Team No. 32

D.C. No. 155-CV-2012
D.C. No. 165-CV-2012

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

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

BRIEF FOR SHIFTY MALEAU

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 (1983), which establishes federal appellate court jurisdiction for the appeals of final decisions of federal district courts. Jacques Bonhomme ("Bonhomme"), the State of Progress ("Progress"), and Shifty Maleau ("Maleau") are each appealing the final order of the United States District Court for the District of Progress. The District Court granted Maleau's motion to dismiss.

STATEMENT OF THE ISSUES

I. Bonhomme is not a real party in interest under Federal Rule of Civil Procedure 17 nor can he bring a claim on behalf of the real party in interest, Precious Metals International, pursuant to Federal Rule of Civil Procedure 17(a).

II. Bonhomme, as a foreign national, is not a citizen under the Clean Water Act and is not entitled to bring a claim under the citizen suit provision.

III. Maleau's dirt piles are not discernible, confined and discrete conveyances in order to be a point source.

IV. (A) Ditch C-1 is not a navigable water or water of the United States under 40 C.F.R. section 122.2, which defines a water of the United States; and (B) Reedy Creek is not a navigable water or water of the United States under 40 C.F.R. section 122.2, which defines a water of the United States.[1]

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

[1] Pursuant to the District Court's Order on pages 2-3 of the record, issues 4 and 5 have been briefed as issues IV(A) and IV(B) in the argument section under IV for efficiency purposes.

STATEMENT OF THE CASE

Bonhomme brought a citizen suit under the Clean Water Act ("CWA"), 33 U.S.C. section 1365, against Maleau for a violation of discharging a pollutant without a permit, seeking all relief available under section 1365. R. at 4. This citizen suit commenced in the District Court for the District of Progress on July 23, 2012, after proper notice was given to Maleau. R. at 4.

Progress filed a citizen suit against Bonhomme under the CWA, 33 U.S.C. section 1365 for violations of an unlawful addition of pollution, which Maleau intervened pursuant to CWA section 1365(b)(1)(B). R. at 5. Progress and Maleau moved to consolidate the case, to which Bonhomme did not object, and the District Court granted the motion. R. at 5. Both Bonhomme and Maleau filed motions to dismiss. R. at 5.

Bonhomme moved to dismiss claiming Maleau was in violation of discharging a pollutant from a point source into a navigable water or water of the U.S. without a permit under 33 U.S.C. section 1311(a). R. at 4-5. Maleau moved to dismiss because Bonhomme is not a real party in interest pursuant to Federal Rule of Civil Procedure 17 and is not a citizen entitled to bring a citizen suit pursuant to 33 U.S.C. sections 1365(g), 1362(5). R. at 2.

The District Court granted Maleau's motion to dismiss and entered an Order on September 14, 2013. R. at 2-3. Bonhomme filed a Notice of Appeal challenging the real party in interest and citizen holdings. R. at 2. Bonhomme also challenges the decision that Maleau's piles are not point sources, that Ditch C-1 ("the Ditch") is a not a water of the U.S., and that there is an addition of arsenic to Reedy Creek ("the Creek"). R. at 2-3. Progress appeals the court's holding that the Ditch is not a water of the U.S. R. at 2. Maleau challenges the court's decision that the Creek is a water of the U.S. R. at 3.

STATEMENT OF THE FACTS

Maleau owns and operates an open pit gold mining business in Lincoln County, State of Progress. R. at 5. On this property, Maleau holds several permits in compliance with the practice of gold mining. R. at 5. Additionally, on this property he keeps several old chicken coops. R. at 6-7. Maleau's property borders Buena Vista River, which is a water of the U.S. that requires a permit for any addition of pollutants. R. at 5. Maleau loads his excess dirt and rock from the gold mining process and drives it fifty miles to his second property in Jefferson County. R. at 5. Naturally, rain falls on the dirt piles leaching and carrying arsenic into a nearby water, the Ditch. R. at 5.

Maleau's Jefferson County property is adjacent to the Ditch, which has been protected since 1913 under real covenants, passed down through deeds to the current landowners, including Maleau and Bonhomme. R. at 5. The Ditch's purpose, and use, is for agricultural runoff supporting a three-mile stretch of agricultural properties. R. at 5. The Ditch is on average three feet wide and reaches a depth of only one foot and flows for approximately nine months out of the year. R. at 5.

Nearby is a second body of water, the Creek, which starts in the State of New Union. R. at 5. In this state, the water provides for Bounty Plaza, where highway I-250 intersects with the Creek. R. at 5. The Creek serves local travelers and provides for a local service area. R. at 5. As the water from the Creek flows downstream on its fifty-mile journey, it serves local agricultural properties, which supports interstate commerce, and eventually crossing into the State of Progress, and reaching Bonhomme's property. R. at 5. The Creek runs through Bonhomme's property and ends at Wildman Marsh ("the Marsh"). R. at 5.

The Marsh is a wetland providing for over one million migratory birds that visit annually. R. at 5-6. Most of the Marsh is within the Wildman National Wildlife Refuge operated by the United States Fish and Wildlife Service. R. at 6. The Fish and Wildlife service has detected arsenic in three Blue-winged Teal, but there has been no change in the flora and fauna of the Marsh due to arsenic. R. at 6. The Marsh is also a local hunting ground for neighboring states, as well as for Bonhomme. R. at 6. Bonhomme hosts hunting parties for the clients of Precious Metals International ("PMI"), friends, and acquaintances. R. at 6. Bonhomme usually brings about eight hunting parties a year, but has recently decided to reduce these to only two per year. R. at 6.

On Bonhomme's property, there is a hunting lodge used primarily for PMI's hunting parties. R. at 6. A culvert is present under his farm road in to make his passage on his property more convenient. R. at 5. This culvert causes the Ditch to discharge directly into the Creek. R. at 5.

In addition to hosting hunting parties for PMI's clients, Bonhomme serves as president of PMI, which is incorporated in Delaware and headquartered in New York. R. at 6. PMI has five mining locations worldwide, two of which are in the U.S., but none in the State of Progress. R. at 6. Bonhomme serves as one of seven board members, and although he is the largest shareholder, he only holds three percent of the shares. R. at 7. PMI is in direct competition with Maleau's company, which is known to have one mining site in the State of Progress. R. at 7.

After a series of press conferences, Progress is convinced that Bonhomme is only bringing this citizen suit in order to harm Maleau's business, especially since PMI does not have any locations in the State of Progress. R. at 6. Bonhomme accused the Attorney General of Progress of political payback to Maleau and is only suing Bonhomme in return of receiving

Maleau's campaign contributions. R. at 6. Bonhomme further accuses Maleau of lowering his cost of production due to ignoring environmental requirements, hiring undocumented aliens, and housing the aliens in his chicken coops. R. at 6. Bonhomme undermines Maleau's business by alleging he is contributing arsenic from his dirt piles to contaminate the water of the Marsh, which is lessening Bonhomme's hunting parties brought for PMI. R. at 4, 5. Bonhomme bases this theory off personal testing of the upstream and downstream areas of both the Ditch and the Creek. R. at 6.

