CA No. 13-01234

In the United States

Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME

Plaintiff-Appellant, Cross-Appellee

v.

THE STATE OF PROGRESS DEPARTMENT OF

ENVIRONMENTAL PROTECTION,

Intervenor-Appellant, Cross-Appellee

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee

ON APPEAL FROM

THE UNITED STATE DISTRICT COURT

FOR THE DISTRICT OF PROGRESS

BRIEF FOR JACQUES BONHOMME

Plaintiff-Appellee

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JURISDICTIONAL STATEMENT

Appellant Jacques Bonhomme filed a complaint in the United States District Court for the District of Progress seeking review under 28 U.S.C. § 1331. On July 23, 2013, the district court granted motions by the State of Progress and Shifty Maleau to dismiss the case and denied Jacques Bonhomme's motion to dismiss because Progress adequately stated a cause of action. Jurisdiction is proper pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Jacques Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311.
2. Whether Bonhomme is a "citizen" under CWA § 505, 33 U.S.C. 1365, who may bring suit against Maleau.
3. Whether Maleau's mining waste piles are "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).
4. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14).
5. Whether Reedy Creek is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).
6. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for District of Progress granting Shifty Maleau's (Maleau) motion to dismiss and denying Jacques Bonhomme's motion to dismiss as against Progress. (R. at 10). Jacques Bonhomme brought a citizen suit under the Clean Water Act (CWA), § 505, 33 U.S.C. § 1365, seeking relief requiring Shifty Maleau to comply with CWA effluent limitations for arsenic discharge. (R. at 4)

After proper notice, the State of Progress likewise brought a citizen suit under the CWA,

33 U.S.C. § 1365, alleging that Bonhomme violated the CWA by arsenic discharge through a culvert on his property. (R. at 5). Maleau intervened under CWA § 505(b)(1)(B), and Progress and Maleau moved to consolidate the case with *Bonhomme v. Maleau*. (R. at 5). The court granted the motion to consolidate, and then granted Maleau's motion to dismiss as against Bonhomme, and denied Bonhomme's motion to dismiss as against progress. (R. at 10).

STATEMENT OF THE FACTS

Shifty Maleau mines and extracts gold ore adjacent to the Buena Vista River in Progress. (R. at 5). Rather than discharge the overburden and slag ("waste") from these operations into the traditionally navigable Buena Vista, he moves the waste onto his private property, located in Lincoln County. *Id.* He places the waste in piles adjacent a ditch, Ditch C-1, located in Jefferson County, Progress. *Id.* Rainwater picks up arsenic as it flows through these piles, eventually discharging into channels located between the piles, themselves the result of erosion. *Id.* These channels in turn discharge into Ditch C-1. *Id.*

Ditch C-1 is a drainage ditch, dug in 1913 to drain saturated soils for agricultural use. *Id.* The ditch is protected by restrictive covenant, running with the land and applied to the predecessors in interest of Bonhomme and Maleau. (R. at 5). The Ditch itself contains running water at all times, except during annual droughts lasting as many as three months. *Id.* Groundwater is the primary source of water within the Ditch. After leaving Maleau's property, the water runs some three miles through several agricultural properties and into Reedy Creek through a culvert located on Bonhomme's property. *Id.*

Reedy Creek begins in the state of New Union, where it is used as the water supply for a service area—Bounty Plaza—which sells gasoline and food on Interstate 250 ("I-250"). *Id.* Reedy Creek is used in both Progress and New Union for agricultural purposes; its water, like

that from Ditch C-1, is used to irrigate agriculture. Farmers sell the resulting product in interstate commerce. *Id.* After flowing into the state of Progress, and subsequently into Bonhomme's property, the river flows for several miles before ending in Wildman Marsh. *Id.*

Wildman Marsh is a wetlands, used twice annually as a stopover by more than one million waterfowl. (R. at 5-6). The Wildman National Wildlife Refuge contains much of these wetlands. The United States Fish and Wildlife Service owns and maintains the Wildman National Wildlife Refuge. (R. at 6). Hunters from adjacent states and foreign countries use the marsh for recreation. *Id.* Hunting adds over $25 million to the local economy. *Id.*

Jacques Bonhomme's property lies directly adjacent these wetlands. (R. at 5). His hunting lodge, used to conduct duck hunting activities, sits on the edge of the marsh. (R. at 6). Before commencing suit, Bonhomme tested the water in Ditch C-1 upstream of, and downstream from, Maleau's property. *Id.* Arsenic, a poison and a toxic pollutant specifically mentioned in the Code of Federal Regulations at 40 CFR 401.15, the discharge of which is subject to stringent effluent limitations (namely, the best available technology economically feasible), is undetectable upstream of Maleau's property. *Id.* Immediately downstream of Maleau's property, arsenic is detectable in high concentrations, decreasing commensurate with increases in groundwater flow. *Id.* Arsenic is likewise detectable at lower levels throughout Wildman Marsh.

Arsenic is a well-known byproduct of gold mining and extraction. V. Straskraba & R.E. Moran, *Environmental Occurrence and Impacts of Arsenic at Gold Mining Sites in the Western United States*, Int. J. Mine Water. 181, 181 (1990). This pattern of arsenic discharge, taken true during a motion to dismiss, strongly suggests the contamination is a result of Maleau's waste storage on his private property. (R. at 6). The Arsenic levels in Wildman Marsh have discouraged Bonhomme from using the marsh for hunting parties. *Id.* Whereas before he

conducted eight hunting parties a year, he now conducts two. *Id.*

STANDARD OF REVIEW

Circuit Courts review "a district court's determination of standing de novo." *Natural Res. Def. Council v. U.S. E.P.A.*, 542 F.3d 1235, 1244 (9th Cir. 2008) (citations omitted). This Court "must accept as true all material allegations contained in the complaint and liberally construe them in favor of the complaining party." *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 540 (6th Cir. 2004) (citations omitted).

SUMMARY OF THE ARGUMENT

The district court erred in holding that Bonhomme was not a proper plaintiff, that Bonhomme is not a "citizen" within the definition of section 505 of the CWA, that Maleau's mining waste piles are not point sources under the CWA, that Ditch C-1 is not a navigable water within the jurisdictional scope of the CWA, and that Bonhomme is liable for the arsenic which enters Reedy Creek through the culvert on his property. Bonhomme has standing because he has alleged sufficient facts to establish that he has suffered injury from Maleau's activities. He is the real party in interest because he, and not PMI, holds the substantive right at issue. Third parties may bear the costs of litigation without themselves being the real party in interest. Bonhomme is a "citizen" under the CWA because he has standing under *Sierra Club v. Morton* and because his use of Wildman Marsh is a protected interest under the CWA. Maleau's mining waste piles are "point sources" under the CWA because they are discrete conveyances of pollutants into Ditch C-1, a navigable water of the United States. Ditch C-1 is a navigable water of the United States because it is a relatively permanent, continuously flowing water connected to Reedy Creek, a regulated water. Reedy Creek is a regulated water because it is a water currently used in interstate commerce. Finally, Bonhomme is not liable for the discharge of arsenic through his culvert because he is not the but-for cause of the arsenic, and because Maleau, and not

Bonhomme, can stop, rather than merely reduce, the pollution.

