Team Number 35

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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGRESS
Nos. 155-CV-2012 and 165-CV-2012

BRIEF FOR THE INTERVENOR-PLAINTIFF-APPELLANT SHIFTY MALEAU

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JURISDICTIONAL STATEMENT

This case involves an appeal from a final judgment rendered by the United States District Court for the District of New Union. (R. 1). The district court had subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, a law of the United States, and 28 U.S.C. § 1331 confers federal district courts original jurisdiction over civil actions arising under the laws of the United States. The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decisions of the District Court for the District of Progress. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Is a shareholder -litigant a real party in interest when his corporation is paying litigation costs in a matter that affects its interest?

II. Can a foreign national be considered a citizen, who may bring a suit under the CWA, when the statute's plain language, congressional intent, and case law indicate otherwise?

III. Do mining waste piles consisting of only gravitational rainwater runoff with no manmade channels constitute "point sources" under the CWA?

IV. Can a ditch be a navigable water when it is expressly included in the definition of "point source" under section 502 of the CWA?

V. Is a creek subject to federal regulations when it is not navigable and does not substantially affect interstate commerce?

VI. Is the owner and operator of a culvert, a point source, liable under the CWA when they did not generate the pollutant but are in ownership of the point of discharge?

STATEMENT OF THE CASE

When the State of Progress learned that Jacques Bonhomme ("Bonhomme") was discharging arsenic from his culvert into Reedy Creek, it filed a citizen suit against Bonhomme for violating the Clean Water Act ("CWA" or "the Act"). (R. 5). Shifty Maleau ("Mr. Maleau") intervened in *Progress v. Bonhomme* (165-CV-2012) as a matter of right pursuant to §

505(b)(1)(B). (R. 5). The State of Progress and Mr. Maleau moved to consolidate their case with another pending case, *Bonhomme v. Maleau* (155-CV-2012), because the facts and law were the same. (R. 5). In *Bonhomme v. Maleau*, Bonhomme brought a citizen suit under § 505 against Mr. Maleau, alleging Mr. Maleau violated the CWA by placing piles of mining overburden adjacent to a drainage ditch on his property. Bonhomme did not object to the motion to consolidate, nor did he challenge Mr. Maleau's presence in the consolidated cases. (R. 5, 8). The District Court for the District of Progress granted the motion to consolidate. (R. 5).

After the district court consolidated the two actions, Bonhomme and Maleau each filed cross-motions to dismiss. (R. 5). The State of Progress supported Mr. Maleau in the majority of arguments. Specifically, it supported Mr. Maleau's arguments that: Bonhomme is not the real party in interest; Bonhomme is not a citizen for purposes of § 505; Mr. Maleau's mining overburden is not a point source; and, Bonhomme is the one in violation of the CWA.[1] (R. 2-3). The State supported Bonhomme on arguments relating to Ditch C-1 and Reedy Creek.[2] (R. 2-3).

On July 23, 2012, the district court found in Mr. Maleau's favor on five of the six issues. (R. 10). The district court dismissed Bonhomme's suit in *Bonhomme v. Maleau* without prejudice under Fed. R. Civ. Pro. 12(b)(6), finding Bonhomme was not a proper plaintiff. (R. 10). The district court went on to note that even if Bonhomme could maintain his suit, it would find for Mr. Maleau on all issues, except on the issue of jurisdiction over Reedy Creek as a "navigable water." (R. 10). Finally, the district court denied Bonhomme's motion to dismiss *Progress v. Bonhomme*, finding Progress adequately stated a cause of action. (R. 10).

Bonhomme, the State of Progress, and Mr. Maleau each timely filed a Notice of Appeal. (R. 1). Mr. Maleau only appeals the district court's holding that Reedy Creek is a navigable

[1] Issues I, II, III, and VI, respectively.
[2] Issues IV and V, respectively.

water under the Act. (R. 2). The State of Progress only appeals the district court's holding that Ditch C-1 is not a water of the United States. (R. 2). Bonhomme appeals all but one of the district court's holdings. Specifically, Bonhomme disagrees with the district court's holdings that: he is not a real party in interest; he is not a "citizen" for purposes of § 505; the piles of mining overburden are not point sources; Ditch C-1 is not a navigable water; and, he violates the CWA by discharging pollutants from his culvert. (R. 1-2). This Court granted review on September 14, 2013. (R. 3).

STATEMENT OF THE FACTS

1. Precious Minerals International, Inc. and Jacques Bonhomme

Precious Minerals International, Inc. ("PMI") is a gold mining company. (R. 6). PMI owns gold mines around the world, with only two gold mines in the United States neither of which are in Progress or New Union. (R. 7). Although it is incorporated in the United States, its President, largest shareholder, and board member, Bonhomme, is a French national. (R. 7). PMI is paying the attorney and expert witness in Bonhomme's suit. (R. 7). Though owning property in Progress, Bonhomme does not live in New Union or Progress. He is not a citizen of the United States. (R. 8).

PMI is in direct competition with gold mining operations owned by Mr. Maleau. (R. 7). At a press conference, Bonhomme accused Mr. Maleau of being an "unfair business competitor," evading federal abatement requirements, and housing illegal aliens in abandoned chicken coops. (R. 6). He also accused the Progress Attorney General of political payback. (R. 7-8).

2. Mr. Maleau's Property in Progress

Mr. Maleau's operation is stationed in Lincoln County, Progress adjacent to the traditionally navigable Buena Vista River. (R. 5). Mr. Maleau's operation is one of the region's

largest employers and requires CWA permits to operate. (R. 5-6). There is no evidence in the record that Mr. Maleau has ever failed to fully comply with these permits. (R. 5).

Mr. Maleau also owns property in Jefferson County, Progress. (R. 5). Mr. Maleau's Jefferson County property is not used for agricultural purposes or mining and is located fifty miles away from the Buena Vista. (R. 5). Mr. Maleau trucks overburden and slag from his mining operation to his Jefferson County property and places it in piles adjacent to a ditch (Ditch C-1). (R. 5). When it rains, rainwater runoff flows down and percolates through the piles. (R. 5). Gravity-eroded channels in the piles carry leached arsenic, a poison, in the runoff into Ditch C-1. (R. 5).

Ditch C-1 is a drainage ditch dug 3' across and 1' deep on average. (R. 5). It was dug in 1913 by a landowners association which included Mr. Maleau's predecessor in interest. (R. 5). Ditch C-1's purpose was, and is, draining saturated soils on the landowners' properties for agricultural use. (R. 5). Mr. Maleau is required to maintain the ditch on his property by restrictive covenants in his deed. (R. 5). The same is true for every other owner who has the 100-year-old ditch running through their properties. (R. 5).

Ditch C-1 begins before Mr. Maleau's property line. (R. 5). It continues past his property line for three miles, through several agricultural properties, before it crosses into Bonhomme's property. (R. 5). At Bonhomme's property, Ditch C-1 reaches a culvert owned by Bonhomme which runs underneath a farm road and drains into Reedy Creek. (R. 5).