In addition to undermining Maleau's business, Bonhomme filed this citizen suit against Maleau. R. at 4. Bonhomme is not a United States citizen, but rather a French foreign national. R. at 8. He has purposefully chosen not to add PMI as a plaintiff in the lawsuit, even after notice by Maleau. R. at 7.

SUMMARY OF THE ARGUMENT

The purpose of the CWA is to maintain and restore the biological and chemical integrity of water. The 1972 amendments created what is known today as the CWA. Courts and agencies have continuously questioned the amount of regulation needed in each circumstance.

First, every suit is required to be brought by the real party in interest to prevent double litigation of cases that have already been litigated. Mandating that the person holding the substantive right under the applicable law bring the suit allows for the courts to function efficiently and productively.

Second, the District Court rightly determined the interpretation of a citizen under the CWA in that it does not extend to foreign nationals. Allowing a foreign national to bring a citizen suit under the CWA mistakes the expansion of a person able to bring a suit. The CWA liberally allows more than just individuals to bring claims by recognizing corporations and

partnerships. This necessary expansion deals specifically with the definition of a person and should not be extended to the definition of a citizen.

Third, the District Court's disqualification of the dirt piles as point sources is correct. Congress gave the EPA the right to regulate point sources where there is a discernible, confined and discrete conveyance. This congressional delegation does not include indiscernible conveyances like piles of dirt. The piles fall under the agricultural stormwater discharge exemption due to their mixed composure of mining overburden and agricultural debris. If the EPA was given the right to regulate every indiscernible conveyance this would disregard Congress's original delegation given to the EPA. If the EPA began regulating every type of conveyance it would be unreasonably attempting to regulate every unclear source and spread EPA resources too thin.

Fourth, the District Court rightly determined the Ditch did not qualify as a navigable water or water of the U.S. Traditional navigability acts as a foundation for analyzing if a body of water falls under the heavy regulation of the CWA. In regulating a water that is not traditionally navigable, it is exasperating the resources regularly used for more imminent problems.

Fifth, the District Court mistakenly classified the Creek as a navigable water or water of the U.S. By regulating an entire body of water, the court turns a blind eye to the physical diversity of a dynamic water. This would set new precedent allowing areas outside the scope of the CWA to be regulated, such as portions unused by interstate commerce, having little to no effect on people or the environment.

Finally, the District Court rightly found Bonhomme was in violation of the CWA by causing an addition of a pollutant to the Creek. The CWA finds dischargers of any pollutant

strictly liable. By regulating all polluters whether they are the but-for cause or not, furthers the purpose of the CWA.

The District Court's holding should be upheld, with the exception of classifying the Creek as a water of the U.S.

STANDARD OF REVIEW

A court of appeals reviews a district court's decision to grant a motion to dismiss de novo. *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009). A district court's interpretation of the Federal Rules of Civil Procedure is reviewed de novo. *Kuelbs v. Hill*, 615 F.3d 1037, 1041 (8th Cir. 2010). A court's interpretation of the CWA is also reviewed de novo. *Natural Res. Def. Counsel v. U.S. E.P.A.*, 542 F.3d 1235, 1241 (9th Cir. 2008).

ARGUMENT

I. BONHOMME IS NOT A REAL PARTY IN INTEREST TO BRING A SUIT AGAINST MALEAU ALLEGING A DISCHARGE OF A POLLUTANT BECAUSE BONHOMME DOES NOT HAVE A REDRESSABLE RIGHT AND CANNOT ACT ON BEHALF OF PRECIOUS METALS INTERNATIONAL.

Bonhomme is not a real party in interest under Rule 17 of the Federal Rule of Civil Procedure ("Rule 17") because PMI is the real party in interest—because it has a substantive right enforceable by law—and Bonhomme is not entitled to any rights under the CWA. Rule 17 mandates the real party in interest bring suit. Fed. R. Civ. P. 17. A real party in interest is the party entitled to a substantive right enforceable by substantive law. *Oscar Gruss & Sons, Inc., v. Hollander*, 337 F.3d 186, 194 (2d Cir. 2003). When an individual brings a claim under the CWA, the only forms of recovery are: (1) an injunction to stop the pollution; (2) fines for continued pollution if the pollution is not stopped; and (3) attorney's fees for the prevailing party. 33 U.S.C. § 1365 (2011). Others may act on behalf of the real party in interest, but only if they fall under one of the seven exceptions provided: executor, administrator, guardian, bailee,

trustee of an express trust, contractual relationship, or party authorized by statute. Fed. R. Civ. P. 17(a). The statute does not include: president, shareholder, nor a member of the board of directors. *Id.*; *see e.g., Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947) (holding a claim presented by a stockholder against third parties is not his own but the corporations); *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (holding a shareholder was not the proper party to bring a claim on behalf of the company and therefore the case was dismissed).

A lumber retailer was the real party in interest in a case where he suffered injuries when seeking to recover on customer rebates. *Curtis Lumber Co. v. La. Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010). The Eight Circuit reasoned there was no risk of duplicate litigation, because the retailer was the real party in interest. *Id.* Similarly, the Fourth Circuit determined a subrogor was the real party in interest because it had the ability to recover the entire loss from the failure of a generating station. *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973).

The Supreme Court determined a policyholder of Lumbermens was unable to bring a suit on behalf of the company because the plaintiff only had a small financial interest in a large controversy. *Koster*, 300 U.S. at 538. The Court reasoned the smaller financial interest is not sufficient to make up the required jurisdictional amount. *Id.*

Bonhomme is not a real party in interest under Rule 17 because he is not entitled to a substantive right under the CWA. This substantive right is a form of recovery, provided by the CWA. An injunction will have no effect on Bonhomme or his property but will affect only PMI's hunting parties. No evidence supports Bonhomme's hunting parties have decreased due to an addition of a pollutant. No evidence supports the number or frequency of personal hunting parties. An injunction is not necessary because the record does not indicate the pollutant is

affecting Bonhomme's hunting parties, that arsenic in the migratory birds is coming from the Marsh, or that any potential decrease in the bird population visiting annually would be a result of higher concentrations of arsenic. Therefore, the pollutant has not affected the bird hunting and no injunction is necessary because any additional arsenic has not proven to be harmful.

It is speculative that receiving an injunction will prevent future pollution or potential harmful effects because the evidence does not suggest any harm has happened to the Marsh, migratory birds, or hunting. No evidence shows the arsenic from mining will have a future impact, especially since there is no impact thus far to the arsenic levels. The agricultural properties in the community along the Ditch and the Creek produce arsenic, but have yet to impact the hunting, environmental conditions, or aesthetic appeal of the Marsh. Therefore, it is unlikely any arsenic from Maleau's mining piles will have any future impact either.

Even if an injunction is granted, all fines will be paid to the government, not to the party bringing the citizen suit; therefore, Bonhomme will not recover any monetary compensation. The final right to recovery is the collection of attorney's fees. PMI is paying all attorney and expert witness fees, therefore any recovery will be paid directly to PMI, not Bonhomme. Unlike the lumber retailer or the subrogor, Bonhomme has failed to show he has suffered any recoverable injuries entitling him as a party interest. Bonhomme's injuries are merely speculative as Bonhomme has voluntarily decreased PMI's hunting parties for fear of a future injury. Allowing Bonhomme to continue in this case creates the risk of duplicate litigation should PMI, the real party in interest, decide to sue in the future.

