Team 37

C.A. No. 13-01234

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee,
and
SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

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

BRIEF FOR SHIFTY MALEAU
Defendant-Appellant, Cross-Appellee
Intervenor-Plaintiff-Appellant, Cross-Appellee

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STATEMENT OF JURISDICTION

This case involves an appeal following the issuance of the final decision of the United States District Court for Progress, granting Shifty Maleau's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and denying Jacques Bonhomme's motion to dismiss. (R. at 1 and 10). The District Court had proper subject matter jurisdiction to hear the case under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.* (2012). Federal courts have original jurisdiction over questions of federal law. 28 U.S.C. § 1331 (2012). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court of the District of Progress. 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Can Bonhomme properly continue the suit against Maleau without joining PMI as a real party in interest under Rule 17 of the Federal Rules of Civil Procedure ("Rule 17") when Bonhomme has not suffered any injury to his property, PMI has suffered injury in lost business opportunities, and Bonhomme has had sufficient opportunity to join the real party in interest?

2. Does the CWA § 1365(g)'s definition of "person" strip the ordinary meaning from § 1365(a)'s use of the term "citizen," and thus allow Bonhomme, a foreign national, to bring suit under CWA's citizen suit provision?

3. Are mining waste piles point sources within 33 U.S.C. §§ 1362(12) and (14) when stormwater runoff moves from the piles to navigable waters through naturally eroded channels which are created solely by land runoff and percolation and are not a component of any manmade drainage system?

4. Does Ditch C-1, a one-foot deep by three-foot wide drainage ditch that has no connection to navigable-in-fact waters, fit within the CWA's definition of navigable waters where the Supreme Court has held that this term applies only to those waters that are, were, or reasonably could be made navigable-in-fact, or that have a significant nexus to such navigable-in-fact waters?

5. When a waterway is non-navigable-in-fact and does not connect to any navigable-in-fact waterway, can that waterway nonetheless fall within the CWA jurisdiction solely on the basis that it provides water to a business alongside an interstate highway and feeds into a marsh land that provides habitat for migratory birds?

6. Despite 33 U.S.C. § 1311(a)'s lack of a causation element on its face, can a defense of but-for causation be read into the statute to excuse the liability of an individual who owns and operates a point source which discharges pollutants into navigable waters but does not itself create those pollutants?

STATEMENT OF THE CASE

This is an appeal from the District Court's final decision on July 23, 2012, granting in its entirety Maleau's motion to dismiss and denying in its entirety Bonhomme's motion to dismiss on six of its stated grounds. Bonhomme commenced the present action against appellant Maleau in the United States District Court for the District of Progress. (R. at 4). Bonhomme's citizen suit was brought pursuant to § 505(a) of the CWA. 33 U.S.C. § 1365 (2012). (R. at 4). Bonhomme's complaint alleged that Maleau violated the CWA by piling gold mining overburden, waste rock and dirt adjacent to Ditch C-1 in such a way that runoff erodes channels and adds arsenic to Ditch C-1 through those channels. (R. at 4-5). Furthermore, Ditch C-1, which Bonhomme asserts is a navigable water under EPA regulations, discharges the arsenic into Reedy Creek ("the Creek"). (R. at 5). Bonhomme sought all relief available under the CWA. (R. at 4).

Later, the State of Progress filed a citizen suit against Bonhomme alleging that he violated CWA by discharging arsenic from his culvert, a point source, into the Creek. Maleau intervened as a matter of right in Progress's action against Bonhomme under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2012). (R. at 5). Progress and Maleau moved to consolidate their case because the facts and law are the same. Bonhomme did not object, and the Court granted the motion to consolidate. (R. at 5).

Following consolidation, both Bonhomme and Maleau filed motions to dismiss under Rule 12(b)(6) for failure to state a claim. (R. at 5). On July 23, 2012, the District Court granted in its entirety Maleau's motion to dismiss and denied in its entirety Bonhomme's motion to dismiss finding: (1) Bonhomme is not a proper plaintiff; (2) even if Bonhomme could maintain his suit, the Court would

find for Maleau on all issues, except that Reedy Creek is a water of the United States; and (3) Progress adequately stated a cause of action against Bonhomme for a § 1311(a) violation. (R. at 10). Following the issuance of the Order, Bonhomme, Maleau and the State of Progress each filed a notice of appeal. (R. at 1).

