at 10. Here, the record indicates, "[t]he water in the Ditch is derived primarily from draining groundwater from the saturated soil, with some rainwater runoff after rain events." (R. at 5). This indicates that after it rains, Ditch C-1 experiences an additional flow but given the USACE Guidance the precipitation cannot render Ditch C-1 a "water of the United States" under the CWA § 502(7), 33 U.S.C. § 1362(7).

c. *If Ditch C-1 Were Under the Jurisdiction of the CWA, It Would Be As A Point Source And Not A Navigable Water*

Finally, even if Ditch C-1 were under the jurisdiction of the CWA, it would be a point source and not a navigable water. Under the CWA a point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, *ditch*, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14)

(emphasis added). Because the CWA defines a "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source," Congress expressed an intent to remove ditches from the definition of navigable water. § 1362(12)(A) (emphasis added). If ditches were capable of being navigable waters, the statute would require a permit for "any addition of any pollutant to *navigable waters from navigable waters," producing absurd results.* This interpretation of the statute would eviscerate the purpose and meaning of including the term "point source." In *Rapanos* the Supreme Court, rejecting that a ditch was a navigable water, stated that the significant overlap created by interpreting a ditch as navigable water would make little sense. 547 U.S. *at* 735. Therefore, Ditch C-1 is not a "navigable water" or "water of the United States" as defined in the CWA.

V. REEDY CREEK IS NEITHER A TRADITIONALLY NAVIGABLE WATER NOR IS IT A TRIBUTARY IN FACT WATER

Like Ditch C-1, Reedy Creek is not navigable in fact. As the record indicates, none of the parties assert that the creek is, was or could be used for waterborne transportation, (R. at 9), as is required for navigable in fact waters. However, the EPA's traditional definition of navigable waters encompass more than simply navigable in fact, rather it includes "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. §328.3(a)(1) and 40 C.F.R. §230.3(s)(1).

Since the promulgation of these rules, the Supreme Court has ruled that the commerce clause can only be used to legislate under three broad categories: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce, even though the threat may come only from intrastate activities; and (3) the power to regulate those activities having a substantial relation to interstate commerce. *United*

States v. Lopez, 514 U.S. 549, 558-59 (1995). Here, the Creek does not fall under the first or third prong of Lopez and the second is inapplicable as there is nothing in the record to suggest the Creek is an instrumentality of interstate commerce.[3] Furthermore, the Creek does not fall under the CWA's jurisdiction by virtue of being a tributary to the Marsh because the Marsh is not a navigable in fact water.

a. *The Creek Is Not A "Channel" of Commerce And Therefore Does Not Fall Under CWA Jurisdiction Pursuant to the First Prong of Lopez*

Both the plurality and Justice Kennedy's opinions in Rapanos has the practical effect of limiting the CWA to the first prong of Lopez by holding that an adjacent body of water be tied to a traditionally navigable body of water. *Rapanos*, 547 U.S. at 779. This requirement is based on the Court's efforts to limit the jurisdiction of the federal government, and respect the state's traditional police powers over land and water. *See SWANCC*, 541 U.S. at 172. Through this limitation, the Court makes it clear that the traditional navigability of a body of water is the basis for jurisdiction under the CWA. The origins of the CWA also support this principle. See River and Harbors Act Appropriation Act of 1899 (making it illegal to discharge refuse that would impede the ability of boats to navigate). 30 Stat. 1151 (1899). Therefore, *Rapanos* limits federal jurisdiction over bodies of water to situations where they act as channels of interstate commerce. Because no such allegation has been made here, the Creek is beyond the scope of the CWA. Drawing water for irrigation and Bounty Plaza do not constitute use as a channel of interstate commerce. (R. at 5).

[3] The Code of Federal Regulations (CFR) states the general characteristics of an instrumentality of commerce. The CFR provides that instrumentalities of commerce may be "a link in a chain or system of conduits through which interstate commerce moves." 29 C.F.R. § 776.29. The man made examples listed by the CFR are "railroad terminals, airports which are components of a system of air transportation, bridges and canals." 29 C.F.R. § 776.29 Reedy Creek is neither man made, nor does any party allege that it is link in a chain through which interstate commerce moves. Therefore, Reedy Creek is not an instrumentality of commerce and the second prong of *Lopez* is inapplicable.

b. *The Creek Has at Most An Attenuated Effect on Interstate Commerce And Is Therefore Not Subject to Regulation Under the Third Prong of Lopez*

Even if the third prong of *Lopez* applied to federal jurisdiction under the CWA, the facts alleged do not place the Creek under the jurisdiction of the Act. In *United States v. Morrison*, the Supreme Court held that activities that have an "attenuated" effect on interstate commerce were beyond the scope of Congress's power derived through the Commerce Clause. 529 U.S. 598, 599 (2000) (finding that the aggregate effects of violence against women were beyond the scope of the Commerce Clause because they did not have a substantial effect on interstate commerce).