Furthermore, Bonhomme does not fall under one of the exceptions provided in Rule 17 for parties acting on behalf of the real party in interest. Of the exceptions, the only possible category Bonhomme could qualify under is an administrator. Bonhomme may be the President,

but he is only a three percent shareholder and one of seven board members. Just as in *Koster*, a plaintiff with a minimal financial interest is not enough to act as the real party in interest. None of these three qualifications are enumerated in Rule 17(a) and have not been accepted as qualities establishing an administrator. Bonhomme cannot act on PMI's behalf because has a weak connection to PMI.

Bonhomme does not have a redressable substantive right under the CWA and cannot act on behalf of PMI, the real party in interest. This Court should affirm and find Bomhomme is not a real party in interest.

II. AS A FOREIGN NATIONAL, BONHOMME IS NOT A CITIZEN UNDER THE CLEAN WATER ACT QUALIFIED TO BRING A SUIT BECAUSE THE TERM "CITIZEN" SHOULD BE INTERPRETED UNDER ITS PLAIN MEANING AS TO NOT UNDERMINE ITS FOUNDATIONAL SIGNIFICANCE.

Bonhomme is not a citizen under the CWA because he is a foreign national that does not qualify under the term citizen entitled to bring such a suit. The CWA defines a citizen as "a person . . . having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2011) ("Citizen Suit Section"). The CWA further defines a "person" to include not only individuals, but also nonhuman entities, like corporations. 33 U.S.C. § 1362(5) (2011). When examining a federal statute, courts must give words their ordinary meaning. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The Fourteenth Amendment of the United States Constitution states in pertinent part, "all persons born or naturalized in the United States . . . are citizens." U.S. Const. amend XIV.

If the court finds a statute is unambiguous, Congress's intent must prevail. *Chevron*, 467 U.S. at 842-43. If the statute is "silent or ambiguous," a court should defer to the administering agency's permissible construction of the statute. *Id.* at 843. For this section of the CWA, there

is no agency decision, so no *Chevron* deference is necessary. This Court should apply the plain meaning, even if there is ambiguity, so the true definition of "citizen" is not undermined.

A. Bonhomme is not a citizen under the plain meaning of the statute because he is a foreign national and not a United States citizen.

Bonhomme is not a citizen under the plain meaning of the statute because he is a French foreign national and recognizing him as a citizen would change the meaning of the statue. Every word has a meaning and that meaning does not disappear even when the word evolves over time. A statute is read to mean exactly what the plain meaning of the words say. *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000). If Congress intends a different meaning other than the plain meaning of the current words presented, it can easily change the wording of the statute at any time. *Id.* A word included in a statute does not lose its original meaning. *See W. J. Lake & Co., v. King County*, 4 Wash. 2d 651, 655-56 (1940) (finding a statute cannot be extended beyond its' plain terms but the plain meaning should be applied). The CWA Citizen Suit Section includes the term citizen and defines it as any person who has an interest. § 1365. Person is further defined as an individual and other nonhuman entities. § 1362(5).

The Constitution does not define the meaning of a citizen, except it declares that citizens are "all persons born or naturalized in the United States." *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898) (citing U.S. Const. amend. XIV). When adopting interpretations, courts must only adopt interpretations that do not violate the Constitution. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2593 (U.S. 2012) (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). The Supreme Court has consistently held "every reasonable construction must be resorted to in order to save the statute from unconstitutionality." *Id.* (citing *Hooper v. California*, 155 U.S. 648, 657 (1895)). The term "foreign national" is defined as "an individual who is not a citizen of the United States and who is not lawfully admitted for permanent

residence, as defined by section 1101(a)(20) of title eight United States Code." 2 U.S.C. § 441e(b)(2) (2011).

The Supreme Court held a term enumerated in the statute did not lose its original meaning when further defined by the CWA. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). Similarly, the CWA defines "navigable waters" further as "waters of the U.S." but the Court reasoned this did not deprive the term "navigable waters" of its initial meaning simply by adding to the definition for the purposes of the statute. *Id.*

Bonhomme claims to be a citizen entitled to bring a citizen suit under the CWA. Under the plain meaning of the statute, the term citizen must be defined to extend to U.S. citizens, not foreign nationals. Although the term has been further interpreted in the statute, the term citizen has not lost its original meaning. "Citizen" should retain its true meaning as U.S. citizen like the term navigable waters in *Solid Waste*. A "citizen" cannot be defined as any person or corporation having an interest regardless of nationality because such an interpretation unreasonably conflicts with the United States Constitution. The only permissible interpretation is to construe "citizen" in harmony with other sections of the United States Code. Pursuant to title two of the United State Code, Bonhomme, as a foreign national, is not a citizen of the United States.

Expanding the term citizen to include more than U.S. citizens frustrates the purpose of the statute and causes the Citizen Suit Section to apply to any person in the world. If the Court chose to disregard the plain meaning, it would contradict the Constitution. The Court should act reasonably in their determination in order to remain consistent with the constitutional definition. Because the term citizen retains its original meaning and Bonhomme is not a citizen under this definition, Bonhomme is not entitled to bring this citizen suit.

B. Congress's intent demonstrates the narrow definition of "citizen" because the statute allows United States citizens to enforce the Clean Water Act and does not intend to open the floodgates to unnecessary litigation by non United States citizens.

Bonhomme is not a citizen under the CWA because Congress did not intend citizen suits to reach beyond U.S. citizens. If this statute's meaning is susceptible to multiple interpretations, the court should interpret the statute to avoid serious constitutional concerns. *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 514 (2007). The major federal environmental laws—including the Clean Air Act ("CAA"); the CWA; the Resource Conservation and Recovery Act ("RCRA"); and the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")—contain essentially the same citizen suit provisions.[2] After the first citizen suit enactment in section 304 of the CAA, Congress "lifted" this section into all the amended federal environmental statutes. *See* Robert D. Snook, *Environmental Citizen Suits and Judicial Interpretation: First Time Tragedy, Second Time Farce*, 20 W. New Eng. L. Rev. 311, 313–14 (1998).

Congress took action to enhance the CWA by passing the Water Quality Act of 1967, because states were not enforcing CWA regulations. *See* Pub. L. No. 89-234, 79 Stat. 903 (1965). States were not meeting the CWA regulations with only about half having approved standards. *See* S. Rep. No. 92-414, at 4 (1971). In the 1970s, United States citizens grew passionate about the environment and the Subcommittee on Air and Water Pollution created the 1972 Amendments, resulting in the modern day CWA. S. Comm. on Pub. Works, A Legislative History of the Water Pollution Control Act Amendment of 1972, at 3674 (Jan. 1973).

The previous procedures imposed on the states to enforce CWA regulations included conferences, recommendations by the Federal Water Pollution Control Administration, and

[2] *See* CERCLA § 310; CAA 304; CWA § 405; RCRA § 7002.

hearings with the alleged polluter. Pub. L. No. 845, 62 Stat 1155 (1948). Because these procedures were so cumbersome, the EPA decided to allow citizens to regulate pollution under the CWA in order to increase efficiency. *See* Walter Russell & Paul Gregory, *Awards of Attorneys' Fees in Environmental Litigation: Citizen Suits and the "Appropriate" Standard*, 18 Ga. L. Rev. 307, 325 (1984). The new Citizen Suit Section was a congressional attempt to rectify the States' inadequate methods of environmental enforcement. Jeffrey Miller, *Private Enforcement of Federal Pollution Control Laws, Part I*, 13 Envtl. L. Rep. 10,309, 10,309 (1983). Congress additionally discussed the importance of providing a check on citizen suits to prevent a potential flood of illegitimate suits intended solely to harass defendants. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 708 n.22 (1983).