All of the properties that Ditch C-1 runs through, including Bonhomme's and Mr. Maleau's, lie in Progress. (R. 5). Though none are uplands, Ditch C-1 still drains the agricultural properties. (R. 5). Drained groundwater makes up most of Ditch C-1's water, with some rainwater runoff after rain events. (R. 5). Though the ditch sometimes contains running water, it

is dry every year during annual periods of drought. (R. 5). These droughts last from several weeks to three months. (R. 5).

3. Bonhomme's Culvert

The culvert on Bonhomme's property discharges directly into Reedy Creek. (R. 5). Reedy Creek is about fifty miles long and maintains water flow throughout the year. (R. 5). It begins in New Union and ends in Wildman Marsh. (R. 5). It is used as water supply for Bounty Plaza, a store in New Union that sells gasoline and food on federally-funded Interstate 250 ("I-250"). Farmers in New Union and Progress divert water from Reedy Creek for agricultural irrigation. (R. 5). They sell their agricultural products in interstate commerce. (R. 5). No one argues Reedy Creek is, ever has been, or could be used for waterborne transportation. (R. 9).

Reedy Creek flows from Bonhomme's culvert for several miles before ending in Wildman Marsh. (R. 5). Wildman Marsh is a wetland and stopover used by millions of waterfowl during annual migrations. (R. 5-6). Wildman Marsh is contained within the Wildman National Wildlife Refuge ("Refuge") which is owned by the United States Fish and Wildlife Service. (R. 6). Though hunters from around the nation use the wetland, the $25 million in revenue all adds to the local economy. (R. 6).

Business acquaintances of PMI use Wildman Marsh for hunting activities. (R. 6-8). A hunting lodge sits on Bonhomme's property near Wildman Marsh. (R. 6). Bonhomme does not live at the lodge and only uses it a few times a year primarily to entertain PMI business acquaintances. (R. 7-8). The hunting parties have decreased from eight to two a year, mirroring a declining economy and declining profits of PMI, for whose benefit those parties have been held. (R. 6).

4. PMI Pays For Water Testing

Before Bonhomme's cause of action, PMI paid for sampling analyses of rainwater in Ditch C-1 upstream and downstream of Mr. Maleau's property. (R. 7). No samples were ever taken on Mr. Maleau's property. (R. 6). Arsenic is undetectable in Ditch C-1 upstream of Mr. Maleau's property. (R. 6). Downstream, arsenic is present in high concentrations. (R. 6). As Ditch C-1 flows towards Bonhomme's culvert, the concentration of arsenic decreases in proportion to the increasing flow in the ditch. (R. 6). Rainwater flows into Reedy Creek through Bonhomme's culvert. (R. 5).

There is no arsenic present in Reedy Creek before Bonhomme's culvert. (R. 6). However, just below Bonhomme's culvert, arsenic is present in "significant concentrations." (R. 6). Reedy Creek flows from Bonhomme's culvert into Wildman Marsh. (R. 5). In Wildman Marsh, arsenic has only been detected in lower levels. (R. 6). Of the millions of migratory birds that use the area, the U.S. Fish and Wildlife Service has only detected arsenic in three Blue-winged Teals. (R. 6). Further, there has been no notable changes in the flora and fauna surrounding Bonhomme's hunting lodge. (R. 6).

5. Legal Action

After PMI financed the water testing, Bonhomme brought a suit against Mr. Maleau. (R. 4). The State of Progress then chose to file a citizen suit against Bonhomme. (R. 4). The State of Progress alleged Bonhomme violated the CWA by discharging arsenic from his culvert—a point source—into Reedy Creek. (R. 5). The Attorney General of Progress stated in a press conference that Progress was acting to protect both a citizen of the State, Mr. Maleau, and the waters of the State. (R. 6). According to the Attorney General, Bonhomme, as President of PMI, filed suit against Mr. Maleau to injure PMI's competition. (R. 6).

STANDARD OF REVIEW

The district court granted Mr. Maleau's motion to dismiss Bonhomme's suit pursuant to Fed. R. Civ. P. 12(b)(6). (R. 10). This Court reviews a district court's grant of a Rule 12(b)(6) motion to dismiss *de novo*. *See e.g., Harry v. Marchant,* 237 F.3d 1315, 1317 (11th Cir. 2001); *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990).

SUMMARY OF THE ARGUMENT

The district court properly granted Mr. Maleau's motion to dismiss because: Bonhomme is not a real party in interest; the CWA precludes citizen suits initiated by foreign nationals; mining waste piles are not point sources; Ditch C-1 is not a navigable water; and Bonhomme is the one in violation of the CWA. The district court incorrectly found that Reedy Creek is a navigable water and, thus, its decision on the fifth issue should be reversed.

Bonhomme is not the real party in interest because his injury is derivative to that of PMI. Allowing a corporation to be the face of the lawsuit without actually being involved is contrary to interests of judicial economy and double counting. PMI cannot buy a plaintiff. Second, should this Court find that Bonhomme is a real party in interest, he is nonetheless not a citizen undern § 505(g) and 502(5) of the CWA. Plain language, congressional intent, and Supreme Court precedent indicate that a foreign national cannot be considered a citizen under the CWA because to hold otherwise would be to controvert the word "citizen" itself.

Third, Mr. Maleau's mining slag and overburden piles are not point sources under the CWA because they do not collect and channel drainage before discharge into a navigable water. Further, diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not regulated under the Act.

Fourth, Ditch C-1 is not a navigable water under the CWA because it is encompassed in the definition of "point sources," not "navigable waters." Ditch C-1 cannot simultaneously be two elements of the CWA. Regardless, Ditch C-1 is not encompassed in the term "navigable waters," because it is intermittent, non-navigable, intrastate, and does not feed into a traditional navigable body of water.

Fifth, Reedy Creek is not a navigable water under statutory or Supreme Court standards, and the agencies' regulatory provisions are neither met nor within the scope of the Commerce Clause. The plain language of the CWA and case law emphasize that the term "navigable" was put in the CWA for a reason. The EPA and Corps cannot expand jurisdictional waters so broadly that navigability is read out of the Act. Any agency definition of "navigable waters" cannot exceed the scope of the Commerce Clause. Reedy Creek does not meet regulatory definitions because it does not substantially affect interstate commerce.

Finally, Bonhomme violated the CWA because he is the owner of the culvert from which arsenic was discharged into a water. The plain language of the Act and EPA regulations focus on the point of a discharge and ownership of that point, not the underlying cause of the pollutant being discharged. Focusing on the underlying cause of the pollutant, rather than the point of discharge, would undermine the purpose of the Act as well as Supreme Court precedent.

ARGUMENT

I. BONHOMME IS NOT A REAL PARTY IN INTEREST BECAUSE HIS CLAIMS ARE DERIVATIVE OF PRECIOUS MINERALS INTERNATIONAL.

Appellant is asserting a claim derivative of injuries to PMI and is not a real party in interest. Thus, the lower court properly granted Mr. Maleau's motion to dismiss on this issue.