On September 14, 2013, this Court issued an Order that all parties brief the following issues: (1) whether Bonhomme is a real party in interest under Rule 17; (2) whether Bonhomme is a "citizen" for CWA jurisdictional purposes; (3) whether Maleau's mining waste piles are "point sources" under the CWA; (4) whether Ditch C-1 is a navigable water under the CWA; (5) whether Reedy Creek is a water of the United States under the CWA; and (6) whether Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert. Bonhomme takes issue with the District Court rulings one through four and six, Maleau challenges the fifth ruling, and the State of Progress challenges the fourth ruling. (R. at 1-2).

STATEMENT OF THE FACTS

Shifty Maleau runs one of Progress' largest employers, a regionally significant gold mine in Lincoln County, Progress. (R. at 6). Maleau's company trucks the tailings from the mine to Jefferson County, where Maleau places the overburden, rock, and dirt in piles on his property. (R. at 5).

In 2012, one of Maleau's competitors, Precious Metals International, Inc. ("PMI"), paid a team of investigators, lawyers, and expert witnesses to prosecute a CWA lawsuit against him. (R. at 7). Jacque Bonhomme, a French citizen, who is also PMI's President, largest stockholder, and a member of the Board of Directors filed the lawsuit. (R. at 7-8). Despite Maleau's timely answer raising the issue that Bonhomme is not the real party in interest pursuant to Rule 17(a), Bonhomme never joined PMI as a party to the lawsuit. (R. at 7).

The PMI-funded lawsuit alleges that rainwater runoff percolates through the intentionally placed piles of overburden, rock and dirt placed on Maleau's property. (R. at 5). The water then flows from those piles through naturally eroded channels into a one-foot deep by three-foot wide drainage ditch officially known as "C-1." (R. at 5). PMI's investigators determined that arsenic, a pollutant under the CWA commonly associated with gold mining, has been found in portions of the ditch below (but not above) Maleau's property. (R. at 6).

Ditch C-1 is dry for as many as three months of the year. It was dug into saturated soils in order to drain them sufficiently for agricultural purposes. Maleau's property, however, is not used for agricultural purposes. Ditch C-1 begins before Maleau's property line and runs three miles through several agricultural properties, which it drains, before crossing onto Bonhomme's property. Since 1913, deed restrictions have required all adjacent landowners to maintain the ditch. (R. at 5).

The water is then conveyed by a culvert on Bonhomme's property into Reedy Creek. (R. at 9). No party alleges that Reedy Creek is a navigable-in-fact waterway. (R. at 9). The Creek begins upstream of Bonhomme's culvert in New Union. (R. at 5). Some of the water upstream of the culvert is diverted both to supply a service station on Interstate Highway 250 in New Union and to irrigate farmland in both Progress and New Union (these irrigated farms produce crops consumed by people in several different states). (R. at 5).

The Creek then enters Progress, passes Bonhomme's culvert, and, several miles later, terminates in Wildman Marsh. (R. at 5). The United States Fish and Wildlife Service owns a large portion of the marsh land. (R. at 6). Bonhomme owns, but does not live at, a large hunting lodge on the edge of the marsh. (R. at 6-7). He uses the property primarily to entertain PMI's business clients and associates, along with some social acquaintances. (R. at 6-7). PMI's clients travel to Progress (as do many others)

to shoot ducks and other birds migrating through the area. In the aggregate, these bird-related activities add millions of dollars to the local economy. (R. at 6).

PMI's clients formerly came to the lodge as many as eight times per year. (R. at 6). But, at the same time that PMI's business declined, Bonhomme and PMI reduced the number of parties to only two annual gatherings. (R. at 6). Bonhomme claims he reduced the parties out of fear of arsenic contamination. (R. at 6). However, the Fish and Wildlife Service has found arsenic in only three birds out of the millions that use the marsh. (R. at 6). Additionally, PMI's experts, the State of Progress, and Maleau agree that arsenic has not caused any notable changes in flora or fauna in Wildman Marsh. (R. at 6).

STANDARD OF REVIEW

This case concerns the District Court's grant and denial of the parties' motions to dismiss for failure to state a claim. An appellate court reviews a decision on a motion to dismiss for failure to state a claim de novo, applying the same legal standard as a district court. *Thomas v. Rhode Island*, 542 F.3d 944, 948 (1st Cir. 2008). Additionally, the Court of Appeals takes all well-pleaded allegations as true, drawing all reasonable inferences in favor of the nonmoving party. *Covington Court, Ltd. v. Village of Oak Brook*, 77 F.3d 177, 178 (7th Cir. 1996). Finally, the court should only approve a dismissal if no relief could be granted under any set of facts which could be proved. *Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir. 1994).

SUMMARY OF THE ARGUMENT

The District Court properly granted Maleau's motion to dismiss on the first four issues. The District Court erred in holding for Bonhomme on the fifth issue, and the District Court properly denied Bonhomme's motion to dismiss on the sixth issue.