Even though Congress intended to correct more violations by allowing citizen suits, it did not intend to break all boundaries by extending an invitation to all individuals worldwide. Under a broadened definition of "citizen" in the CWA, unprecedented results would occur allowing anyone to sue. Expanding the definition to include any person claiming an interest could vastly affect all other citizen suits with similar statutory language. Such an effect would open the floodgates of excessive litigation, because under the CWA, almost everyone would be a "citizen." Congress enacted citizen suits to assist with the workload, not to create an influx.

Bonhomme is bringing a citizen suit for the sole purpose of harassing Maleau's company, which is PMI's direct competitor, not for environmental concern. Bonhomme is unable to receive any monetary gain, which disproves any individual need to bring a citizen suit. This emphasizes the intent to harm PMI's direct competition, which contradicts Congress's intent. To avoid these results, the definition of "citizen" must only extend to United States citizens and the enumerated parties listed in section 1362(5) of the Definition Section. Therefore, this Court

should affirm the finding that Bonhomme is not citizen under the meaning of the Citizen Suit Section in order to uphold the constitutionality of the statute.

III. THE DIRT PILES ARE NOT POINT SOURCES BECAUSE THE PILES ARE NOT CONVEYANCES OF ARSENIC CONSTITUTING AN ADDITION TO DITCH C-1 AND THE PILES ARE EXEMPT UNDER THE AGRICULTURAL STORMWATER DISCHARGE PROVISION.

The dirt piles are not point sources because they are not discernible, confined and discrete conveyances discharging a pollutant into the Ditch. The CWA's prominent objective is to maintain and restore the chemical, physical, and biological integrity of the water throughout the United States. 33 U.S.C. §1251(a) (2011). To accomplish this mission, the CWA sets certain standards on the discharge of pollutants from point sources. 33 U.S.C. §1311 (2011). A point source is defined as a "discernible, confined and discrete conveyance from which pollutants are or may be discharged including but not limited to any pipe . . . channel . . . conduit . . . rolling stock, or from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2011). The EPA does not have the ability to regulate all sources of pollution, only "additions" of pollutants. *Nat'l Wildlife Fed. v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982).

These piles are not contributing to a water of the U.S., because the Ditch is not classified as such, as will be discussed in more detail in issue IV. Moreover, the dirt piles are not conveying any addition to a water of the U.S. and should be considered under the agricultural stormwater discharge provision because the piles are not discernible, confined and discrete conveyances of arsenic strictly from mining. The piles can be considered under the agricultural stormwater exception because they are composed of a mixture of mining deposits and chicken debris. Therefore, the piles do not warrant CWA regulation because they do not fall under the point source classification.

A. Maleau's dirt piles are not point sources because they are not discernible, confined and defined conveyances of arsenic.

Maleau's dirt piles are not point sources because they are not conveying a pollutant into the Ditch. In order to qualify as a point source, there must be a discernible, confined and discrete conveyance that is releasing a pollutant. § 1311. In the Definition Section, there is a list of examples of what constitutes a point source, such as a pipe, ditch, channel, or tunnel. § 1362(14); *see also S. Fla. Water Mgmt Dist v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Courts generally look to the result of the runoff rather than the actual deposit itself. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (6th Cir. 1980) (reasoning that runoff must be examined and not the actual spoil piles themselves in order to determine a point source). Congress chose these specific examples to include in the list of point sources and it is understood that Congress does not omit necessary words within statutes. *See United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993).

The Second Circuit held a defendant was not a point source when he left vials of human blood from a blood testing laboratory at the edge of the Hudson River that ended up in the water. *Plaza Health*, 3 F.3d at 646. The court reasoned if the CWA intended to find human beings as point sources, the statute's lengthy definition would have been unnecessary and Congress does not add unnecessary words to statutes. *Id.*

In *Abston*, the Fifth Circuit shifted the focus from mining piles to the actual runoff created reasoning that the runoff from rainwater was causing the discharge of a pollutant through eroded channels in the ground that carried the pollutant to the nearby water. 620 F.2d at 45. The court concluded that these channels did not constitute point sources. *Id.* at 47 (citing *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)).

Maleau's piles contain dirt and rock creating runoff after rainfall—constituting a discharge. The stromwater discharge, stemming from the dirt piles, is creating a nonpoint source much like the discharge in *Abston*. The piles may be discernible, confined and discrete, but they are not conveyances. The statute does not list piles as a typical point source. Even though the list is not exhaustive, a pile has traditionally not been held as a point source because a stack of dirt and rock cannot convey anything. Rather, courts look to the result of runoff from the piles because the runoff is the actual conveyance. If the EPA regulates Maleau's piles, it would be overreaching the original power Congress delegated. Maleau brings the dirt piles near the edge of the Ditch but because piles of rock and dirt are not plainly listed in the statute, they were meant to be excluded from the point source definition. None of the listed categories even resembles dirt piles and regulating such piles would allow for unnecessary control over piles made of anything, resulting in irrational exertion of EPA resources. Therefore, Maleau's piles are not conveyances and cannot be classified as point sources.

B. Maleau's dirt piles are not point sources because the discharge of arsenic is not an addition to Ditch C-1.

Maleau's dirt piles are not point sources because arsenic from the dirt piles is not an addition being introduced into the Ditch and Bonhomme's testing does not confirm this conclusion. The discharge of a pollutant is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2011). "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2011). In the CWA, Congress did not reserve the ability to regulate all sources of pollution, only "additions" of a pollutant. *Gorsuch*, 693 F.2d at 176.

Elements naturally present in the water or are there due to other industrial discharges, do not constitute an addition of pollutants. *Appalachian Power*, 545 F.2d at 1377. Had Congress wanted the CWA to regulate all sources of pollution, it would have chosen suitable language in the Definition Section—for example—all pollution released through a point source. *Gorsuch*, 693 F.2d at 176. The CWA does not define an addition, however, the EPA has adopted the plain meaning of addition, which is the introduction of a new pollutant into a navigable water from the outside world. *Id.* at 175-76. "From the outside world" means the pollutant will not be an addition if it is already present in the water. *Id.* Additionally, the EPA uses a specific process to ensure water testing is properly conducted. *See generally* 40 C.F.R. § 125.3 (2012).

One court found a dam conveying minerals and oxygen to another part of a river where all the minerals were already present was not an addition because it was not from the outside world. *Gorsuch*, 693 F.2d at 171. The court first gave deference to the EPA's interpretation of an addition and stated because this interpretation was reasonable it must be followed. *Id.* at 173-74. The Sixth Circuit determined the movement of live and dead fish as well as fish remains already present in the water was not an addition of pollutants to a navigable water requiring a National Pollutant Discharge Elimination System permit ("NPDES"). *Nat'l Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 581-82 (6th Cir. 1988). The court reasoned the fish were not newly introduced from the outside world, were not considered an addition, and should not be regulated by the CWA. *Id*.