The fact that a federal statute has been violated and some person was harmed does not automatically give rise to a private cause of action in favor of that person. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). An action must be brought by the person entitled under the governing substantive law to enforce the asserted right. Fed. R. Civ. P. 17(a); *Whelan v. Abell*, 953 F.2d 663, 676 (9th Cir. 1992). Under the traditional test, a party is a "real party in interest" if it has the legal right under the applicable substantive law to enforce the claim in question. Fed. R. Civ. P. 17(a); *White Hall Bldg. Corp. v. Profexray Div. of Litton Indus., Inc.*, 387 F.Supp. 1202, 1204 (E.D. Pa. 1974) *aff'd sub nom. Quaglia v. Profexray Div. of Litton Indus., Inc.*, 578 F.2d 1375 (3d Cir. 1978). A shareholder is not a real party in interest based on the derivative nature of his claim. *Weissman v. Weener*, 12 F.3d 84 (7th Cir. 1993). Because a derivative lawsuit brought by a shareholder is not his own, the corporation is the real party in interest. *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 (1947).

A stockholder cannot assert a corporation's claims, and the corporation is the real party in interest. *Weissman* involved a shareholder who owned fifty percent interest in a corporation. *Weissman*, 12 F.3d at 85. The corporation ran into financial difficulties and lacked sufficient credit for a bank loan causing the shareholder to contact an attorney. *Id*. The corporation paid the attorney but never received the loan and went bankrupt leading the shareholder to bring suit against the attorney. *Id*. The court found that although because the issue primarily affects the corporation, the shareholder's interest is derivative. *See id*. at 86. Rules preventing derivative lawsuits brought by every shareholder that suffers loss prevents double counting and serves judicial efficiency. *See Mid-State Fertilizer Cp. v. Exchange Nat'l Bank of Chicago*, 877 F.2d 1333, 1335-36 (7th Cir. 1989).

Any injury that Bonhomme claims is derivative of his shareholder status in PMI. Like in *Weissman*, Bonhomme is the largest shareholder of PMI and is one of seven directors. Here, Bonhomme is essentially the face of the lawsuit that PMI is claiming. PMI conducted or paid for the sampling and analyses to support the contention that the arsenic in Reedy Creek and Wildman Marsh comes from Mr. Maleau. (R. 6). Additionally, PMI pays the attorney and expert witness fees. (R. 7). Furthermore, Bonhomme does not even live on the property adjacent to Wildman Marsh, and Bonhomme only uses the property to entertain PMI's business associates and clients. (R. 7-8). Finally, PMI is in direct competition with Mr. Maleau and his mining business, and PMI can use this lawsuit to publicize Mr. Maleau in a negative light. Such competition and publicity is evident in Bonhomme's comments at a recent press conference alleging that Mr. Maleau is "an unfair business competitor" who ignores environmental protection requirements, and houses illegal aliens in chicken coops. The issue primarily affects PMI, and any personal interest Bonhomme has in the matter is derivative.

Allowing Bonhomme to bring this suit could result in double counting. Hypothetically, if PMI could bring an action and receive money relief, it would distribute such damages to individual shareholders. Allowing each individual shareholder affected to bring separate lawsuits would take up judicial time and resources.

Bonhomme is not a real party in interest because his interest in the lawsuit is derivative of PMI's interest.

II. BONHOMME IS NOT CAPABLE OF BRINGING A CITIZEN SUIT BECAUSE A "FOREIGN NATIONAL" IS NOT A "CITIZEN" UNDER THE PLAIN LANGUAGE AND LEGISLATIVE INTENT OF THE CWA.

Sections 505(g) and 502(5) of the CWA are intended to apply to American citizens and not foreign nationals. The term "citizen" is unambiguous. Congressional intent indicates

narrowing "citizen" to the Nation's geographical area and to United States citizens. Finally, case law has indicated that broadening the scope of "citizen" to include "foreign nationals" exceeds the scope of the term itself. The court below properly granted Mr. Maleau's motion to dismiss on this issue.

In matters of statutory construction and interpretation, the starting point is examining the plain language of the statute itself. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Then, courts look to the legislative history to determine Congress's intended meaning. *Middlesex Cnty.*, 453 U.S. at 13.

By looking at the plain language of the CWA, it is clear that "citizen" does not include a national of a foreign country. The statutory question concerns the meaning of the term "citizen" as defined by the CWA. Section 505(g) defines "citizen" as, "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The dictionary definition of "citizen" is, "a native or naturalized individual who owes allegiance to a government (as of a state or nation) and is entitled to the enjoyment of governmental protection and to the exercise of civil rights." *Merriam-Webster's Dictionary of Law*, 77 (2011)[3]. The plain dictionary definition of "citizen" indicates that it impliedly carries with it a reference to nationality and allegiance to a territorial boundary. In light of the overarching definition of "citizen," it is only then that CWA § 502(5) expounds on the meaning of the word "person" as used in the definition of "citizen". Section 502(5) defines "person" as: "an individual, corporation, partnership,

[3] *See also Webster's New World College Dictionary* 268 (4th ed. 2008) (stating "*citizen* refers to a member of a state or nation, especially one with a republican government, who owes it allegiance and is entitled to full civil rights either by birth or naturalization...*national* is applied to a person residing away from the country of which he or she is, or once was, a citizen or subject.") (emphasis added).

association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). The dictionary definition of "person" is, "a human being, especially as distinguished from a thing or lower animal; an individual man, woman, or child." *Webster's New World College Dictionary* 1074 (4th ed. 2008). The CWA broadens the definition of "person" to include entities and not just living, breathing human beings. When these terms are viewed together, the word "citizen" and its link to nationality and territorial boundaries is controlling. The CWA merely expanded the word "citizen" and the implications it carries with it to non-human entities. The plain meaning of "citizen" was never discounted.

By looking at the legislative history of the CWA, Congress clearly indicates its intention that citizens include only citizens of the United States. Section 101 of the CWA is entitled "*National* Goals and Policies". H.R. Rep. No. 104-112, at 5 (1995). (emphasis added). In that same section, Congress included that "[i]t is the *national* policy to recognize, support, and enhance the role of State, tribal, and local governments in carrying out the provisions of this Act." *Id*. Likewise, section 802 states that the CWA is to support our *national* economy and the well-being of *citizens throughout the Nation*. *Id*. at 65. (emphasis added). These provisions indicate that the CWA is not a worldwide initiative for citizens the world over but merely for citizens of this Nation. Inherent in these provisions is the understanding that this is a United States Act for United States citizens confined in the United States boundaries. Section 510 discusses state authority in the implementation of the CWA. It states:

> Nothing in this Act shall be implemented, enforced, or construed to allow any officer or agency of the United States to utilize directly or indirectly the authorities established under this Act to impose any requirement not imposed by the State which would supersede, abrogate, or otherwise impair rights to the use of water resources allocated under State law, interstate water compact, or Supreme Court decree, or held by the United States for use by a State, its political subdivisions, or its citizens. *Id*. at 57.

This provision indicates that the federal government cannot use the CWA to impair the rights of certain actors. Those actors are states, political subdivisions, and citizens.