The district court erred in holding that Bonhomme was not a proper plaintiff. The court found that PMI was the real party in interest because PMI is in direct competition with Maleau and because PMI has paid all costs pursuant to the current litigation. The real party in interest is the party who holds the substantive right at issue; the purpose of the rule is to prevent subsequent litigation by the party entitled to recover. The CWA permits citizen suits for damage to recreational interests when pleaded with sufficient precision. Hunting is a recreational interest, and Bonhomme has demonstrated a reasonable belief that Maleau's actions have damaged this interest. He has alleged facts sufficient to establish that the increased arsenic levels in Wildman Marsh come from Maleau's actions. Bonhomme, and not PMI, is entitled to recover, and accordingly no subsequent action will be brought by another party for damage to Bonhomme's right.

Bonhomme is a "citizen" under the CWA because he is a person whose interest is adversely affected. The district court focused incorrectly on Bonhomme's status as a foreign national in determining whether he is a "citizen" under the CWA. The CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Hunting is a recreational interest, recognized by the CWA. Bonhomme only has to establish a "reasonable fear and concern" that Maleau's activities have affected this interest. He has established that Maleau's activities are most likely the cause of harm to his interest.

The waste piles Maleau keeps on his property are "point sources" under the CWA. The CWA defines "discharge of a pollutant" as "any addition to any navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is "any discernible, confined and discrete conveyance . . . ." *Id.* at (14). The waste piles are discernible, confined, and individually distinct

sources of arsenic. They discharge into Ditch C-1, a navigable water.

Ditch C-1 is a navigable water because it is relatively permanent, and because it is connected to a regulated water, Reedy Creek. The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). "[W]aters of the United States" are waters which are "relatively permanent, continuously flowing," and connected to a regulated water. *Rapanos v. United States*, 547 U.S. 715, 732 (2006). The court allowed "continuously flowing" to include streams which might dry up intermittently during periods of drought. *Rapanos*, 547 U.S. at 733 n.5. Ditch C-1 contains running water except for annual droughts, lasting from "several weeks to three months." (R. at 5). At minimum, it contains running water nine (9) months out of the year, making it "continuously flowing" within *Rapanos*. The restrictive covenants that protect it make it "relatively permanent" within the *Rapanos*. It is connected to a regulated water, Reedy Creek. Ditch C-1 is therefore a "navigable water" within the CWA.

The district court correctly held that Reedy Creek is a "navigable water" of the United States. For the purposes of the CWA, a water need not be "navigable in fact." The EPA defines navigable water as a water either "currently used" or "susceptible to use" in interstate commerce. 40 C.F.R. § 122.2(a). Reedy Creek flows between two states, and is used to supply Bounty Plaza, a service area on an interstate highway. (R. at 5). It flows between two states, and supplies farms whose agricultural products are used in interstate commerce. *Id*. It is included under the EPA's definition of navigable water because of this interstate use.

Bonhomme is not liable under the CWA because he is not the but-for cause of the pollution. The restrictive covenants prevent Bonhomme from interfering with Ditch C-1. The culvert is a bridge over the Ditch and not a conveyance. The water which enters Reedy Creek underneath the Culvert is therefore of the same body of water as the Creek itself, and the culvert

underneath his property does not actively "discharge" water into Reedy Creek..

ARGUMENT

I. JACQUES BONHOMME HAS STANDING; HE IS THE REAL PARTY IN INTEREST BECAUSE HE HOLDS BOTH THE SUBSTANTIVE RIGHT AND A DIRECT STAKE IN THE OUTCOME OF THE LITIGATION

The judicial process begins with standing, a constitutional requirement. "[T]he question of standing is whether the litigant is entitled to have the court decide on the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Only cases and controversies may be heard before the court. U.S. Const. Art. III, § 2. The litigant must have a "direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

Standing begins with injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The litigant must have suffered, or is under imminent threat of suffering, injury to a legally protected interest. *Id.* The first inquiry turns on right; absent a legally protected interest, judicial remediation is impossible. *Id.* Secondly, the defendant's conduct must demonstrate a "fairly traceable" causal link to the injury. *Id.* This inquiry turns on proximity, that the defendant's forbidden conduct caused the type of harm the law seeks to prevent. *Id.* Third, a favorable outcome of the litigation must remediate the injury. The last inquiry is not absolute. *Id.* A favorable outcome must probably, rather than possibly, redress the injury. *Lujan* 504 U.S. at 560-561.

Congress may create the right to sue through statute, and assign that right to specifically designated parties. These Congressional grants may eliminate prudential, but not constitutional standing requirements. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Bonhomme has both constitutional standing and prudential standing to sue. However, he does not need prudential standing because he is among the parties entitled to sue under the CWA.

A. Jacques Bonhomme has Constitutional and Prudential Standing

The injury prong of standing requires injury in fact to a legally protected interest. *Friends of the Earth, Inc. v. Laidlaw Entl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Lujan*, 504 U.S. at 560-561). An injury in fact is an injury to an interest which is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Kerchner v. Obama*, 2009 U.S. Dist. LEXIS 97546 (D.N.J Oct. 20, 2009). Legally protected interests include both the common law right of quiet enjoyment to one's property, and the right to recreational enjoyment of natural resources. *See Morton*, 405 U.S. 727.

Jacques Bonhomme has legally protected interests in his property and his hunting lodge. He has a legally protected recreational interest in the use of Wildman Marsh for hunting parties. *See Friends of the Earth, Inc.*, 528 U.S. 167. His common law property rights protect the former; the CWA protects the latter. Standing requires more than mere "general averments" and "conclusory allegations." *Id*. at 184.

In *Friends of the Earth*, the belief that pollution caused diminution of recreational enjoyment was enough when the plaintiffs pleaded with specificity in regards to use of the specific property. *Id.* at 183. In *Lujan* the same diminution was insufficient where the plaintiffs could not prove they used any of the land specifically affected by alleged pollution. *Lujan*, 504 U.S. at 565-566. Bonhomme has conducted arsenic tests at various locations around Maleau's property, and in Wildman Marsh. At this stage in the litigation, given these facts, his reasonable belief is sufficient to meet the injury requirement of the standing inquiry. *See Friends of the Earth, Inc.*, 528 U.S. 167.