This Court should defer to the EPA's definition of an addition and find the arsenic is not an addition. Maleau may appear to be discharging a pollutant, however, arsenic is already present in the Ditch. Arsenic is present in agricultural farms and because the Ditch's purpose is for agricultural runoff and the runoff contains arsenic, the dirt piles are not an addition. Like the

minerals and entrained fish, Maleau's dirt piles are not introducing something new to the water because arsenic naturally occurs as runoff in water from the surrounding agricultural properties may use pesticides containing arsenic that also drain into the Ditch. Maleau complies with all CWA permits from the extractions of his gold mining operation and by not dumping the dirt piles near the traditionally navigable Buena Vista River but near the non-navigable Ditch, further proves his intended compliance under the CWA.

Bonhomme's allegations are founded upon his personal testing of both the Ditch and the Creek. This testing is untrustworthy because it is doubtful it complies with the EPA's stringent standards of reliable water testing for potential violators. Even if the testing was properly conducted in compliance with the EPA's testing standards, the results provide no helpful conclusions. Bonhomme only detecting arsenic downstream of Maleau's property in the Ditch provides little insight. There is no evidence of any agricultural properties upstream of Maleau's property possibly contributing to the arsenic levels, which is why no arsenic was detected. Below Maleau's property are several agricultural properties, causing the detection of the exact area of arsenic addition virtually impossible to pinpoint. Regardless of the results of the personal test by Bonhomme, the results are not precise enough to determine point sources.

C. Maleau's dirt piles are not point sources because they satisfy the agricultural stormwater discharge exemption because the piles are a combination of both agricultural and mining overburden.

The piles are nonpoint sources under agricultural stormwater discharge exemption since there is no direct cause showing the conveyance of a combination of agricultural and mining waste. The point source definition creates a second category of nonpoint sources. *Appalachian Power*, 545 F.2d at 1373. Congress has distinguished between the regulation of point sources and nonpoint sources only allowing the EPA to regulate point sources. *Id.* A nonpoint source

includes items the statute explicitly excludes because it is understood that Congress does not omit necessary words to statutes. *See Plaza Health*, 3 F.3d at 646.

The Definition Section specifically recognizes a nonpoint source of agricultural stormwater discharge. § 1362(14). The agricultural stormwater discharge applies to any "discharges that were the result of precipitation." *Nat'l Park Procedures Council v. U.S. E.P.A.*, 635 F.3d 738, 743 (5th Cir. 2011). Although discharges from mining activities may be from nonpoint sources, it is possible pollutants will be conveyed through a point source and be subject to regulation under the CWA. *United States v. Earth Scis., Inc.*, 599 F.2d 368, 372 (10th Cir. 1979). Also, arsenic is naturally occurring in the ground as well as in agricultural lands. Lynne Peeples, *Arsenic in Agriculture Enjoys Comeback in Poultry Feed, Pesticides*, Huffington Post (Oct. 22, 2012, 8:24 PM) http://www.huffingtonpost.com/2012/10/22/arsenics-industrial-agriculture-pesticides-poultry_n_2001340.html. Arsenic from agricultural pesticides that have been banned still "haunts the soil today." *Id.*

The Fourth Circuit ultimately set aside the EPA's rainfall runoff regulations when reviewing them in light of discharge of heat from steam electric generating plants into navigable waters. *Appalachian Power*, 545 F.2d at 1356. The court held the EPA erred in extending regulations to nonpoint sources because it showed overreaching from the original powers that the EPA was given by Congress. *Id.* at 1373.

Maleau's piles are considered nonpoint sources because they fall under the agricultural stormwater discharge exemption since they are not purely composed of mining debris. Maleau's mining property also contains several abandoned chicken coops. R. at 6. Raising chickens is a process that produces arsenic. Regardless that the coops are now abandoned, they retain arsenic and are contributing to the arsenic content of Maleau's dirt piles. Therefore, Maleau has a mix

of both arsenic from chicken coops, which is an agricultural production, and from mining. This is a case of first impression and these piles cannot be considered solely as mining overburden. As a mixed content, the piles should not lose their status as agricultural discharge, although the amount is unclear. The agricultural stormwater discharge exemption applies to discharges as the result of rain, which is exactly Maleau's situation.

If the court excluded these piles from the intended provision, then the EPA would be overreaching in its power. Very few piles would qualify under this exception because it is difficult to separate what is the "waste" from the other components of the piles. Arsenic occurs naturally in the ground and at least some of this is contained in every waste deposit. Therefore, the court cannot ignore that these piles deserve to qualify under the stormwater exception based on their mixed nature. Based on this exception, the piles are not considered to be point sources, but rather will qualify as nonpoint sources.

The lack of conveyance and the mixed components of the dirt piles place Maleau's piles in the nonpoint source classification under the CWA. Because Maleau's dirt piles satisfy the agricultural stormwater discharge provision and the arsenic is not an addition into the Ditch, Maleau's dirt piles are nonpoint sources and not point sources and this Court should affirm.

IV. NEITHER DITCH C-1 NOR REEDY CREEK ARE NAVIGABLE WATERS OR WATERS OF THE UNITED STATES UNDER THE CLEAN WATER ACT BECAUSE THEY DO NOT FALL UNDER ANY OF THE STATUTORY CATEGORIES.

Because the Ditch and the Creek do not fall under any categories used to determine a water of the U.S., neither one is considered navigable waters or waters of the U.S. Navigable waters are defined as a "water of the U.S., including territorial seas." 33 U.S.C. § 1362(7) (2011). If a body of water does not fall within the definition of a the water of the U.S., it will not

be regulated by the CWA. *Solid Waste*, 531 U.S. at 164. A water of the U.S. is defined and analyzed under seven categories:

> "(a) waters used, were used in the past, or are susceptible to interstate commerce; (b) interstate waters; (c) all other waters [meaning the remaining intrastate waters] whose use, degradation, or destruction of which would affect or could affect interstate commerce of waters: (i) that are or could be used by interstate travelers for recreational or other purposes, (ii) from which fish or shellfish are or could be taken and sold in interstate commerce, or (iii) used or could be used for industrial purposes by industries in interstate commerce; (d) all impoundments of waters; (e) tributaries of waters; (f) the territorial sea; and (g) wetlands adjacent to waters."

40 C.F.R § 122.2 (2012). Neither the Ditch nor the Creek fall under any of the defined subsections and are not waters of the U.S. because of the potential for overregulation.

A. Ditch C-1 is not a water of the United States because the water is not supporting interstate commerce, affecting interstate commerce of another water, nor is it a tributary.

The Ditch is not a water of the U.S. because its navigability is not used for interstate commerce, it does not affect interstate commerce of the Creek, and it is not a tributary. Navigability-in-fact is the test that determines whether a water in its natural condition is used as a highway for commerce where trade is, or may be, conducted. *The Montello*, 87 U.S. 430, 439 (1874). An intrastate water is a water of the U.S. if it impacts the interstate commerce of different water. § 122.2. For a water to be a tributary, it must adjoin to another water that is a water of the U.S. based on one of the first four categories listed. *Id.*

The only sections of the analysis that could possibly apply to the Ditch are whether the water is, was, or could be used for interstate commerce, has any effect on interstate commerce of the Creek, and if the Ditch is a tributary to another water. The Ditch is not, was not, and cannot be susceptible to interstate commerce because the Ditch's physical qualities create the impossibility of transporting commerce. The remaining sections are not at issue in respect to the Ditch and do not apply. The Ditch is not a water of the U.S. because it does not, has not, and

will not affect interstate commerce on its own water, on the Creek, nor is it a tributary.