The implication is that the federal government is addressing citizens of the United States and not citizens worldwide. Section 603 discusses federal loans for water pollution control. *Id.* at 60-62. Section (k) states that public agencies may transfer their water treatment facility for which it received federal financial assistance if (1) it is majority-owned and controlled by *citizens of the United States* and (2) it does not receive subsidies from a foreign government. *Id*. at 62 (emphasis added). This provision makes explicit that federal funding for water treatment is for citizens of this Nation and is not for the benefit of anyone outside this Nation's borders. Furthermore, under a section entitled "Risk Assessment and Cost-Benefit Analysis," Congress articulated the rising costs of environmental protection of National waters. *Id*. at 95. Referenced in that section is the cost on "each American household" and implies the impact environmental regulation has on American taxpayers. *Id.*

Civil remedies under the CWA further indicate Congressional intent for citizen-suits to be brought by United States citizens. Congress intended citizen suits to provide a second front in law enforcement. *See Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976). The purpose of the CWA is to protect United States waters and not to provide economic benefit to property owners. 33 U.S.C. § 1251 (stating that the CWA was designed to restore and maintain the chemical, physical, and biological integrity of the *Nation's* waters). Citizen suits deter future violations and do not allow plaintiffs to recover damages for themselves. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 167 (2000); *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1261 (1st Cir. 1996); *Cabot Corp. v. EPA*, 677 F.Supp. 823, 829 (E.D. Pa. 1988).

Extending the meaning of the word "citizen" to include all people regardless of legal standing in the United States would rob the term of any meaning. In *SWANCC*, a collection of Chicago municipalities attempted to dispose waste in an abandoned sand and gravel pit that had evolved into seasonal ponds. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 162-63 (2001). The Army Corps of Engineers ("Corps") argued that this was illegal under the CWA without a permit as the pit was a "navigable water" which is defined as "waters of the United States". *Id*. at 163. The Supreme Court found expanding the meaning of "navigable" to include an abandoned pit would not only limit the effect of the word "navigable" but would also give it no effect whatsoever. *Id*. at 172. Such expansion is too wide as it would deprive the word of any meaning. *Id*. *See also In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003) (stating "[the] definition [of navigable] is unsustainable...[t]he CWA and [Oil Pollution Act] are not so broad as to permit the federal government to impose regulations of "tributaries" that are neither themselves navigable nor truly adjacent to navigable waters"). Similarly, in *GDF Realty* the U.S. Fish and Wildlife Service denied landowners the right to develop property as it would endanger one-eighth inch cave bugs contrary to the "take" provision of the Endangered Species Act. *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286, 287 (5th Cir. 2004). Expansion of the term in this way was confusing and contrary to Congressional intent. *Id*. at 291, 287 (stating that limitless theory of federal protection "lends new meaning to the term *reductio ad absurdum*," which is Latin for a method of proving the falsity of a premise by showing that its logical consequence is absurd or contradicting).

Here, in light of the structure of the CWA and the meaning of the terms therein, Bonhomme is not a citizen capable of bringing suit. The inherent definition of the word "citizen"—carrying with it undertones of territory and nationality—is not discounted. Citizen is

only expounded upon in the CWA by applying it to entities such as corporations, municipalities, political subdivisions, and the like. It is undisputed that Bonhomme is not a citizen of the United States but a French national. (R. 8). His primary allegiance to this country is derived from his relationship to PMI. Although *he* does not fit the definition of "citizen", *PMI* can be considered a citizen. It is a person as defined by the statute and is also incorporated in the United States. Further, its interest has been adversely affected as the polluted water inhibits *its business associates* from being entertained on Bonhomme property.

Expanding the meaning of "citizen" to include Bonhomme, a non-citizen, deprives the term of any meaning. Congress chose the word "citizen" out of the endless words in the English language for a purpose. Congress explicitly expanded the word to include non-human beings such as corporate entities. However, a continuing expansion covering non-citizens, literally the exact opposite of a citizen, would degrade the word and the statute itself. Like *SWANCC*, this would deprive the term of any meaning. If "citizen" included "non-citizens" and that precedent continues in American legislation, then statutes and their wording would lose any legitimacy whatsoever. Bonhomme has other remedies at his disposal. If Bonhomme wants to file a claim in this country concerning the pollution of water, he should do so under international treaty or tort law. If he wants to amend the CWA to include non-citizens, he should consult local representatives. However, in light of the purpose of the CWA and the words chosen as it stands today, this is the wrong law for a non-citizen to sue under.

The plain language and legislative intent of the CWA indicates that Bonhomme cannot be considered a citizen capable of filing a citizen suit.

III. MR. MALEAU'S MINING SLAGS ARE NOT POINT SOURCES UNDER THE ACT BECAUSE THEY DO NOT PURPOSELY COLLECT OR CHANNEL WATER; FURTHER, THE WATER RUNOFF CONSTITUTES NONPOINT SOURCE POLLUTION BECAUSE IT RESULTS FROM NATURAL RUNOFF AND PERCOLATION RATHER THAN A SPECIFIC POINT OF DISCHARGE.

Mr. Maleau's mining slags and overburden are not point sources because they do not collect and channel rainwater runoff before discharge. Therefore the lower court properly granted Mr. Maleau's motion to dismiss on the third issue.

The CWA prohibits the discharge of pollutants except in compliance with CWA permits. 33 U.S.C. § 1311(a). The "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). Neither party is contesting that an addition of a pollutant occurred. (R. 8). The term in dispute here is whether Mr. Maleau's slag piles are considered point sources under the act. (R. 8).

The Act defines the term point source as

> any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14). To constitute a point source, the source must channel or collect water through a manmade conveyance. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009). Further, diffuse water that is not channeled through a manmade conveyance, is considered nonpoint source pollution and is not subject to federal regulation. *Id.*

Mr. Maleau's overburden and mining slags are not point sources within the definition in the Act because they do not channel and collect storm water runoff before discharge. Further, they are not discernible, confined, and discrete conveyances. Finally, the rain water running off of the mining slags constitutes nonpoint source pollution because they are nothing more than storm water runoff, unchanneled and uncollected by man.

A. **Mr. Maleau's mining overburden and slag piles are not point sources because they do not collect and channel pollutants before discharging them.**

Mr. Maleau's mining slags and overburden are not point sources within the meaning of the Act because they do not purposefully collect and channel water. The list examples found in the statutory definition all require some sort of manmade conduit or tunnel, constructed for the purpose of collecting or conveying. *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 44-45 (5th Cir. 1980). EPA regulations further limit point source pollution to include only water collected and channeled by man. 40 C.F.R. § 122.2.

Rainwater runoff must be collected or channeled in order to constitute a point source. *Sierra Club*, 620 F.2d at 47. In *Sierra Club*, coal miners employed strip mining techniques, removing dirt and rock from the ground and placing it into piles. *Id.* at 43. In an effort to control rainwater runoff, the miners created sediment basins to collect and halt the draining water. *Id.* As a result of heavy rains and snow melt, these sediment basins, containing acid and silt deposits, overflowed and drained into a creek. *Id.* There was also evidence of a standpipe and an emergency spillway that were constructed to guard against drainage overflows. *Id.* at 47. The court found the overflowing sediment basins were point sources requiring a NPDES permit. *Id.* The court found controlling water drainage through manmade efforts was consistent with the definition of a point source. *Id.* The court recognized that a storm *pipe* is included in the definition of point source. *Id.* Likewise, the court found sediment basins constituted *containers* under the definition. *Id. See also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (finding sumps, ditches, hoses, pumps and pits used to control drainage from a gold leaching operation constituted a point source when overflowing); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 510 (9th Cir. 2013) (finding utility poles simply not "discernible, confined and discrete conveyance" that channel and control storm water). Finally, in *Greater Yellowstone Coal. v. Lewis*, rain water filtered through 200 feet of overburden,

eventually entering surface water. 628 F.3d 1143, 1153 (9th Cir. 2010). The court found no permit was required because the water was never *channeled or collected* prior to the discharge.