The second prong of the standing inquiry demands a causal link between the behavior of the defendant, and the injury suffered by the claimant. *Id*. at 181. Here, Bonhomme's legally

protected hunting interest has been impinged. To overcome dismissal, all that is required is a reasonable belief, averred with sufficient precision, that the pollution has caused the diminution. *See Lujan*, 504 U.S. at 561. Bonhomme's belief that his hunting interest has been diminished, because of an increased concentration of arsenic, is supported by his allegations. (R. at 6). The testing around Maleau's property tends to indicate that the source of this arsenic is the waste piles Maleau maintains on his property. *Id*.

The third and final prong of the standing inquiry is remediation. *See Friends of the Earth*, 528 U.S. at 181. The question then becomes, will a favorable outcome redress the injury which forms the basis of action? A favorable ruling by the court will enjoin Maleau from maintaining waste piles on his property; removal of the piles will prevent additional arsenic from entering Ditch C-1, Bonhomme's property, Reedy Creek, and Wildman Marsh. Bonhomme can no longer fully enjoy Wildman Marsh because of increased arsenic levels; enjoining Maleau's illegal disposal of mining waste will allow him to fully enjoy the Marsh once again. Jacques Bonhomme has constitutional standing.

In addition to the Constitutional standing requirements of Article III, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-475 (1982). Among these prudential principles, concerned here is the notion that "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision . . . ." *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Section 505 of the Clean Water Act, allows any "person or persons having an interest which is or may be adversely affected," to commence civil action. 33 U.S.C. § 1365(a), (g) (2006). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use

the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth*, 528 U.S. at 187, (quoting *Sierra Club v. Morton*, 405 U.S. at 735). In *Friends of the Earth*, "the affidavits and testimony presented by FOE . . . assert that [defendant's] discharges, and the [claimant's] reasonable concerns about the effects of those discharges, directly affected the [claimant's] recreational, aesthetic, and economic interests." *Id*. at 169.

Mere "general averments" and "conclusory allegations" were insufficient in *Lujan*, 497 U.S. at 888. In *Lujan*, the plaintiff's affadavit did not specify that the lands in question were the ones used by the plaintiff. Here, Bonhomme has alleged his interest in Wildman Marsh sufficient to defeat a motion to dismiss. "Here, the appellees claimed that the specific and allegedly illegal action of the ICC would directly harm them in their use of the natural resources of the Washington area." *United States v. SCRAP*, 412 U.S. 669, 686 (1973) (concerning 12(b)(6) motion to dismiss).

B. Jacques Bonhomme is the real party in interest.

The Federal Rules of Civil Procedure, Rule 17, requires that all actions be brought in the name of the real party in interest ("RPI"). Fed. R. Civ. P. 17(a). Standing is necessary, but not sufficient, to be the RPI in a cause of action. *4-17 Moore's Federal Practice – Civil* § 17.10 (2013). "[Rule 17] does not itself define real party in interest. Instead, it allows a federal court to entertain a suit at the instance of any party whom the relevant *substantive* law grants a cause of action." *U-Haul Int'l, Inc. v. Jartan, Inc.*, 793 F.2d 1034, 1038 (citing *McNeil Construction Co. v. Livingston State Bank*, 300 F.2d 88, 90 & n.5) (emphasis added) (1962). The focus is substantive right, rather than economic interest. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464-465 (1980). *See also Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990).

1. Jacques Bonhomme, not PMI, owns the substantive right to be enforced.

"[Rule 17's] meaning perhaps would be more accurately expressed if it read: An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced." *United States v. 936.71 Acres of Land*, 418 F.2d 551, 556 (citing James William Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J.551, 564 (1937)).

Standing concerns injury and causation, the RPI inquiry concerns right. *4-17 Moore's Federal Practice – Civil* § 17.10 (2013). Neither injury nor benefit alone confer this right, they must coincide with substantive law. *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 42-43 (6th Cir. 1994) ("The real party in interest analysis turns upon whether the substantive law creating the right being sued upon affords the party bringing the suit a substantive right to relief."). The substantive law at issue in this case is the CWA; the interests granted thereunder are at issue. (R. at 4). Their owner is the owner of the substantive right, and is therefore the RPI. Section 505 of the CWA allows any person to bring suit whose "interest is or may be adversely affected." 33 U.S.C. § 1365(a), (g). Section 502(5) defines "person" broadly, as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). Interests are likewise widely defined; as discussed earlier, they include recreational interests. *See Friends of the Earth*, 528 U.S. at 183.

That a person or entity not party to litigation may benefit from the outcome of that litigation, does not render that party the real party in interest. *See U-Haul Inc.*, 793 F.2d at 1038. *See also Navarro*, 446 U.S. at 464-465. A third party may bear the cost of litigation. *Waugh Chapel South, LLC v. United Food & Commer. Workers Union Local 27*, 728 F.3d 354, 365 (4th Cir. August 2013) ("[T]hird-party financing of legal proceedings does not itself demonstrate an

illegal purpose or render [] suits sham. . . .”). Though controversial, third-Party litigation financing is a growing industry. *See generally* Steven Garber, RAND Inst. for Civ. Just., Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns (2010), *available at* http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf. *Steven Garber, Rand Corp., Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns.* By 2010, at least six companies generate profit solely through financing litigation whose outcome they otherwise had no stake in. *Id.*

“[The purpose of Rule 17] . . . is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.” *U-Haul* at 1039. Jacques Bonhomme is the real party in interest because he uses Wildman Marsh for recreation. (R. at 6). The CWA allows any “person or persons having an interested which is or may be adversely affected” to bring action. 33 U.S.C. § 1365(a), (g). (2006). “[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons ‘for whom the aesthetic and recreational values of the area will be lessened’ by the challenged activity.” *Friends of the Earth* 528 U.S. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. at 735).

Without reference to the effect on the competitive abilities of Maleau, as they relate to Precious Metals International, the right here asserted belongs to Bonhomme. That PMI has paid legal expenses relating to the suit does not divest Bonhomme of his rights under the CWA. Nor does the fact that the hunting parties are tangentially related to the business of PMI deprive Bonhomme of his right to recreational enjoyment. That PMI competes with Maleau is not germane to the disposition of the present litigation. Maleau's purpose in storing his mining waste

at his residence is likewise irrelevant; mens rea requirements are wholly absent from the CWA. It mandates rather the cessation of waste entrance into the waters of the United States. Were Maleau to dispose of the waste at the site of the mine, into the river which flows by it, he would become subject to the CWA's effluent limitations. Because he does not, he has created the specific type of harm the CWA guards against. PMI owns no substantive right here asserted. Bonhomme owns the property and conducts the hunts; their number and nature are relevant only insofar as they establish a legitimate recreational interest. The diminution to both the value, and enjoyment, of the property is borne entirely by Bonhomme.