1. Ditch C-1 is not a water used, previously used, or susceptible to interstate commerce based on Ditch C-1's physical composure.

The Ditch is not used for navigation purposes affecting interstate commerce because its purpose is for agricultural drainage and not for the transportation of commerce. The United States Constitution authorizes Congress to regulate interstate commerce in accordance with the laws in relation to trade and navigation. *Gibbons v. Ogden*, 22 U.S. 1, 1 (1824). The CWA regulates a water based on interstate commerce if the water is navigable-in-fact as a highway for trade. *In Re Needham*, 354 F.3d 340, 346 (5th Cir. 2003). Navigability-in-fact is the traditional navigational test that determines whether a water is used, or susceptible to being used, in its natural condition as a highway for commerce where trade is, or may be, conducted. *The Montello*, 87 U.S. at 439.

Courts do not need to analyze the commerce of adjacent properties because a water of the U.S. analysis only concerns interstate commerce in relation to navigability. *United States v. Rands*, 389 U.S. 121, 123-24 (1967). In determining if a water is susceptible to navigation, courts consider factors such as the physical characteristics of the water including size, depth, and flow of velocity. Draft Guidance on Identifying Waters Protected by Clean Water Act, at 6, 2011. A creek and a dam have been determined to not be waters of the U.S. because the waters could not be susceptible to interstate commerce without improvements. *United States v. Crow, Pope & Land Enters, Inc.*, 340 F. Supp. 25, 34 (Dist. Ct. N.D. GA 1972). The District Court reasoned that in order to be susceptible to interstate commerce, the alterations to the water must be reasonable, not too costly, and must be useful to that water. *Id.* at 35.

In the instant case, the Ditch is not used, was not used, and cannot be susceptible to interstate commerce because it does not have the possibility to transport commerce based on the

physical qualities of the Ditch. There are agricultural properties adjacent to the Ditch that contribute to interstate commerce. The water within the Ditch is only drainage from the adjacent properties that are not used for interstate commerce. Currently, the water cannot be used for interstate commerce. The Ditch was not previously used for interstate commerce since the purpose of the Ditch is for agricultural drainage, protected by the 1913 real covenants still in place today. With the Ditch being strictly intrastate, this precludes any future possibility of navigational interstate commerce without drastic alterations to the Ditch.

Under Congress's express authority, the CWA does not have power to regulate the Ditch as a water of the U.S. due to it being intrastate, and not susceptible to interstate commerce through navigation. If the CWA regulated intrastate waters, the EPA would be regulating all waters within the United States. Major alterations of the Ditch would include lengthening the Ditch to reach beyond the state line of Progress to another state as well as adjustments to the measurements because the water is only three feet wide by one foot deep. Therefore, the Ditch itself is not used, was not ever used, and is not susceptible to interstate commerce.

2. As an intrastate water, Ditch C-1 is not a water that's use, degradation, or destruction would or could affect interstate commerce of another water because of the location of the point of impact.

The Ditch does not and cannot affect the interstate commerce of another water because the point of impact with the Creek is downstream of all interstate commerce and it is not adjacent to the Marsh. An intrastate water is further defined as a water of the U.S. if it impacts the interstate commerce of another water. § 122.2. Interstate commerce of the interstate water under this subsection is affected if the water: (i) is or could be used by interstate travelers for recreational or other purposes, (ii) from which fish are or could be taken and sold in interstate commerce, or (iii) could be used for industrial purposes by industries in interstate commerce. *Id.*

A water can be looked at in sections, rather than as a whole, based on the physical conditions of the water. *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1229 (U.S. 2012). Additionally, to affect interstate commerce of any wetland, the water must be adjacent. *Rapanos v. United States*, 547 U.S. 715, 724 (2006).

The Supreme Court held that when determining navigability in fact, a water is considered in segments based on the physical attributes of the water. *PPL Montana*, 132 S. Ct. at 1229. The Court reasoned the ability to view a water in segments in relation to navigability determinations in relation to highways of interstate commerce is not a "piecemeal classification to navigability," but is a well settled approach and should not be ignored. *Id.* Regardless of how short the segments are, a court can still divide these areas. *Id.* at 1230. The Court also noted the practical aspects of the segment approach, stating that physical conditions vary along water and therefore one physical attribute should not affect the entire water. *Id.*

Here, the Ditch does not affect interstate commerce of the Creek, because the Ditch does not reach interstate travelers' activities at Bounty Plaza, fishing for interstate commerce business, nor industrial commerce. The Ditch does not touch the interstate commerce of the Creek because it is not connected but-for the culvert. The service station serving interstate travelers and the agricultural farms along the Creek are upstream from the forced connection between the two waters. Due to the natural ebb and flow of the tides, it is virtually impossible for arsenic to travel upstream for approximately fifty miles in order to impact interstate commerce.

The Ditch does affect fishing used for interstate commerce of the Creek because no evidence exists showing there are any fish in the Creek. Additionally, the Creek is not, has not, nor will it be susceptible to industrial interstate commerce because the only properties abutting the water, other than Bonhomme's, are used for agricultural purposes. These agricultural

properties are not operating as industrial factories. Even if one of the farms is converted in the future to an industrial use supporting interstate commerce, the property is still upstream of any pollutant. Although there is interstate commerce occurring on the Creek, the Ditch does not affect this commerce because of the manmade connection of the waters and the forged intersection is downstream of any commerce activities.

The point of impact with the Creek deserves severability. In *PPL Montana*, the Court severed a seventeen-mile river based on a segment about four miles long, but here this river is over fifty miles long. This distance is nearly two and one-half times longer than that particular case. If the court chooses not to sever the Creek, or others like it, the CWA will ultimately stretch itself too thin in its attempt to regulate every single drop of water on the nation's surface. This would far outreach the EPA's authority, but more importantly, would overwork the EPA and ultimately result in detrimental contamination being overlooked.

The Ditch does not impact the Marsh. The Marsh is an undisputed wetland. For the Ditch to affect the interstate commerce of the wetland, the Ditch must be adjacent. The Ditch and the Marsh are not adjacent due to the intermediary water of the Creek, thus the Ditch does not, has not, and will not have any impact on the interstate commerce unless substantial improvements are made to connect these two waters. The Ditch does not affect the Creek or the Marsh and therefore is not a water of the U.S.

3. Ditch C-1 is not a tributary of a water of the United States because Ditch C-1 is not naturally connected and does not reach the interstate commerce of Reedy Creek.