Here, Mr. Maleau has only piled mining overburden on his property. (R. 5). He has made no effort to channel or control the rainwater runoff as required by the examples in the statute. (R. 5). Moreover, unlike the manmade drainage control systems in *Sierra Club*, Mr. Maleau has made no effort to control or collect the drainage. There are no manmade conveyances at issue here. Mr. Maleau's piles are more consistent with the overburden in *Greater Yellowstone Coal* because, again, no effort was undertaken to collect or channel the rainwater runoff.

Gravity runoff causing an erosion channel in a pile of overburden alone is not enough to impose liability; there must be some human effort to channel or collect the water. *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980). "Gravity flow, resulting in a discharge into a navigable body of water, *may be* part of a point source discharge *if* the miner at least initially collected or channeled the water and other materials." *Id.* (emphasis added). There has to be an initial channeling of the running; and here that initial channeling did not occur. Mr. Maleau did nothing to attempt to control the rainwater running down his slag piles beyond the simple act of creating the slag piles. (R. 5). EPA's own regulations further the contention that water be channeled or collected in order to require a permit. 40 C.F.R. § 122.2 defines the addition of a pollutant as including "surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State." 40 C.F.R. § 122.2.

EPA's regulation is in line with the Act because it limits the scope of the term point source to include only surface runoff collected or channeled by man. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009). This is consistent with the CWA's examples of point sources including "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or]

container." *Id.* In *Cordiano*, lead leached from a dirt berm used for shooting bullets into at a shooting range. *Id.* at 204. The court found the pile of dirt was not a point source because, though the dirt was placed there intentionally, there was no evidence that it collected or channeled water running off it to a jurisdictional water. *Id.* at 223. Likewise, here Mr. Maleau has simply placed his overburden piles on his property, and he does not purposefully channel or collect the rainwater that runs down them. (R. 5).

Mr. Maleau's piles do not constitute point sources because there has been no effort to collect or channel the water running off of them. Gravity-causing erosion and water runoff alone is not enough to trigger liability. EPA regulations are consistent with the CWA in requiring some sort of channeling or collecting efforts by man in order to designate a point source.

B. The storm water runoff from Mr. Maleau's overburden is considered nonpoint source pollution and is not subject to regulation.

Diffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009). Both the CWA's definition of a point source and the CWA's structure, which leaves the regulation of nonpoint source pollution to the states, make clear that Congress chose to exempt a class of pollution from the CWA's permit requirement. *Id.* The EPA does not regulate uncollected and unchanneled rainwater runoff that does not pass through a discernible, defined and discrete conveyance. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976).

In *Appalachian Power Co.*, the court set aside EPA regulations that attempted to regulate general water runoff through construction and mining sites. *Id.* The EPA attempted to regulate "material storage runoff" which it defined as "the runoff from or through any coal, ash, or other material storage pile." *Id.* (citing 40 CFR s 423.41(b)). The court found this regulation

inconsistent with the definition of a point source. *Id.* This definition requires a "discernible, confined, or discrete conveyance" and does not include unchanneled and uncollected surface water. *Id.* Here, Bonhomme's desire to regulate uncollected and unchanneled surface water that runs through Mr. Maleau's slag piles is inconsistent with the CWA definition. Likewise, EPA regulations on nonpoint sources support this contention, saying nonpoint source pollution is:

> [...] caused by diffuse sources that are not regulated as point sources and normally is associated with agricultural, silvicultural and urban runoff, runoff from construction activities, etc. Such pollution results in the human-made or human-induced alteration of the chemical, physical, biological, and radiological integrity of water. In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation.

Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 220 (2d Cir. 2009) (citing EPA Office of Water, *Nonpoint Source Guidance* 3 (1987)). The above regulations describe the situation of water runoff on Mr. Maleau's property. Rainwater erodes and percolates through Mr. Maleau's piles and discharges into the ditch. (R. 5). This runoff, as above, is a result of a "physical" change to the land and not similar to a "single pipe." Likewise, the channel in Mr. Maleau's slag pile is a result of natural runoff and percolation and *not* the result of a discharge at a specific location. (R. 5). There is no "discernible, confined, or discrete conveyance."

Mr. Maleau's piles do not constitute point sources because, under the Act and EPA regulations, efforts by man to channel or collect rainwater runoff are required. Furthermore, the rainwater runoff that has eroded and percolated through Mr. Maleau's piles are more consistent with rainwater runoff that constitutes nonpoint source pollution and is not regulated by the CWA.

IV. DITCH C-1 IS NOT A NAVIGABLE WATER UNDER THE CWA BECAUSE IT IS ENCOMPASSED IN THE DEFINITION OF "POINT SOURCES," NOT "NAVIGABLE WATERS."

Ditch C-1 is a point source, not a navigable water, as defined in the CWA. It is intermittent, non-navigable, and intrastate, further falling outside the scope of "navigable waters." Thus, the district court properly dismissed Bonhomme's suit.

To fall under the jurisdiction of the CWA, a person must discharge a pollutant into "navigable waters" without a permit. 33 U.S.C. § 1311(a). Congress defined "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Congress included "ditch" and similar structures in its definition of point source. 33 U.S.C. § 1362(14). On the other hand, Congress simply defined "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). "Ditch" does not appear in the EPA's or Corps' expansive definitions of "waters of the United States." 40 C.F.R. § 122.2(c) and 33 C.F.R. § 328.3(a) (2013).[4]

Statutory construction begins "with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Adherence to statutory text is especially due when Congress defines statutory terms. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Courts "must presume that a legislature says in a statute what it means and means in a statute what it says." *Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992). Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

Ditch C-1 is not a navigable water because ditches are listed as point sources in § 502(14) yet are *not* listed in any definition of "navigable waters." Ditch C-1 cannot simultaneously be two elements of the CWA. Regardless, Ditch C-1 is not encompassed in the term "navigable

[4] The EPA and the Corps share responsibility for implementing and enforcing the CWA, and both have defined the term "waters of the United States" in substantially equivalent terms. The definition applies to all CWA programs.

waters," because it is intermittent, non-navigable, intrastate, and does not feed into a traditional navigable body of water. Therefore, the lower court's decision on this issue should be affirmed.

Section 502(14) is unambiguous, and the plain language of the CWA demonstrates that Congress intended for ditches to be point sources, not navigable waters. A plurality of Justices agreed in *Rapanos v. United States*: "[t]he CWA itself distinguishes 'navigable waters' from 'the channels and conduits that typically carry intermittent flows of water'" by including the latter in the definition of "point source." 547 U.S. 715, 716 (2006). In part, the Supreme Court in *Rapanos* vacated a Sixth Circuit judgment that asserted jurisdiction over wetlands that flowed into a man-made drainage ditch, which flowed into a creek, which flowed into a navigable river. *Id.* Writing for the plurality, Justice Scalia explained "[t]he separate classification of 'ditch[es], channel[s], and conduit[s]'" shows that these are *not* "navigable waters." *Rapanos*, 547 U.S. at 735-36.