The District Court in this action would have Bonhomme only subject to Clean Water Act liability while at the same time denying him the ability to indemnify the source of that liability under the same Act. Further, the court's dismissal of Bonhomme's suit would also prevent the desired effect of stopping the pollution at its source. Whereas Bonhomme's property merely lies between the source of the arsenic and its ultimate destination, Maleau's is the source itself. It is the source because Maleau has, through deliberate and positive action, made it the source.

II. JACQUES BONHOMME IS A CITIZEN UNDER THE CLEAN WATER ACT

A. The Plain Language of the Clean Water Act Includes Foreign Nationals.

The CWA, section 505 allows "any citizen [to] commence a civil action on his own behalf – – (1) against any person . . . who is alleged to be in violation of (a) an effluent standard or limitation under this Act." 33 U.S.C. § 1365(a). Subsection (a) continues, "[t]he district courts shall have jurisdiction, without regard to the amount in controversy *or the citizenship of the parties*, to enforce such an effluent standard or limitation." *Id.* (emphasis added). The statute does not distinguish between the claimant and the party against whom the right is claimed; jurisdiction exists notwithstanding citizenship of either party.

Subsection (g) further defines a "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). There are no further qualifiers within the statute. The plain language requires only a person, statutory or natural, and an interest. It sets no further requirements. Congress conferred under the CWA an interest in the natural resources of the nation to protect those resources, by aiding the Administrator in implementing the Act and its policies.

B. Courts have interpreted the definition of "citizen" in the CWA broadly in order to effectuate the purposes of the CWA.

"It is clear that the citizen-suit provisions apply only to persons who can claim some sort of injury [under the CWA]." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 17 (1981) (rev'd on other grounds). "It is clear . . . that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*." *Middlesex County*, 453 U.S. at 17 (citing S. Conf. Rep. No. 92-1236, p. 146 (1972). "This *broad* category of potential plaintiffs includes . . . plaintiffs seeking to enforces these statutes . . . as private attorneys general, whose injuries are 'noneconomic' and probably noncompensable." *Middlesex County*, 453 U.S. at 17.

Standing under *Morton* requires injury, causation, and redressability. *See Sierra Club v. Morton*, 405 U.S. 727. The injury to Bonhomme's recreational enjoyment of his property is a recognized noneconomic interest. He has gathered evidence and pleaded with sufficient particularity the existence of that injury. The allegations are neither baseless nor speculative, as earlier discussed. Foreign nationals are among the class of those included in the plain language of the statute, supported by both congressional intent and Supreme Court jurisprudence under *Middlesex* and *Morton*. Bonhomme has standing under *Morton*; therefore, under *Middlesex* he is a member of the class of persons able to bring CWA citizen suits.

C. The policies underlying the clean water act are best served by a broad interpretation of "citizen"

Congress enacted the citizen suit provision in the CWA because it was dissatisfied with the level of agency enforcement. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). Citizen suits are fundamentally different from traditional litigation, in that their purpose is to be considered a public service in addition to private relief.

Section 1010 of the CWA provides that the CWA's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, . . . [and that the statute sets the] national goal that the discharge of pollutants into the navigable waters be eliminated . . .[and] the national policy that the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251. Acknowledging that the Administrator cannot possibly enforce all violations of the CWA alone, Congress included the citizen suit provision in the act. *Sierra Club v. Whitman*, 268 F.3d 898, 905 (2001). ("By allowing citizens to sue to bring about compliance with the Clean Water Act, Congress implicitly acknowledged that there would be situations in which the EPA did not act.")

The focus of the citizen suit provision is enforcement of the CWA; to better accomplish this, Congress has offered a broad definition of citizen, contained within the act itself. 33 U.S.C. § 1365(g). Congressional history itself states that "citizen" was meant to encompass "all persons possessing standing under . . . *Sierra Club v. Morton*." *Middlesex County Sewerage Auth. V. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (referencing S. Conf. Rep. No. 92-1236, p. 146 (1972). Courts interpret citizen broadly, and have frequently allowed non-person entities to bring citizen-suits under the CWA. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49 (1997), *Department of Energy v. Ohio*, 503 U.S. 607, 617 (n.11) (1992). The term is interpreted broadly so as to reach bad actors who are the source of impermissible water borne pollutants. *Babich,*

Adam. Citizen Suits: The Teeth in Public Participation, 25 ELR 10141 (March 1995). Maleau is exactly the type of bad actor contemplated by the Congress in outlining the scope of citizen under the CWA. If not for Maleau's deliberate and illegal actions, Bonhomme and hunters around the world would have full enjoyment of Wildman Marsh. It is irrelevant for the purposes of dismissal that Maleau and Progress allege the decline have different but-for causation because the court must ask whether the claims, taken together, constitute a valid cause of action before considering a motion to dismiss. The allegations resolved in Mr. Bonhomme's favor, a cause of action has been alleged sufficient to sustain suit. Mr. Bonhomme's suit reaches the source of the pollution. It reaches the party who is best able to prevent arsenic leakage because it is the same party that caused that leakage in the first place. It serves the purposes of the Act, and prevents a bad actor like Maleau from circumventing the requirements of the Clean Water Act.

III. THE WASTE PILES ON SHIFTY MALEAU'S PROPERTY ARE POINT SOURCES UNDER THE CLEAN WATER ACT

A. Maleau's waste piles are point sources under regulatory interpretation by the EPA.

Water-borne pollutants must be discharged in compliance with the CWA. 33 U.S.C. § 1311(a). The National Pollutant Discharge Elimination System ("NPDES") is one such relevant provision, and it requires that anyone discharging a pollutant must first obtain a permit limiting the quantity and type of any such pollutants being discharged into the nation's waters. *Id*. at § 1342. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id*. at § 1362(12). The CWA defines "point source" as "any discernible, confined and discrete conveyance" which includes, but "is not limited to any pipe, ditch, channel, tunnel, conduit . . . from which pollutants are or may be discharged." *Id*. at § 1362(14).

B. Mining waste piles which add pollutants to the wastewater they discretely convey are

"point sources" under the CWA.