The Ditch is not a tributary of a water of the U.S. because it is not naturally connected or adjacent and does not reach interstate commerce of the Creek. For a water to be a tributary to a water of the U.S., the secondary water must qualify under one of the first four statutory sections:

"(a) waters used, were used in the past, or are susceptible to interstate commerce; (b) interstate waters; (c) all other waters [meaning the remaining intrastate waters] whose use, degradation, or destruction of which would affect or could affect interstate commerce of waters . . . [or] (d) all impoundments of waters." § 122.2. Here, the only applicable sections are water used for interstate commerce and interstate waters.

Courts have taken into account the plain meaning definition of a tributary, which is defined as a stream that directly contributes its flow to a larger body of water. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). To be a tributary to any wetland, the water must be adjacent. *Rapanos*, 547 U.S. at 724; § 122.2. Tributaries are known for moving pollutants downstream. *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003). Therefore, courts have been predominately concerned with the downstream interstate commerce. *United States v. Buday*, 138 F. Supp. 2d 1282, 1283 (Dist. Ct. D. Mont. 2001).

In *Buday*, the court held that a non-navigable water was a tributary to another water because it would affect interstate commerce on that second water. *Id.* at 1288. The court reinforced the fact that Congress's intent in making tributaries waters of the U.S. is to regulate pollutants that affect interstate commerce. *Id.* (citing *United States v. Eidson*, 108 F.3d 1336, 1341 (11th Cir. 1997)). The court specifically analyzed the effects of the tributary only downstream of its intersection with the second water. *Id.* at 1283.

The Ditch is not a tributary to the Creek because the Ditch does not flow directly into it and does not reach any interstate commerce. The Creek and the Ditch are connected artificially by Bonhomme's culvert and all interstate commerce is happening upstream of this intersection. Here, the merging of the Ditch to the Creek is significantly downstream of where the agricultural properties use the water for interstate commerce and Bounty Plaza on I-250. The Ditch is not

adjacent to the Marsh, disqualifying the Ditch as a tributary. Therefore, the Ditch is not a tributary of the Creek nor to the Marsh. Because the Ditch is not connected to interstate commerce nor is it a tributary, the Ditch is not a water of the U.S. Therefore, this court should affirm and find that the Ditch is not a navigable water or a water of the U.S.

B. Reedy Creek is not a water of the United States under the Clean Water Act because the point of impact has no effect on interstate commerce, is within the State of Progress, and is not a tributary.

The Creek does not fall under a water of the U.S. classification because its areas of interstate commerce are not affected because they are upstream of the point of impact. The navigability determination is used for applying the statute for a water of the U.S., with the important sections of: "(a) waters used, were used in the past, or are susceptible to interstate commerce; (b) interstate waters; . . . and (e) tributaries of waters" pertaining to the Creek. § 122.2. The Creek's point of impact has no affect on interstate commerce, it occurs only in Progress, and the Creek is not a tributary to another water.

1. Reedy Creek is not a water used, nor was it used in the past, nor is it susceptible to interstate commerce because of the natural flow of the tides.

The Creek is not used, has not been used, nor is it susceptible to interstate commerce because the commerce is upstream of the point of impact. Congress only has the authority to regulate navigable interstate commerce. *Gibbons*, 22 U.S. at 1. This does not apply to the neighboring properties and the CWA is concerned with commerce in relation to navigability because it can only regulate the water and underlying land. *Deaton*, 332 F.3d at 707. When determining if a water can be a water of the U.S., a water can be severed to focus on the point of impact. *See PPL Montana*, 132 S. Ct. at 1229 (finding a river can be severed into sections based on navigability and non-navigability of the river). The Creek cannot, in the present, past, or future, have an impact on interstate commerce, because the arsenic does not affect the point of

impact on the Creek. The point of impact is assigned to the point where the Ditch and the Creek meet through Bonhomme's culvert.

The potential for severability is logical because it accounts for all of the physical dynamics essential to a body of water. Each section must be examined in turn to avoid classifying a water based on one minute attribute. Otherwise, a small section of water will determine the entire classification of a body of water. This would be like deeming a 100-mile river navigable, simply because a one-mile section at the very end is engaged in interstate commerce.

Because of the location of the point of impact, the Creek is not used, nor was it used, and is not susceptible to interstate commerce. Upstream, the Creek provides for a service station in Bounty Plaza and several agricultural properties. Because the point of impact where the Ditch is forcibly joined with the Creek is downstream, the point of impact has no possible effect on those activities. If any arsenic was to reach the service station or agricultural properties, it would have to flow upstream against the natural ebb and flow of the tide for fifty miles—this cannot happen. Therefore the point of impact is not subject to interstate commerce.

2. Reedy Creek's pollution point of impact severs Reedy Creek, even though it is an interstate water, because the point of impact is downstream from the state line.

The Creek is an interstate water, however, it is severed based on the point of impact where the allegedly infected area is only within the State of Progress. An interstate water can be severed when only one section of the water is being analyzed. *PPL Montana*, 132 S. Ct. at 1229.

The Supreme Court severed an interstate river to view part of a river within the borders of the State of Oklahoma when determining navigability and the ability for interstate commerce. *Oklahoma v. Texas*, 258 U.S. 574, 588 (1922). The Supreme Court examined the western and

eastern halves of the Oklahoma river separately, based on their physical attributes. *Id.* Although the Court ultimately found the entire river was non-navigable, the Court split the river between the western and eastern halves to consider the effects of each half on the other. *Id.* at 591. Recently, the Supreme Court reinforced the severability of a river into segments when determining navigability by considering the individual parts of a river. *PPL Montana*, 132 S. Ct. at 1229.

Based on the ability to sever a water, the Creek is not an interstate water. The Creek runs through both the State of New Union and the State of Progress, which qualifies it as an interstate water. The point of impact is only within the State of Progress, not in the upstream area of New Union. Any activity happening at the point of impact cannot run upstream fifty miles to reach beyond the State of Progress into the State of New Union. Thus, the Creek's point of impact in not interstate.

3. Reedy Creek is not a tributary because it does not flow into a water of the United States that is capable of being a tributary.

The Creek is not a tributary because it is not flowing to another water deemed a water of the U.S. for purposes of being a tributary. To constitute a water receiving a tributary, that water must be a water of the U.S., because it is a water used presently, in the past, or in the future for interstate commerce; qualify as an interstate water; qualify as an intrastate water where the use, degradation, or destruction would affect a second water's interstate commerce; or be an impoundment. § 122.2. Only the sections of interstate waters and intrastate waters apply. *See Buday*, 138 F. Supp. 2d at 1289 (stating that courts should focus on the downstream effects of pollution on interstate commerce coming from a tributary). Because the Creek is only upstream of the Marsh, the Creek is not a tributary.

The Creek is not a tributary to the Marsh because the Marsh is an intrastate wetland. The statute sections including wetlands for purposes of defining a tributary are the sections of interstate waters and intrastate waters affecting a commerce of another water because the statute explicitly extends to this special classification of a water of the U.S. The Creek does not fall under the interstate section because the point of impact only exists within the State of Progress. The Creek must be analyzed under the intrastate waters affecting interstate commerce of another water section because it extends to intrastate wetlands whose use, degradation, or destruction will affect interstate commerce of another water.