Ditches are listed as point sources and cannot simultaneously be two elements of the CWA. A statute should be read to avoid internal inconsistencies. *See Chapman v. Higbee Co.*, 319 F.3d 825, 836 (6th Cir. 2003); *Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985). Congress chose to define "discharge of a pollutant" as "any addition of any pollutant *to* navigable waters *from* any point source." *Id.* (quoting 33 U.S.C. § 1362(12)(A)). The interpretation that avoids inconsistencies is one recognizing that Congress intended for point sources and navigable waters to be "separate and distinct categories." *Rapanos*, 547 U.S. at 735.

Many courts correctly hold ditches and similar structures are "point sources," not navigable waters. *See Natural Resources Defense Council v. Kempthorne*, 525 F. Supp. 2d 115, 124, n.11 (D.C. Cir. 2007) (classifying ninety drainage wells as point sources); *In re: Needham*, 354 F.3d 340, 345 (5th Cir. 2003) ("[Corps] may not simply impose regulations over puddles,

sewers, roadside ditches, and the like"); *Concerned Area Residents for Env't v. Southview Farm,* 34 F.3d 114, 118 (2d Cir.1994) (concluding a swale, which is a ditch on a contour, was a point source); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (finding an open ditch between a mining operation's reserve sump and a navigable water was a point source); *Stepniak v. United Materials, LLC,* 03-CV-569A, 2009 WL 3077888 at *4-5 (W.D.N.Y. Sept. 24, 2009) (finding a roadside ditch did not constitute a "navigable water"); *United States v. RGM Corp.,* 222 F. Supp. 2d 780, 787-88 (E.D. Va. 2002) (rejecting argument that drainage ditches were themselves "navigable waters").

Some courts have mislabeled ditches as tributaries, transforming them into "navigable waters." *See United States v. Gerke Excavating,* 412 F.3d 804 (7th Cir. 2005); *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993 (11th Cir. 2004); *North Carolina Shellfish Growers Association and North Carolina Coastal Federation v. Holly Ridge Associates,* 357 N.C. 1429 (E.D.N.C. 2003). However, most of these cases dealt with ditches that were draining wetlands found to be "navigable." Such cases were decided pre-*Rapanos* and were met with express disapproval by the *Rapanos* plurality. *Compare NAHB v. Army Corps,* 699 F. Supp. 2d 209, 216-17 (D.D.C. 2010) (citing *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993, 1009 (11th Cir. 2004); *United States v. Deaton,* 332 F.3d 698, 712 (4th Cir. 2003); and *Treacy v. Newdunn Assocs.,* 344 F.3d 407 (4th Cir. 2003) *with Rapanos,* 547 U.S. at 727 (plurality) (disapproving such authorities).

The majority of Justices in *Rapanos* agreed that the term "navigable waters" should not be stretched so wide as to cover ditches. The four-Justices plurality found that "[i]n applying the definition to […] man-made drainage ditches, […] the Corps has stretched the term 'waters of the United States' beyond parody[.]" *Rapanos,* 547 U.S. at 734 (plurality). Justice Kennedy

agreed. *Id*. at 778-79. Thus, while *Rapanos* affirmed that some non-navigable waters *may* fall under the CWA, the Court limited the Corps' reach so as not to allow jurisdiction over wetlands lying alongside remote and insubstantial ditches. *Precon Dev. Corp., Inc. v. U.S. Army Corps of Engineers*, 633 F.3d 278, 288 (4th Cir. 2011) (quoting *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring)).

Allowing the Corps to include ditches as "navigable waters" would give the agency unfettered regulatory authority. *See e.g., United States v. RGM Corp.*, 222 F. Supp. 2d 780, 787-88 (E.D. Va. 2002). "When carried to its logical extreme[,] this argument means that *any* mountain stream, drainage ditch, culvert[,] or artificial watercourse which *eventually* enters navigable water, even sporadically [...] would [be] subject to Corps jurisdiction." *Id.* (emphasis added). In *Newdunn Associates*, multiple drainage ditches, a culvert under a highway, and miles of non-navigable waters remotely connected wetlands to navigable waters. 195 F. Supp. 2d 751 (E.D. Va. 2002), *rev'd sub nom. Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), *called into question by Rapanos*, 547 U.S. at 727. The court refused to extend jurisdiction over every segment of the drainage system, fearing "*any property* connected by a drainage pipe or culvert [...] would [then] fall under the Corps' jurisdiction." *Id.* at 765. (emphasis added).

Regulating ditches as "navigable waters" raises serious federalism concerns. Courts recognize the stated purpose of the CWA to restore and maintain waters of the United States. 33 U.S.C. § 1251. However, this purpose must be balanced against the CWA's stated policy "to recognize, preserve, and protect the primary responsibilities and rights of the States […] to plan the development and use of land and water resources." 33 U.S.C. § 1251(b); *Rapanos*, 547 U.S. at 723. Looking at the CWA in its entirety, it becomes clear that Congress did not intend to infringe upon traditionally state-governed areas. Section 510 of the CWA discusses state

authority in the implementation of the Act. H.R. Rep. No. 104-112, at 57 (1995); *See supra* page 16. The federal government cannot use the CWA to impair the rights of the states, local governments, or its citizens. In other words, the CWA does not give the Corps and EPA a "roving commission to achieve pure [water] or any other laudable goal." *Michigan v. Environmental Protection Agency*, 268 F.3d 1075, 1084 (D.C. Cir. 2001).

The Supreme Court has twice recognized these federalism concerns. In *SWANCC*, the Supreme Court refused to assert jurisdiction over an abandoned sand and gravel pit (a man-made land feature, like ditches). *SWANCC*, 531 U.S. at 174. Asserting jurisdiction would have "result[ed] in significant impingement" on States' primary and traditional power over land and water use. *Id*. Five years later, in *Rapanos*, the Corps attempted to expand the CWA to non-navigable tributaries and adjacent wetlands. *Rapanos*, 547 U.S. at 723. Citing to *SWANCC*, the Court again emphasized that the "extensive federal jurisdiction urged by the Government" would permit the Corps to "intru[de] into traditional state authority." *Id.* Congress did not authorize such an "unprecedented intrusion." *Id.*

Here, Bonhomme and the State of Progress would have this Court ignore the plain language of § 502 and classify Ditch C-1 as a "navigable water." Ditch C-1 is an agricultural drainage ditch dug a hundred years ago. (R. 5). It is 3 feet across and 1 foot deep on average, and it is undisputed that the ditch discharges into Reedy Creek via a culvert on Bonhomme's property. (R. 5). Interpreting the CWA as saying Ditch C-1 is both a point source and a navigable water would create internal inconsistencies and require circular reasoning. It would suggest Ditch C-1 discharges into itself. This assertion is "beyond parody." *Rapanos*, 547 U.S. at 734. As the *Rapanos* plurality explained, Congress' definition of "discharge" as "any addition of any pollutant *to* navigable waters *from* any point source" would "make little sense if the two

categories were significantly overlapping." *Id.* (emphasis in original). Indeed, the very purpose of a drainage ditch is to convey the water it drains to another location. Here, Ditch C-1 drains saturated soils, discharging the saturation *into* Reedy Creek. (R. 5). In statutorily defined terms and in practice, Ditch C-1 operates as a point source.