While guidelines for the definitions of what constitutes a "point source" were set out in the CWA, the Supreme Court and United States Circuit Courts have broadly interpreted the definitions to find many different types of "point sources" under the CWA. In *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) the Supreme Court addressed whether or not a water pump could be considered a "point source" under the CWA even though it was not adding any pollutant. *Miccosukee* 541 U.S. at 105. The Court reiterated that there was no requirement that the "point source" actually add the pollutant in question; rather, it must merely convey the pollutant to the navigable water. *Id*. Justice O'Connor, writing for the majority, emphasized this point in saying, "[t]ellingly, the examples of 'point sources' listed by the Act include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them." *Id*. (quoting §1362(14)). The Court in *Miccosukee* did not, however, preclude the possibility that a "point source" can *both* add and convey the "pollutant" in question.

Circuit Courts have broadly interpreted the definition of "point sources" to include a wide variety of discharges, and these include sources of pollution that are mobile and remote from the original source of the pollution. *E.g.*, *League of Wilderness Defenders/Blue Mts. Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (Pollution being discharged by airplanes spraying pesticide became a "point source" when passing over streams). The Second Circuit found a pipe extending multiple miles, and underneath property controlled and owned by others, to be a "point source" under the statute's definition. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). While courts have traditionally taken an approach to interpret "point source" and "addition" under the CWA broadly, this approach is

based in part on the statutory goal of "'attain[ing] . . . the no discharge objective,' and this objective could not be achieved if the term 'point source' were read narrowly." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 652 (2d Cir. 1993) (quoting *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979) (internal citations omitted)). The Tenth Circuit specifically addressed "point sources" in mining operations in *United States v. Earth Sciences*, 599 F.2d 368 (10th Cir. 1979). The *Earth Sciences* court found that failures in the channeling and containment system of runoff water polluted by mining waste was a "point source" within the meaning of the CWA. *Earth Sciences* 612 F.2d at 374. The defendant mining company's operation had waste piles of mining byproduct which, uncontained, would discharge a pollutant when rain and snow runoff percolated through the piles and flowed out saturated with pollutants. *Id*. at 370. The pollution laced discharge was normally contained using "a closed system [of pits, pipes, and hoses] . . . [resulting in no] pollutant discharge." *Id*. The court found that "whether from a fissure in the dirt berm or overflow of a wall . . . [any] escape of liquid from the confined system is from a point source" even when the source of the liquid is from rain or snowmelt. *Id*. at 374. The court found support for pinpointing the location of the "point source" because it was limited to a system, including a series of hoses, pumps, and pits, which was discretely failing. *Id*. at 374. The *Earth Sciences* court examined a failed pollution control system, but the Fifth Circuit went further when it cited *Earth Sciences* in their decision in *Sierra Club v. Abston*. *See Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41 (5th Cir. 1980). (holding that unaddressed or unforeseen runoff from mining waste piles may also be "point sources" under the CWA.)

The court in *Abston* addressed whether or not point sources existed where "sediment basin overflow and the erosion of piles of discarded material [at a coal mine] resulted in rainwater carrying pollutants into a navigable body of water." *Abston*, 620 F.2d at 43. The defendant in

Abston operated a coal mine whose "spoil piles" eroded with rain; the resulting runoff deposited silt and acid into a creek. *Id*. The defendant created sediment basins to attempt to contain the pollution, but these basins would sometimes overflow and reintroduce the pollution to the creek due to rainfall. *Id*. In finding that a "point source" existed, the court rejected the defendant's argument that "point sources" do not include "the discharge of pollutants into the waterway through ditches and gullies created by natural erosion and rainfall," and instead found that pollutants may be discharged from a "point source" by "gravitational or non-gravitational means" so long as they are discretely conveyance. *Id*. at 44-45. The court went on to say that "[n]othing in the Act relieves miners from liability simply because the operators did not actually *construct* those conveyances, so long as they are *reasonably likely* to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id*. (emphases added) (citing *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), cert. granted sub nom *Environmental protection Agency v. National Crushed Stone Association*, 444 U.S. 1069, 100 S. Ct. 1011, 62 L. Ed. 2d 750 (1980)). The *Abston* court found that a "point source" may be created "even if the miners have done nothing beyond the mere collection of rock and other materials." *Abston*, 620 F.2d at 45.

C. The waste piles are "point sources" discharging a pollutant into a "navigable water" because they "discretely convey" pollution into both Ditch C-1 and Reedy Creek.

While the court in *Earth Sciences* addressed the potential for mining waste to produce and convey pollutants via a "point source," the decision in *Abston* made clear that discretely conveyed pollutant-laced runoff from mining waste piles is a "point source" under the CWA. Maleau intentionally places his mining slag adjacent to Ditch C-1 where the percolating water becomes laden with arsenic. (R. at 5). This arsenic discharge then flows out of gravity worn channels into Ditch C-1, into Reedy Creek, and into Wildman Marsh. *Id*. The purpose of Ditch

C-1 is to collect rainwater runoff, and this would include runoff from the lands Ditch C-1 runs through. *Id.*

These gravity worn channels from Maleau's waste piles are not constructed by Maleau, nor need they be. The decision in *Abston* supports the conclusion that the reasonable likelihood that the arsenic laden runoff will flow through them and into Ditch C-1 makes them a discrete conveyance within the meaning of the CWA's definition of a "point source." It would be, in fact, *unreasonable* to think that water from Maleau's piles would not flow into the ditch, whose purpose and reason for being is the discharge of rainwater runoff.

If Ditch C-1 is a "navigable water," then Maleau's waste piles are a "point source" under *Earth Sciences* and the 5th Circuit's decision in *Abston*. However, even if Ditch C-1 is a not navigable water, Maleau's waste piles are still "point sources" because they "discharge" the pollutants in question via a "discernible, confined and discrete conveyance." 33 U.S.C § 1362(14). The court in *Earth Sciences* found "point sources" when a runoff system *failed*, but here a "point source" is created by the *success* of the runoff system. The discrete conveyance of arsenic into Reedy Creek makes the waste piles point sources under the CWA. *Earth Sciences*, 599 F.2d at 374. The CWA's definition of "point sources" includes, but is not limited to "any pipe, ditch, channel, tunnel, conduit." *Id*. An exclusive list of "point sources" would severely limit the CWA's jurisdictional reach and render it unable to achieve its purpose. Here, the combination of two statutory examples, channels and ditches, form a "discrete conveyance" within the meaning of 33 U.S.C § 1362(14). Specifically, when the gravity worn channels and Ditch C-1 act as a discrete conveyance of arsenic into Reedy Creek.

IV. DITCH C-1 IS A NAVIGABLE WATER UNDER THE CLEAN WATER ACT

A. The District Court erred in holding that *Rapanos* definitively excludes the Ditch from CWA jurisdiction on the basis that it is not "navigable in fact."