First, the District Court correctly deduced that PMI is the real party in interest because PMI is the person entitled to enforce the asserted right under the governing substantive law, not Bonhomme. As such, Rule 17 requires that PMI bring this lawsuit. Here, Bonhomme has no substantive right to enforce because (1) his own property was not affected by the arsenic pollution, and (2) the arsenic's effect on Wildman Marsh injured PMI, not Bonhomme. Bonhomme took hunting parties into Wildman Marsh primarily in his capacity as the President and largest shareholder of PMI. Accordingly, PMI is the real party in interest in this case, and the case should not proceed without PMI.

Second, the District Court properly dismissed Bonhomme's suit, as he is not a "citizen" of the United States who may sue under the CWA § 1365 “citizen suit" provision. The legislature, as supported by analogous principles of case law, did not intend the CWA's definition of a "person" under § 1365(g) to strip the ordinary meaning from § 1365(a)'s use of "citizen." As Bonhomme is a foreign national, he does not qualify as a citizen.

Third, the District Court properly granted Maleau's motion to dismiss as Maleau's overburden piles are not point sources. A point source does not exist when the pollutants emanating from the site travel in stormwater in an uncollected and unchanneled manner, with no effort by man to change the water's course. Bonhomme's complaint concedes that the stormwater moves from the piles to Ditch C-1 through land runoff and percolation alone, two natural forces that are inherently uncollected and unchanneled. Bonhomme also mistakenly relies on *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir. 1980); Maleau's overburden piles are not point sources under *Sierra Club*'s analysis because they involve simple erosion over the material surface, not a mine drainage system.

Fourth, the District Court properly granted Maleau's motion to dismiss as Ditch C-1 is not a navigable water. In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Kennedy's concurrence is the narrower, thus controlling, opinion. Justice Kennedy established that a body of water does not fall

within CWA jurisdiction absent, at a minimum, a significant nexus to waters either navigable-in-fact, or susceptible of being made so. The waters at issue here do not pass the litmus test: Ditch C-1 is merely a one-foot by three-foot drainage ditch, and all parties agree that Reedy Creek is not a navigable-in-fact waterway. Neither Reedy Creek, nor Ditch C-1 connect, directly or indirectly, to any navigable-in-fact waterway.

Justice Kennedy's *Rapanos* test accords with the CWA's plain meaning; the Supreme Court's repeated refusal to interpret statutes to broaden the federal government's intrusion into traditional state arenas absent a clear intent by Congress to do so; and lower courts' subsequent abrogation of prior CWA cases in conflict with *Rapanos,* as well as most courts' express adoption of Justice Kennedy's significant nexus to navigable-in-fact waters test. Lastly, the Supreme Court has held that courts owe no *Chevron* deference to the EPA and Corps' broader interpretation of "navigable."

Fifth, the District Correct incorrectly found that Reedy Creek is a navigable water under §§ 1362(7) and (12). As with Ditch C-1, Reedy Creek is not navigable, is not susceptible of being made so, and is not significantly linked to a navigable-in-fact body of water. Both Bonhomme and the District Court erroneously relied on arguments which either have been previously rejected by the Supreme Court or are not grounded in precedent.

Lastly, even if this Court finds that Reedy Creek is navigable, the District Court correctly found Bonhomme liable under § 1311(a). Bonhomme satisfies the elements of a § 1311(a) violation: he is the owner and superintendent of a culvert point source which discharges arsenic, a pollutant, into navigable waters. Bonhomme wrongly asserts that he escapes liability because Maleau is the but-for cause of the arsenic. Statutory language and case law confirm that § 1311(a) has no causation element. In other words, it is irrelevant whether Bonhomme's culvert actually produces the arsenic, only that the culvert is the means by which arsenic is introduced into navigable waters.

ARGUMENT

I. BONHOMME CANNOT QUALIFY TO BRING SUIT UNDER THE CWA AS A REAL PARTY IN INTEREST BECAUSE HE LACKS THE POWER TO ENFORCE THE ASSERTED SUBSTANTIVE RIGHTS, AND PMI IS THE REAL PARTY IN INTEREST.

The first issue on appeal is whether Bonhomme is the real party in interest under Rule 17 and can bring suit against Maleau for violating the CWA. Under Rule 17, the action must be brought by the real party in interest in his or her own name. The absence of the real party in interest constitutes proper grounds for dismissal. Here, Bonhomme is not the real party in interest and so wrongly pursued the action without PMI. Further, the Court properly dismissed Bonhomme's suit when he knowingly failed to join PMI as the real party in interest.

A. PMI is the Real Party in Interest as the Person Entitled to Enforce the Asserted Rights Under Governing Substantive Law.