The facts contained in the record here do not a support a contention that the uses of Reedy Creek have a substantial effect on interstate commerce. Although the Supreme Court held in its pre-*Morrison* opinion of *Heart of Atlanta Motel v. U.S.*, that economic activity such as lodging was under the jurisdiction of the Commerce Clause, the allegations made about Reedy Creek can be distinguished. 379 U.S. 241 (1964). In *Heart of Atlanta*, the Court noted not only that the motel sat at a strategic intersection of interstate highways, but also that 75% of its tenants were from out of state. *Id.* at 243. However here, the record does not contain any facts that demonstrate the propensity of the effect of the Creek on interstate commerce. Instead, the facts only state that Bounty Plaza and farmers use the creek for activities that may have an attenuated relationship to instate commerce. Because Bonhomme and Progress have not provided information about the effect these activities have on interstate commerce, they have failed to fulfill the requirements of *Morrison*. Additionally, any reliance on pre-*Morrison* and pre-*Rapanos* cases such as *Heart of Atlanta* or *United States v. Earth Sciences, Inc.,* 599 F.2d 368 (10th Cir. 1979) is misguided. The limitations set out by *Morrison* and *Rapanos* should not be ignored, in order to favor outdated decisions.

c. *The CWA Does Not Have Jurisdiction Over Tributaries of Non-Navigable Waters*

Reedy Creek also fails to qualify as a navigable water, as a tributary of Wildman Marsh. Tributaries of a traditionally navigable water may be under the jurisdiction of the CWA, if they satisfy the requirements of *Rapanos*. See *Rapanos* generally. However, Wildman Marsh is not a navigable water and therefore Reedy Creek is also outside of federal jurisdiction. The record does not provide any information that would indicate that the marsh is navigable in fact. In fact the marsh's use as hunting grounds, implies that the levels of water are too low to be navigable in fact. Record at 6.

In spite of the $25 million added to the local economy by interstate hunters, Wildman Marsh is still not a traditionally navigable body of water. Record at 6. In *Solid Waste Agency v. US Army Corps of Eng'Rs*, the Supreme Court invalidated the migratory bird rule, which had previously allowed for wetlands to fall under CWA jurisdiction if it was a migratory stop for birds. 531 U.S. 159 (2001). Therefore, any contention that migratory birds are enough to establish federal jurisdiction has been rejected.

Finally, Wildman Marsh is not under federal jurisdiction simply because much of it is on federal property. Holding such a contention as valid would have a far-reaching impact on the scope of federal jurisdiction. If this contention was upheld, all water contained on federal land would be subject to the jurisdiction of CWA. This interpretation would eviscerate the requirements of *Rapanos*, because there would no longer be any requirement of a connection to a traditional navigable water. Additionally, this interpretation would remove any connection to jurisdiction under the Commerce Clause all together. Without these requirements, the federal government would exceed its authority to regulate these waters under the Commerce Clause, which is the basis for authority under the CWA.

VI. BONHOMME IS LIABLE FOR DISCHARGING ARSENIC INTO THE CREEK THROUGH HIS CULVERT EVEN THOUGH HE DID NOT INITIALLY CONTAMINATE THE WATER

The district court's determination that Bonhomme illegally discharged pollutants into Reedy Creek through a culvert on his property is undisputedly supported by the facts, and is faithful to the clear terms, structure and purpose of the CWA. Under the CWA, it is of no consequence that Bonhomme is not the initial source of the pollution; the fact that the polluted water is discharged through the culvert on his property is sufficient for establishing liability. Thus, the culvert, found on Bonhomme's property, which adds polluted water from Ditch C-1 into the Creek, renders Bonhomme a discharger of pollutants subject to regulation under the CWA.

a. *Bonhomme is Liable Under the CWA For Discharging Arsenic Into Reedy Creek.*

The CWA makes the discharge of any pollutants unlawful unless in compliance with permit provisions of the Act. 33 U.S.C. §1311(a). The term, "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. §1362(12). Under the Act, each discharge of a pollutant represents a distinct violation of the Act. *See Atl. States Legal Found., Inc. v. Tyson Foods, Inc.,* 897 F.2d 1128, 1138 n. 19 (11th Cir.1990).

The parties agree that discharges from Bonhomme's culvert contains pollutants. (R. at 5-6). In *Dague v. Burlington*, the Fourth Circuit implicitly held that a culvert was a point source under the CWA. 935 F.2d 1343, 1355 (4th Cir. 2010) (concluding that a "discharge" had occurred where leachate from a landfill entered a pond and thereafter water from the pond, polluted with the leachate, flowed through a culvert into a surrounding marsh.) The definition of a point source "makes plain that a point source need not be the original source of the pollutant;

it need only convey the pollutant to 'navigable waters.'" *S. Fla. Water Mgmnt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004). The Supreme Court granted certiorari to consider whether the point source must also be the pollutant's origination and in two short paragraphs it disposed of the question in the negative without referencing anything but the text of the statute. In *Miccosaukee*, the Supreme Court rejected the water district's argument that the Act covers a point source only when pollutants originate from that source, not when pollutants originating elsewhere pass through the point source. Finally, the record does not indicate Bonhomme has obtained any permit. Therefore, all of the required elements to find Bonhomme have been met: (1) Ditch C-1 and Reedy Creek are distinct bodies of water; (2) the culvert is a point source; (3) the release of contaminated water through the culvert was a discharge; and (4) the transfer of contaminated water from Ditch C-1 to Reedy Creek was an "addition" of a pollutant.