The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). Courts have long agreed that the phrase "navigable waters" does not require "navigability in fact," and the entire Court in *Rapanos* supports this interpretation. *United States v. Robison*, 505 F.3d 1208, 1216 (11th Cir. 2007), citing *Rapanos v. United States*, 547 U.S. at 730-31 (plurality opinion); *id*. at 767 (Kennedy, J., concurring); *id*. at 788 (Stevens, J., dissenting); *see also United States v. Bailey*, 571 F.3d 791, 797 (8th Cir. 2009) ("All members of the Court agreed that 'navigable waters' encompassed something more than traditional navigable-in-fact waters." (citations omitted)). Thus, by limiting traditionally broad CWA jurisdiction to those waters that are "navigable in fact," the district court defies *Rapanos* as to the one issue on which all nine Justices are in agreement.

B. Either test under *Rapanos* is proper to establish CWA jurisdiction over Ditch C-1.

Rather than constituting "definitive precedent," *Rapanos*, a fractured 4-1-4 decision, resulted in competing interpretations of "waters of the United States." *United States v. Robison*, 505 F.3d 1208, 1219 (11th Cir. 2007). The plurality focused on distinctions between excluding isolated, intermittent flows, while leaving room to regulate "relatively permanent, continuously flowing" waters that had a connection to a regulated water. *Rapanos*, 547 U.S. at 716.

To determine which part of a fragmented opinion is controlling, the circuits first looked to *Marks v. United States. Robison*, 505 F.3d at 1220 ("The First Circuit . . . cited various post-*Marks* cases in which, in [their] view, the Supreme Court itself had examined not only plurality and concurring opinions, but also dissenting opinions, in order to determine the holding of an earlier, fragmented Supreme Court decision."); *see Marks v. United States*, 430 U.S. 188, 193

(1977) (holding that where fewer than five judges share a rationale explaining the result, the holding is the disposition of the concurring members "on the narrowest grounds." (citations omitted)).

In a case where the scope of statutory jurisdiction is at issue, the "narrowest" holding is that which "relies on the least; doctrinally 'far-reaching-common ground'"; here, because the concurring opinion is that which "offers the least change to the law," the concurrence governs. *United States v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009). Under this rubric, Justice Kennedy's "significant nexus" test should control. The difficulty presented by *Rapanos* is that, rather than constituting a "narrower" holding than the plurality, Justice Kennedy "flatly rejected" the plurality. *Cundiff*, 555 F.3d at 210.

Thus, despite the Court's holding in *Marks* that the narrowest holding governs, the circuits do not agree on what the holding of *Rapanos* means for defining "navigable waters" under the CWA. *Robison*, 505 F.3d at 1219, citing *N.Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006), *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). In response, the circuits have focused on whether their decision in a given case would command a majority of the Court, taking their cue from Justice Stevens' dissent: "Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction [in all cases in which] either the plurality or Justice Kennedy's test is satisfied, [jurisdiction should be found] if *either* of those tests is met." *Rapanos*, 547 U.S. at 810, (Stevens, J. dissenting). *See also U.S. v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009) (citing *United States v. Johnson*, 467 F.3d at 66); *Cundiff*, 555 F.3d at 210-13.

Likewise, the EPA has promulgated guidance in field memoranda as well as

administrative adjudications indicating that establishing jurisdiction under either test is sufficient to ensure CWA protection. *See Smith Farm Enterprises, LLC*, 15 E.A.D. __ CWA 08-02 (EAB 2011); U.S. EPA & U.S. Army Corps of Eng'rs, Draft Guidance on Identifying Waters Protected by the Clean Water Act, (May 2, 2011), *available at* http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf ("Draft Guidance"). In the present case, it is not necessary for this Court to determine which approach to take, because the Ditch satisfies both tests for CWA jurisdiction under *Rapanos*. *Cundiff*, 555 F.3d at 210.

C. Because Reedy Creek is a "water of the United States," Ditch C-1 qualifies under both the plurality and concurrence in *Rapanos* for CWA protection

1. Reedy Creek is a "water of the United States" under the CWA

The District Court correctly found that Reedy Creek comes within Clean Water Act jurisdiction. Reedy Creek is a "water of the United States" under a plain reading of definitions promulgated by the EPA: it is an interstate water, about fifty miles long and spanning the States of New Union and Progress. 40 C.F.R. § 122.2 (b); (R. at 5). Furthermore, because it serves as the main water supply for Bounty Plaza, a stopping off point for interstate travelers of I-250, as well as a major water supply for farmers in both states who sell their products in interstate commerce, it is a water both " currently used" and which "may be susceptible to use" in interstate commerce. 40 C.F.R. § 122.2 (a); (R. at 5-6).

2. Ditch C-1 is a "relatively permanent body of water connected to traditional interstate navigable water."

The plurality in *Rapanos* defined the statutory phrase "water of the United States" to mean a "[1]relatively permanent body of water [2] connected to [3] traditional interstate navigable waters." *Rapanos*, 547 U.S. at 742. The Ditch satisfies all three criteria. Therefore, rather than being "definitively" excluded, the Ditch precisely represents the type of water that the

Rapanos plurality expressly did *not* intend to exclude from the protections of the Clean Water Act, regardless of whether it is navigable-in-fact.

The plurality further sought to more precisely delineate the previously broad interpretation of "the waters of the United States," and expressed criticism of cases where even "such typically dry land features as 'arroyos, coulees, and washes,' as well as other 'channels that might have little water flow in a given year,'" were considered "waters of the United States." *Rapanos*, 547 U.S. at 727, 733 n. 5. The Court explicitly mentioned that they did not intend to exclude all waters that were not "navigable in fact." *Id*. The plurality in *Rapanos* requires a "relatively permanent" flow of water, rather than navigability-in-fact. They explain in footnote five that "[b]y describing waters as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought." *Rapanos*, 547 U.S. at 733.

The plurality's litmus test for permanence is that a body be a "290-day, continuously flowing stream" which, by the plurality's "[c]ommon sense and common usage distinguish [from] a wash." *Rapanos*, 547 U.S. at 733, n.5. Ditch C-1 flows at least nine months of the year, experiencing brief annual droughts. It flows over three miles, spanning multiple private properties, and is subject to restrictive covenants requiring that it be maintained by property owners. (R. at 5). It flows ultimately through a culvert into Reedy Creek, an interstate water itself subject to CWA jurisdiction.