Based on the facts, the only other water that can be affected is the Creek. But due to the severability of the Creek, as well as the natural ebb and flow of the tides, it is virtually impossible for the Marsh to affect any interstate commerce of the Creek. Therefore, the wetland does not affect interstate commerce of another water and thus the Creek is not a tributary to the Marsh. Because the Creek's point of impact is not affecting interstate commerce, is not interstate, and the Creek is not a tributary, the Creek is not a water of the U.S. Therefore, this Court should reverse and find that the Creek is not a water of the U.S.

V. BONHOMME VIOLATES THE CLEAN WATER ACT BY ADDING A POLLUTANT TO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY AND SHOULD BE HELD STRICTLY LIABLE.

Bonhomme is in violation of the CWA because he is discharging a pollutant into the Creek from a culvert on his property and should be found strictly liable under the National Pollutant Discharge Elimination System Water Transfers Rule ("Water Transfers Rule"). A discharge of a pollutant by any person violates the CWA. 33 U.S.C. § 1311(a) (2011). The CWA regulates the discharge of a pollutant when it is conveyed into water by requiring an NPDES permit. *See Decker v. Nw. Envtl. Def. Ctr*, 133 S. Ct. 1326, 1331 (U.S. 2013); *see also*

Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 300 (2009); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). In identifying whether something is considered the discharge of a pollutant, courts have recently recognized the unitary waters theory. *See Friends of the Everglades v. S. Fla. Water Mgmt Dist.*, 570 F.3d 2010, 2028 (11th Cir. 2009); *see generally Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. E.P.A.*, 630 F. Supp. 2d 295 (2d Cir. 2009).

The unitary waters theory explains that all waters of the U.S. are one, entire body of water, but involving a non-water of the U.S. denotes separate and distinctive bodies of water. *Friends*, 570 F.3d at 1217. This difference hinges on the meaning of the word conveyance deeming it a "transfer" between the same body of water and an "addition" between two distinct bodies of water. *Id.* at 1227.

Under the unitary waters theory, an addition occurs only when pollutants first enter navigable waters from a point source. *Id.* at 1217. Alternatively, a transfer has been defined as the transfer of a pollutant from a water of the U.S. to a water of the U.S. 40 C.F.R. § 122.3(i) (2012). An addition is not exempt from the permit requirement while the transfer is exempt. *Friends*, 570 F.3d at 1228. A transfer is exempt from the permit requirement because all waters of the U.S. are already regulated under the watchful eye of the EPA. *Id.* at 1216.

The EPA recently clarified this distinction of an addition versus a transfer with the Water Transfers Rule. *Id.* at 1219. The Water Transfers Rule acknowledges a transfer of a pollutant between non-waters of the U.S. does not fall within the exemption in section 122.3(i) and still requires a permit. National Pollutant Discharge Elimination System Water Transfers Rule, Fed. Reg. vol 73 No. 115, 33699 (June 13, 2008). The Water Transfers Rule has been acknowledged

by the courts under *Chevron* deference adopting the EPA regulation as reasonable and must be applied. *Friends*, 570 F.3d at 1228.

A party causing an addition is required to obtain an NPDES permit, otherwise that party will be held strictly liable as a polluter. *United States v. Allegheny Ludlun Corp.*, 366 F.3d 164, 175 (3d Cir. 2004). Strict liability is imposed under the CWA because polluters are held responsible for their actions to ensure the purpose of the CWA is enforced. *Id.* at 168.

Prior to the release of the Water Transfers Rule, courts mistakenly rejected the unitary waters theory stating that a transfer of a pollutant is similar to an addition and required a permit in both circumstances, but that approach frustrates the general purpose of the CWA. *ONRC Action v. U.S. Bureau of Reclamation*, No. 97–3090–CL, 2012 WL 3526833 at *7 (Dist. Ct. Or. D. Or. Jan. 17, 2012) (stating "between 1991 and 2006, the 'unitary waters' theory . . . [was] considered and rejected by the First, Second, Ninth, and Eleventh Circuit Courts of Appeal"). By recognizing this rule, the EPA acknowledges the need to regulate pollutants but reduces the fear of overregulation and overreaching in their powers given by Congress. *See generally Friends*, 570 F.3d at 1228.

The Eleventh Circuit held that a conveyance of water was not an addition when flood control pump stations moved pollutants from canals to Lake Okeechobee. *Id.* at 1214. The court reasoned that because the canals and Lake Okeechobee were waters of the United States, the unitary water theory applied and the pollutants were not considered an addition but a transfer. *Id.* at 1228. Based on this decision, the Second Circuit revisited its original holding and gave the EPA deference. *See generally Catskill*, 630 F. Supp. 2d 295 (2d Cir. 2009). The court held no addition occurred when pollutants were conveyed interbasin and no permit was required. *Id*. at 302-03.

Predating the EPA clarification, the Supreme Court recognized the value in adopting the unitary waters theory when discussing the conveyance of surface runoff or ground water filled with contaminants between a canal and a pump station. *Miccosukee Tribe*, 541 U.S. at 101, 106. Although the Court did not implement the unitary waters theory, it considered it an option that could reasonably be applied allowing water to be conveyed into the navigable waters without an NPDES permit. *Id.* at 109. The discharger of an unlawful pollutant when filling wetlands was held strictly liable under the CWA. *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993). Strict liability applies in cases dealing with an unlawful discharge of a pollutant, but not a false report of error resulting from over reporting. *Allegheny Ludlun*, 366 F.3d at 175.

Here, the unitary waters theory should apply because it allows for the appropriate amount of regulation by the State of Progress. The pump station acts similar to the culvert on Bonhomme's property transferring the arsenic from the Ditch to the Creek and ultimately into the Marsh. The conveyance of pollutants from the Ditch and the Creek through the culvert is happening between two non-waters of the U.S. In applying the *Chevron* Doctrine to the EPA clarification, the Ditch and the Creek are conveying an addition because they are distinct, separate water bodies requiring and NPDES permit.

Bonhomme should be found strictly liable because the conveyance of the arsenic is an unlawful discharge of a pollutant under the CWA. By finding Bonhomme strictly liable due to the addition of the arsenic into the Creek, this Court will be following years of precedent in allowing the regulation and minimization of the unlawful discharge.

Bonhomme's culvert is the malignant connection spreading the arsenic not only to the Creek but also to the Marsh. The arsenic is considered an addition because it is being conveyed through the culvert from the Ditch and into the Creek. Both the Ditch and the Creek are

considered non-waters of the U.S., solidifying that they are separate and distinct bodies of water. These separate and distinct bodies of water do not fall within the narrowed exception of the unitary waters theory, but fall within the EPA clarification of Water Transfers Rule. Because Bonhomme's unlawful discharge falls within the Water Transfers Rule, Bonhomme is required to maintain the discharge of arsenic through the culvert with an NPDES permit.

The lack of an NPDES permit and presence of the discharge of arsenic shows the need to hold Bonhomme strictly liable under the CWA. Requiring Bonhomme to obtain a permit for this hazardous violation is giving the proper deference to the EPA and acknowledging the CWA's predominant purpose in maintaining the biological integrity of water. Bonhomme is strictly liable because he violates the CWA through the culvert discharging arsenic from the Ditch to the Creek activating the Water Transfers Rule and the renewed purpose under the CWA. Therefore, this Court should affirm.

CONCLUSION

Therefore, this Court should affirm the decision of the District Court for the District of Progress for all issues except as to the Creek being a navigable water or water of the U.S.