b. *The Clean Water Act Does Not Contain Any Causation Requirement.*

Courts have refused to read in a causation element to the CWA because as the Fourth Circuit put it, "the statute takes the water's point of view; water is indifferent about who initially polluted it." *WV Highlands Conservancy v. Huffman*, 625 F.3d 159,167 (4th Cir. 2010). Taking the Creek's point of view, it was Bonhomme that added a pollutant to it because the arsenic-riddled water was discharged out of the culvert on his property. Other courts have supported this position—that an owner of a point source is the liable party under CWA for discharging pollutants. In *Huffman*, the Fourth Circuit was tasked with determining whether the West Virginia Department of Environmental Protection ("WVDEP"), who had taken control over an abandoned mine, a point source, needed to obtain a NPDES permit because the mine was still polluting the water. *Id*. at 164. The court ruled that it did need to obtain a permit because "the question of who generated the pollutants is irrelevant. What matters is who is currently discharging pollutants into navigable waters." *Id*. at 168. Here, while it is true that Bonhomme

has in no way actively contributed to the pollution of the Reedy Creek he is still liable because, like the WVDEP, Bonhomme is in control of the point source.

The fact that Bonhomme was a passive landowner of the point source makes no difference in his liability as a polluter under the CWA. In *El Paso Gold Mines*, the Tenth Circuit found no EPA regulations nor case precedent to support the mines contention that it was not responsible for the point source as a mere landowner. 421 F.3d at 1144—46. In reaching its decision the court noted, "point source owners such as El Paso can be liable for the discharge of pollutants occurring on their land, whether or not they acted in some way to cause the discharge." *Id*. at 1145. The court also found persuasive that "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id*. (citing *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). Taking these decisions into account simply re-emphasizes what the CWA and EPA regulations state, that an owner or controller of a point source is the one who is ultimately liable for the addition of pollutants. The culvert flows into the Reedy Creek and the water is polluted with arsenic while it is in the culvert, thus the exiting of the polluted water from the culvert constitutes "the discharge of a pollutant" under the CWA.

c. *Requiring the Discharger to be the Source of the Pollutant Would Have Harmful Effects on the Purpose of the Clean Water Act.*

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," CWA § 101(a), and to this end it seeks to eliminate the discharge of pollutants into the nations navigable waters. CWA § 101(a)(1). To effectuate this goal, "33 U.S.C. §1311(a) bans the discharge of any pollutant by any person regardless of

whether that 'person' was the root cause or merely the current superintendent of the discharge." *WV Highlands Conservancy v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010). Lacking anywhere in the text of the Act is a suggestion that a causation element is required for there to be a violation. Rather, the text indicates that it is unlawful to add a pollutant from any point source—it makes no qualification to the language, nothing to imply that that conduct is impermissible only if the owner of the point source is also the origin or but-for cause of the pollution. This reading of the statute is also supported by the NPDES MS4 program. This program requires municipalities to take responsibility over discharges created through stormwater. If the source of pollutant were read to be controlling, the entire MS4 program of stormwater management would be destroyed. It is unlikely that Congress intended for a reading of the statute that eviscerated the foundation of a major area of governance, barring clear legislative intent.

The EPA, through subsequent regulations, has done nothing to alter the meaning of the CWA's text. The EPA has arguably promulgated regulations to clarify the text of the statute. For instance, the EPA issued a rule, "when a mining facility is owned by one person but operated by another, it is the operator's duty to obtain a permit." 40 C.F.R. § 122.21(b). In addition, 40 C.F.R. § 122.2 defines discharge as "surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a … person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works." Also, the EPA placed the burden of acquiring an NPDES permit on the party that owns or operates a mine, "mining sites that are not being actively mined, but which have an identifiable owner/operator." 40 C.F.R. § 122.26(b)(14)(iii). These rules demonstrate that whoever controls the point source that adds pollutants to navigable water is liable under the CWA. Here, the culvert is on Bonhomme's property. In short, the CWA

"prohibits Bonhomme's actions, not Maleau's actions," R. 9, because "if you own the leaky 'faucet,' you are responsible for its 'drips.'" *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005).

CONCLUSION

For the foregoing reasons, this court should affirm the United States District Court for the District of Progress' rulings with respect to Bonhomme's inability to bring this citizen suit because he is neither a real party in interest nor does the CWA's Citizen Suit provision permit foreign nationals to bring suit. Additionally, this court should affirm the district court's rulings that the piles of overburden and slag are not considered point sources under the CWA; that Ditch C-1 is not a water of the United States; and that Bonhomme added arsenic to the Creek via his culvert. Finally, this court should overrule the district court's ruling with regards to the Creek being a navigable water.

Respectfully submitted,

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