Ditch C-1 flows continuously forty-nine weeks per year, well in excess of the 290 day requirement under *Rapanos* for "continuously flowing." Restrictive covenants ensure the Ditch enjoys a sufficient degree of "relative permanence" to support inclusion under the plurality's criteria defining a "water of the United States." *Rapanos*, 547 U.S. at 733 n.5. These factors,

combined with its connection to Reedy Creek, mean that Ditch C-1 is not an "ephemeral channel" requiring a "sweeping assertion" of CWA jurisdiction such as the plurality in *Rapanos* sought to cabin. *Rapanos*, 547 U.S. at 726. Rather, it is of precisely that class of waters that the plurality expressly did not exclude from the "waters of the United States." *Id*. at 733 n.5.

3. Ditch C-1 satisfies Justice Kennedy's test because it forms a "significant nexus" with Reedy Creek, a water of the United States.

In *Rapanos*, Justice Kennedy rejected the notion that to be "navigable water," the water had to be "relatively permanent, standing or flowing" or that it had to have a "continuous surface connection." *Rapanos*, 547 U.S. at 768- 777. All that is necessary is a "significant nexus" to waters that "are or were navigable in fact or that could reasonably be so made" to meet the definition of "navigable water." *Robison*, 505 F.3d at 1222; *Rapanos*, 547 U.S. at 759, 779. A finding that the Ditch is a tributary of Reedy Creek is not enough on its own to establish the requisite nexus; however, the Ditch's significant impact on the quality of water in Reedy Creek is sufficient to meet Justice Kennedy's "significant nexus" requirement and thus warrant CWA jurisdiction over the Ditch. *Rapanos*, 547 U.S. at 780, 782 (Kennedy, J., concurring).

EPA guidance describes criteria for determining whether a given body is a "tributary" under the CWA: "A tributary is physically characterized by the presence of a channel with defined bed and bank." U.S. EPA & U.S. Army Corps of Eng'rs, Draft Guidance on Identifying Waters Protected by the Clean Water Act, 11-12 (May 2, 2011), *available at* http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf ("Draft Guidance"). Under this guidance, "non-tidal ditches (including roadside and agricultural ditches) [are not] tributaries except where they have a bed, bank, and ordinary high water mark; connect directly or indirectly to a traditional navigable or interstate water," and have at least one of a list of five qualifying characteristics, including "ditches that have relatively permanent flowing or standing water." *Id*.

These criteria comport with standards promulgated by the Army Corps of Engineers, which Justice Kennedy specifically addressed in determining whether a given tributary should be regulated by the CWA. *Rapanos*, 547 U.S. at 781-82 (Kennedy, J., concurring). While suggesting that these standards "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters" to warrant CWA protection, he rejected it as too broad to be determinative. *Id*. at 782. Thus, the fact that the Ditch feeds into Reedy Creek is not enough on its own to establish jurisdiction; rather, the requisite significant nexus must be established on a "case-by-case" basis. *Id*.

In *Rapanos*, the difficulty of establishing jurisdiction arose from the indeterminate boundary between a water and nearby wetlands. *See Rapanos*, 547 U.S. at 735-743. Thus, expert testimony and detailed findings of fact were necessary to determine whether the water in question should be covered. *Rapanos*, 547 U.S. at 757; *id.* at 759, 783 (Kennedy, J. concurring). Where one stream with a defined channel flows into another, larger stream, demarcation is not an issue. *Rapanos*, 547 U.S. at 742-743. Mindful of Congressional intent in passing the CWA, Kennedy does not exclude all minor tributaries from regulation; he merely requires some showing that a given tributary has a significant effect on water quality. *Rapanos*, 547 U.S. at 780, (Kennedy, J., concurring). Thus, while a merely "speculative or insubstantial" effect on water quality would not be sufficient to establish the requisite nexus, in the present case, no speculation is necessary. *Rapanos*, 547 U.S. at 780, (Kennedy, J., concurring).

The Ditch's effect on the water quality of Reedy Creek is neither speculative nor insubstantial. First, water quality tests conducted at Reedy Creek indicate that arsenic is present in significant concentrations downstream of the Ditch and entirely absent upstream; thus there is a nexus. (R. at 6). Furthermore, the fact that this arsenic remains detectable for several miles in

Reedy Creek, ultimately spreading throughout Wildman Marsh, indicates that the Ditch's effect is indeed substantial; thus, the nexus is significant. (R. at 5). Considering the potentially devastating impact on the fish and fowl of Wildman Marsh, it is clear that regulation of Ditch C-1 is necessary to protect "the chemical, physical, and biological integrity" of our Nation's waters. *Rapanos*, 547 U.S. at 780, (Kennedy, J., concurring), and therefore CWA jurisdiction is proper.

V. JACQUES BONHOMME IS NOT LIABLE FOR THE DISCHARGE OF ARSENIC INTO REEDY CREEK FROM THE CULVERT BECAUSE HE IS NOT THE BUT FOR CAUSE OF THOSE DISCHARGES

A. Bonhomme does not violate the CWA because Maleau is the but-for cause of the arsenic in Reedy Creek.

"It is generally recognized that liability under the CWA is a form of strict liability." *W. Va. Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512, 519-20 (S.D.W. Va. 2009) (citing *Stoddard v. Western Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir.1986); *Earth Sciences*, 599 F.2d 368 (10th Cir.1979); *United States v. Amoco Oil Co.*, 580 F.Supp. 1042 (W.D.Mo.1984); *accord American Canoe Ass'n v. Murphy Farms*, 412 F.3d 536, 540 (4th Cir.2005) (citing *Stoddard*)). A defendant may also be held liable for discharging a pollutant regardless of intentionality and despite the fact that they did not build the conveyance[s]. *Earth Sciences*, 599 F.2d at 374; *Abston*, 620 F.2d at 45.

However, the Supreme Court is clear that no "point source" exists when polluted water is merely passed between the same polluted body of water. *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 712-13 (2013). Further, it would undermine the CWA, and indeed contravene its purpose, to find Bonhomme liable when he can do nothing to alter the flow of polluted water entering or exiting his property.

B. Bonhomme does not violate the CWA by discharging arsenic through the culvert on

his property because the culvert is merely passing arsenic laden water into the same polluted body of water.

In *Los Angeles Cnty. Flood Control* the Supreme Court explicitly said that "a 'discharge of pollutants' [does not] occur when polluted water 'flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river,' and then 'into a lower portion of the same river.'" *Los Angeles Cnty. Flood Control* at 712-13 (citing Pet. for Cert. i. See 567 U.S. ——, 133 S.Ct. 23, 183 L.Ed.2d 673 (2012)). In *Los Angeles Cnty. Flood Control*, the Los Angeles County Flood Control District (District) operated a drainage system for collecting and discharging storm water. *Id*. at 712. The respondents alleged that the District violated the terms of their permit when water tested downstream of their concrete storm sewer system, but in the same body of water, showed elevated levels of pollutants. *Id*. The Court reversed the 9th circuit decision, saying that it did not comport with the Court's decision in *Miccosukee* that polluted water transferred between "two parts of the same water body" was not a discharge of pollutants under the CWA. *Los Angeles Cnty. Flood Control* at 711.