This Court should follow the courts that properly recognize the plain language of section 502 and classify Ditch C-1 as Congress intended—as a point source. The lower courts that improperly labeled ditches as "tributaries" all agree that, to be a tributary, the ditch must in fact flow into a navigable body of water. Ditch C-1 cannot be said to be a tributary, because Ditch C-1 does not flow into a navigable-in-fact water. *See infra* Issue V.

The *Rapanos* plurality would clearly reject attempts to bring Ditch C-1 within the purview of the term "navigable waters." Ditch C-1 is the very type of intermittently flowing channel the plurality declined to regulate. Land and water regulation is traditionally left to the states, and Congress recognized this when it enacted the CWA. Additionally, subjecting Ditch C-1 to jurisdiction would create an unprecedented regulatory burden on property owners nationwide. "[T]he combination of the uncertain reach of the CWA and the draconian penalties imposed for the [...] violations [...] leaves most property owners with little practical alternative but to dance to the EPA's tune." *Sackett v. E.P.A.*, 132 S. Ct. 1367, 1375 (2012).

Since Ditch C-1 is a point source and not a navigable water, the district court's decision on should be affirmed.

V. REEDY CREEK IS NOT A NAVIGABLE WATER UNDER ANY EXISTING STANDARD AND THE REGULATORY PROVISIONS ARE NEITHER MET NOR WITHIN THE SCOPE OF THE COMMERCE CLAUSE.

Reedy Creek does not fall under the CWA because the creek does not meet the definition of "navigable water" under any existing standard and does not substantially affect interstate commerce. Thus, the court below erred in denying Mr. Maleau's motion to dismiss on this issue.

The CWA did not set out to regulate *all* water quality. 33 U.S.C. § 1251(a)(1), (2), & (3) (1987). One limit placed on the CWA is the requirement that the regulated waters must be "navigable." 33 U.S.C. § 1362(7). The Supreme Court recognizes that "navigable" cannot be devoid of significance, and waters must be relatively permanent and maintain a significant nexus to traditionally navigable waters in order to be subject to the CWA. *Rapanos*, 547 U.S. at 759 (2006); *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 168 (2001).

EPA and Corps regulations push their jurisdiction "to the outer limits of Congress's commerce power," as the language of the CWA does not extend jurisdiction to non-navigable waters. *Rapanos*, 547 U.S. at 724. They attempted to obtain jurisdiction over non-navigable waters by extending the original regulatory definition from including waters "capable of use by the public for purposes of transportation or commerce," 33 C.F.R. § 209.260(e)(1) (1974), to include all "other waters" that may affect interstate commerce. 40 C.F.R. § 122.2(c) (2013). This expansion does not warrant *Chevron* deference because it surpasses the agencies' authority granted by Congress and exceeds the bounds of the Constitution. *Compare Chevron, U.S.A., Inc. v. Nat. Res. Defense Counc., Inc.*, 467 U.S. 837 (1984) *with SWANCC*, 531 U.S. at 172. Regulated waters are only those that play a *substantial* role in interstate commerce. *See Lopez,* 514 U.S. at 557.

Reedy Creek is not a navigable water because it does not meet the statutory, case law, or regulatory definitions and it does not play a substantial role in interstate commerce.

A. Reedy Creek is not a navigable water under the plain language of the CWA or under the scope established by case law.

Reedy Creek does not meet the term "navigable waters" because it is non-navigable with no surface connection to any traditionally navigable waters. The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). The qualifier "navigable" reveals what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were, had been, or could be navigable. *SWANCC*, 531 U.S. at 172. While it may be acceptable to include some non-navigable waters, those waters must share a significant nexus with a water that is navigable. *Rapanos*, 547 U.S. at 759. The Court does not support an interpretation that abandons "navigability." *Rapanos* 547 U.S. at 731 (noting navigable is not "devoid of significance"); *SWANCC*, 531 U.S. at 172 ("it is one thing to give [the word navigable] limited effect and quite another to give it no effect whatever").

Congress purposefully qualified "waters" with the term "navigable." The 1972 CWA continued nearly a century of usage of the term "navigable," and the presence of the word in the statute is not inexplicable. *Rapanos*, 547 U.S. at 723. The Supreme Court recognizes that "navigable" is significant, and regulated waters must be relatively permanent with a significant nexus to traditionally navigable waters. *Rapanos*, 547 U.S. at 734, 759; *SWANCC*, 531 U.S. at 172; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-34 (1985). The *Rapanos* plurality held that only waters with a continuous surface connection to waters that are navigable *in their own right* are covered by the Act. *Rapanos*, 547 U.S. at 742.

Reedy Creek does not maintain the requisite connection because neither Ditch C-1 (*Supra*, Issue IV) nor Wildman Marsh (*Infra*, Issue V.B.) are navigable waters in their own right. For the same reasons, Reedy Creek also fails Justice Kennedy's test because the creek has no

significant nexus to any navigable-in-fact water. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring).

B. Reedy Creek does not meet regulatory definitions because it does not substantially affect interstate commerce.

Incrementally, the agencies have tried to expand their regulatory authority under the CWA beyond traditionally navigable waters. The Supreme Court has limited the scope of such jurisdiction. Asserting jurisdiction over Reedy Creek under regulatory definitions is impermissible because Reedy Creek does not substantially affect interstate commerce.

Regulations promulgated under the CWA give the agencies jurisdiction so long as the regulated waters truly have an effect on interstate commerce. 40 C.F.R. § 122.2. These regulations are tied to Congress's power to regulate commerce. U.S. CONST. ART. I § 8, cl. 3. The commerce power, like all enumerated powers, is subject to outer limits. *SWANCC*, 531 U.S. at 173. The Supreme Court limited this power to three areas: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce or persons and things in interstate commerce, and (3) activities that have a substantial effect on interstate commerce. *Lopez v. United States*, 514 U.S. 549, 558-59 (1995). Thus, in looking at the agencies' definition of "waters of the United States," the focus must be on whether the activity plays a role in interstate commerce. Since Reedy Creek and Wildman Marsh are not navigable, they cannot be said to be classified as a channel or instrumentality of interstate commerce. The only area in which these waters *might* be regulated is as an activity that substantially affects interstate commerce, but to meet this standard, the effect must be *substantial*. *Id.* at 559.

No one alleges Reedy Creek is a traditionally navigable water. (R. 9). Moreover, Reedy Creek and Wildman Marsh are not tributaries because none of the waters they are alleged to be connected to (*i.e.*, each other and Ditch C-1) are navigable waters in their own right.