In "*Miccosukee*, polluted water was removed from a canal, transported through a pump station, and then deposited into a nearby reservoir." *Id*. at 712-13 (citing to *Miccosukee*, 541 U.S. at 100). The canal collected groundwater and runoff from an urban area, and the pump station moved it to the reservoir as it would otherwise back up and flood the urban areas. *Miccosukee*, 541 U.S. at 100. The Court in *Miccosukee* "held that this water transfer would count as a discharge of pollutants under the CWA only if the canal and the reservoir were 'meaningfully distinct water bodies.'" *Los Angeles Cnty. Flood Control* at 712-13 (citing *Miccosukee*, 541 U.S. at 112). The Court also said that their decision in *Miccosukee* was derived from the CWA's text, and the common understanding of the word "add." *Los Angeles Cnty. Flood Control* at 712-713.

"As the Second Circuit [aptly] put it ..., '[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot.'" *Miccosukee,* 541 U.S. at 109–110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (C.A.2 2001)).

The polluted water flowing through Bonhomme's culvert is simply a transfer between the same larger polluted body of water. Just as the water flow along the canal in *Los Angeles Cnty. Flood Control*, the polluted water will flow over the improved section of Ditch C-1 and into Reedy Creek regardless of Bonhomme's actions since the covenants on property owners' lands require its flow remain undisturbed. Further, the existing culvert is not affecting the flow of the polluted water at all. Unlike the pump station in *Miccosukee*, the culvert plays no active part in the transfer of water; instead, it merely allows cars to pass over the predetermined flow of water which Bonhomme's property's restrictive covenant bars him from interfering with. The Ditch and Reedy Creek are just as similar as the canal and reservoir in *Miccosukee*. Bonhomme has even less control over Ditch C-1 than the canal in *Miccosukee* because of this restrictive covenant. This Court should follow the Supreme Court's decision in *Los Angeles Cnty. Flood Control* and hold that the culvert on Bonhomme's property is no more than a ladle pouring Maleau's arsenic laden water back into the same body of water.

C. Jacques Bonhomme has every incentive, and no capacity, to prevent the arsenic contamination at issue here, while Shifty Maleau has no incentive, and complete ability, to achieve the same.

Even if the court determines that arsenic is being added to Reedy Creek through the culvert which is a point source, Maleau violates the CWA via the point source, not Bonhomme. The Second Circuit squarely addressed this issue in *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), and found that a party discharging via a point source need not have the point

source on his own property to be liable for discharging without a permit under the CWA. *Dague*, 935 F.2d at 1355.

The court in *Dague* addressed whether or not a city discharged pollutants via a "point source" in violation of 33 USC § 1311. *Id*. at 1349. Specifically, the city operated a landfill that discharged water into a pond, which had first percolated through the landfill and became thereby laced with pollutants. *Id.*, at 1347. The polluted leachate flowed off the city property, through a culvert under a railroad, and into a wetland. *Id*. The district court found that the city had violated the CWA by discharging a pollutant from the culvert, which was a "point source" under the CWA, and the Second Circuit agreed. *Dague*, 935 F.2d at 1355.

In addressing issues of ownership, control, and foreseeability relating to the "point source," the Second Circuit specifically relied on two similar district court cases involving waste entering ditches and pipes before eventually flowing into a navigable water. *Id*. (citing *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361 (D.N.H. 1985) (finding that pollutants collecting in a ditch, flowed a brook, and eventually ended up in a navigable water violated § 1311(a) of the CWA)); *United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945, 947 (W.D. Tenn. 1976) (finding a city sewer system to be a "point source" to exist under § 1311 despite not being located on the defendant's property). The *Dague* court specifically relied on the *Velsicol* court's holding that a "point source" need not *directly* add the pollutants to the "navigable waters" because the defendant knew that the conveyance he was discharging through led to the "navigable water." *Dague*, 935 F.2d at 1355 (citing *Velsicol*, 438 F.Supp. at 947) (emphasis added). The *Dague* court upheld the district court's decision that the culvert was a "point source" despite being located on another's property, and in doing so the court again found support in the *Velsicol* decision for the proposition that "[t]he fact that the defendant discharged pollutants

through conveyances owned by another party was irrelevant." *Dague*, 935 F.2d at 1355 (citing *Velsicol*, 438 F.Supp. at 947). The court also cited to *Earth Sciences* for support that "[t]he definition of point source is to be broadly interpreted." *Dague*, 935 F.2d at 1354. "The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste . . . [and that] [t]he concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Dague*, 935 F.2d at 1354-1355 (quoting *Earth Sciences*, 599 F.2d at 373).

Maleau knows that all water which enters Ditch C-1 on his property flows unimpeded to Reedy Creek. He knows this due to the restrictive covenants, running with the land, on all properties between his and the Creek. In light of these aforementioned covenants, Shifty Maleau is the only individual with the ability to do anything about the flow of arsenic laden water into Reedy Creek. Maleau knows discharge from his property enters Reedy Creek through the culvert on Bonhomme's. It is reasonably foreseeable that the arsenic from his waste piles would flow into Reedy Creek via the culvert on Bonhomme's property, just as it was that the pond water in *Dague* would flow through the railroad culvert to the "navigable water."

If this Court should find that the culvert on Bonhomme's property is a "point source" under the CWA and is discharging Maleau's arsenic laden water into Reedy Creek, then this Court should apply the same reasoning the Second Circuit did in *Dague* and find it to be Maleau's "point source." Such a holding would also serve the purpose of the CWA, to "restore and maintain the chemical, physical and biological integrity of the Nation's waters . . . [by achieving] the national goal that the discharge of pollutants into navigable waters be eliminated by 1985," since only Maleau, and not Bonhomme, can stop the flow of arsenic into Reedy Creek

through the Ditch C-1 culvert. 33 U.S.C. § 1351(a).

CONCLUSION

This Court should hold that Jacques Bonhomme is the real party in interest under Fed. R. Civ. P. 17, and that Jacques Bonhomme is a "citizen" under the Clean Water Act. Shifty Maleau's mining waste piles are "point sources" because they are discrete conveyances in Ditch C-1 and Reedy Creek, waters of the United States. Bonhomme is not liable for any arsenic discharge because Maleau is the but for cause. Therefore, this Court should reverse the District Court's decision to dismiss Bonhomme's suit and dismiss Progress' suit against Bonhomme.

Respectfully Submitted,

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Counsel for Jacques Bonhomme