Regardless of the language used in the Corps' regulation, the provisions cannot go beyond the scope of the Commerce Clause. The Corps asserts jurisdiction over interstate waters under section 122.2(b). However, the Corps cannot go beyond the bounds of the Commerce Clause. Every puddle on state lines cannot be regulated unless they substantially affect interstate commerce. *Lopez*, 514 U.S. at 559. *See also Appalachian*, 311 U.S. at 408-10 (explaining that jurisdiction does not include every water from which one molecule might eventually find its way into a navigable water). Likewise, the Corps asserts jurisdiction over all "other waters," the use, degradation, or destruction of which could affect interstate commerce. The Corps' "could affect" threshold does not pass *Lopez* muster (*i.e.*, "could affect" is not the same as "substantially affects"). *See NLRB v. Jones and Laughlin Steel*, 301 U.S. 1, 37 (1937) (the Commerce Clause "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them […] would effectually obliterate the distinction between what is national and what is local").

Neither Reedy Creek nor Wildman Marsh are "interstate waters" or "other waters" because they do not have a "substantial effect" on interstate commerce. Above the culvert, Reedy Creek is used as a water supply for a service station and for agricultural use in New Union. (R. 5). No arsenic has been detected upstream of Bonhomme's culvert. (R. 6). There is no effect on interstate commerce and certainly not a substantial effect upstream of Bonhomme's culvert.

Downstream, Wildman Marsh remains unaffected. Arsenic in three birds, out of millions of birds, who use the Marsh for migratory purposes is not enough to satisfy *Lopez*. *See SWANCC*, 531 U.S. at 172. It is true that hunting in Wildman Marsh supports the economy – the *local, intrastate* economy. Bonhomme has not offered any evidence of any effect on *interstate*

commerce, much less a substantial one. The hunters' use of Wildman Marsh—a non-navigable, non-adjacent, wholly intrastate wetland—is insufficient to establish a substantial effect on interstate commerce. It, like Reedy Creek, is therefore not covered by the CWA.

VI. Bonhomme violates the CWA because the act only requires ownership of a point source and not causation.

The lower court properly granted Mr. Maleau's motion to dismiss on this issue, because Bonhomme is the one in violation of the CWA. Section 1311 of the CWA plainly states the discharge of any pollutant by any person shall be unlawful. 33 U.S.C. § 1311. The term discharge is defined as any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12). The Act "makes plain that a point source need not be the original source of the pollutant; *it need only convey the pollutant to 'navigable waters.*'" *United States v. Lucas*, 516 F.3d 316, 332-33 (5th Cir. 2008); (quoting *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

Bonhomme violated the CWA because he is the owner of the culvert discharging into Reedy Creek. The plain language defining "discharge" in the Act does not require causation. The context of the term and EPA regulations support this contention. Finally, the Supreme Court and purpose behind the statute would be undermined if causation, rather than the point of the discharge, was the focus.

The plain language of the statute does not include causation as an element. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005) (noting statutory interpretation begins with the plain language of the statute). On its face, Section 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. *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010). *Sierra Club* rejected arguments that a current owner

of a point source was not liable because the pollutants were generated by previous owners. . *Sierra Club*, 421 F.3d at1143.The court focused on the plain and clear language of the statute which includes no language regarding causation. *Id.* Likewise, the court focused on "any" within the definition of a discharge. *Id.* A "discharge" is "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362. The expansive and prolific use of the word "any" indicates the focus is not on who creates a discharge, but the fact that a discharge--*any* discharge--has occurred. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005).

When read in context with other sections of the permitting scheme, it is clear the Act focuses on the point of the discharge and the owner or operator of that point rather than the underlying conduct causing the discharge. *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) ("the plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). Section 1311(g)(2) allows for "owners and operators" to modify permit requirements, section 1318(a) requires "owner or operator[s]" to maintain records, and section 1311 applies effluent limitations to "all point sources of discharge of pollutants." Thus, when taken as a whole, it is apparent the Act's permitting sections focus on owners, operators, and the point of discharge rather than the underlying, originating source of the pollutant. *Sierra Club*, 421 F.3d at 1143.

Regulations promulgated by the EPA further support this contention. *Id.* at 1144. The EPA includes the "addition of any pollutant" from "discharges through [...] conveyances *owned by a* [...] *person* which do not lead to a treatment works." 40 C.F.R. § 122.2. Likewise, § 122.21 states: "[w]hen a facility or activity is owned by one person but is operated by another person, it

is the operator's duty to obtain a permit." 40 C.F.R. § 122.21. *West Virginia Highlands Conservancy* relied on this regulation, finding a state agency required a permit for cleaning up acid drainage generated by the previous owners. *W. Virginia Highlands Conservancy*, 625 F.3d at 164-65. In *West Virginia* surface mines reclaimed by the state continued to drain acid wash into navigable waters. *Id.* at 143. The court rejected the state's contention that a permit was not required because the previous owners were the ones who generated the pollutants. *Id.* at 168.

Finally, the Supreme Court and its progeny holds that the only requirement of the act is that a point sources "convey" a pollutant, and the Act has no causation requirement. In *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, the Supreme Court focused on the definition of a "point source" as a "discernible, confined, and discrete conveyance." *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105, (2004). The statute only requires the point source *convey* a pollutant and need not be the original source of it. *Id.* Supportive of this contention is the list of examples in the definition which include pipes, ditches, tunnels, and conduits, all of which do not generate pollutants but transport them. *Id. See also United States v. Lucas*, 516 F.3d 316, 332 (5th Cir. 2008); *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005); *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993).

The overall purpose of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251. The primary mechanism for achieving this goal, as recognized by Congress, is by regulating the point of discharge: "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

Here, Bonhomme is the one who owns the culvert. (R. 5). Bonhomme is the one in control of the culvert as it is on his land. (R. 5). Under the Act causation is irrelevant, while the owner, operator, and point of discharge are relevant—all of which occur on Bonhomme's land and under his control. It was Bonhomme's responsibility to get a permit. Accordingly, the district court properly found Bonhomme violated the CWA because he owns the culvert, and the Act and the EPA assign liability to those in control of the point of discharge. Furthermore, the district court's holding was correct because the purpose of the Act and congressional intent would be undermined if the Act liability was to the cause rather than the point of discharge.

CONCLUSION

Mr. Maleau asks this Court to affirm the lower court's holding on the first, second, third, fourth, and sixth issue. First, Bonhomme is not the real party in interest because his claims are derivative of PMI. Second, Bonhomme is not a citizen capable of bringing a citizen suit. Allowing Bonhomme, a foreign national, to bring a citizen suit would undermine the plain language and congressional intent of the CWA. Third, Mr. Maleau's mining slags and overburden are not point sources under the CWA because they do not channel or collect rainwater runoff. Fourth, Ditch C-1 is included in the CWA's definition of a point source and is not encompassed in the term "navigable waters." Subjecting Ditch C-1 to federal regulation would invade the state's traditional land use authority. As to the sixth issue, the plain language, EPA regulations, and Supreme Court precedent emphasize that the Act focuses on the ownership, not the source, of a discharge. Mr. Maleau asks this Court to reverse the lower court's decision on the fifth issue because Reedy Creek does not meet the statutory or case law

definitions of "navigable waters," and the agencies' regulations exceed the scope of the Commerce Clause.

Date: December 2, 2013

Respectfully submitted,

Team #35

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