Rule 17(a) requires that an action be prosecuted in the name of the real party in interest. Case law further defines the real party in interest to be the person entitled to enforce the asserted right under the governing substantive law, and not necessarily the person who will ultimately benefit from the recovery. *In re Signal Int'l, LLC*, 579 F.3d 478, 487 (5th Cir. 2009). Congress enacted this provision in order 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. Fed. R. Civ. P. 17 advisory committee's note (1966). In keeping with this goal, case law further demonstrates that where the injury is to the corporation, only the corporation is a real party in interest, not the shareholders. *Hale v. Victor Chu*, 614 F.3d 742, 743 (7th Cir. 2010). Bonhomme does not qualify under either of the above cases: (1) he does not own the land affected, and so has no power to enforce a right; and (2) PMI is the injured party in that Bonhomme no longer hosts hunting parties for the corporation's business associates.

1. Bonhomme lacks the power to enforce the asserted rights as he has not lost the right to use, nor does he own, the land affected.

Bonhomme brought this action against Maleau under the CWA citizen suit provision. Bonhomme alleges that the land and wildlife of Wildman Marsh, which are adjacent to his property, contain arsenic. (R. at 6). The Supreme Court has found that the right to use and enjoy one's property is part of the bundle of rights that come with property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982). Here, the marsh land is the property affected, and not Bonhomme's property. Therefore, Bonhomme lacks any injury or enforceable right regarding the use and enjoyment of his property.

Here, Bonhomme, as an individual property owner, has not lost his right to use and enjoy his property. Bonhomme does not live at the hunting lodge. (R. at 7). Rather, Bonhomme "uses [the property] only for hunting parties composed primarily of business clients and associates of PMI." (R. at 7-8). Despite Bonhomme's argument that arsenic *forced* him to reduce his use of the marsh, he actually *voluntarily* reduced his use, as demonstrated by the fact that there were no notable changes in the flora or fauna surrounding the hunting lodge. (R. at 6). Therefore, Bonhomme has not lost use or enjoyment of his property because a voluntary reduction in use is not a loss of any right. Lastly, though the U.S. Fish and Wildlife Service has detected arsenic in three Blue-winged Teal in Wildman Marsh, Bonhomme does not own the marsh, and thus his property rights remain intact.

2. PMI is the real party in interest.

The real party in interest is PMI, which has lost some use of the marsh lands. Thus, as required by Rule 17, this lawsuit cannot properly proceed without PMI. Courts have held that an organization may sue based on an injury to the organization itself. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011). Though primarily a standing case, the court in that case also found that a party claiming injury from environmental damage must use the affected area, and

not just be in the vicinity. *Id.* at 397. However, the capacity of a corporation to bring suit in a federal district court is determined by the law of the state of its incorporation. *R.N. Kelly Cotton Merch., Inc. v. York*, 379 F. Supp. 1075, 1078 (M.D. Ga. 1973), *aff'd R. N. Kelly Cotton Merch., Inc. v. York*, 494 F.2d 41 (5th Cir. 1974).

Here, PMI suffered injury in its lost ability to network and make use of the marsh lands as hunting grounds for business associates. Bonhomme has not alleged any individual lost use of the marsh lands. In fact, PMI is the injured party, and whatever injuries Bonhomme alleged are really injuries to the corporation and not to Bonhomme as an individual. PMI's extensive involvement and Bonhomme's limited involvement in the case show that PMI is truly the injured party. Bonhomme used the property and surrounding area primarily for PMI business and associates. (R. at 7-8). As PMI's President, largest shareholder, and member of the Board of Directors, Bonhomme appears to have used the property primarily in his capacity as a representative of PMI. A loss of hunting to Bonhomme as an individual would not necessitate PMI involving itself in the suit. PMI, however, has conducted or paid for the sampling and analyses to support Bonhomme's contentions that Maleau is violating the CWA. (R. at 7). PMI is also paying for the attorney and expert witness fees incurred in the litigation. (R. at 7). A corporation would not be involving itself and its assets if it was not the real party with an injury and enforceable right. Here, PMI lost the ability to use the marsh lands for promoting business through hunting parties.

As PMI is incorporated in Delaware, Delaware substantive law would govern PMI's capacity to be a real party in interest. (R. at 6). Under the Delaware Code, every corporation has the power to "sue and be sued in all courts and participate, as a party or otherwise, in any judicial, administrative, arbitrative or other proceeding, in its corporate name." Del. Code Ann. tit. 8, § 122 (West 2000). Delaware's Supreme Court has further held that "the traditional concept of standing confers upon the

corporation the right to bring a cause of action for its own injury." *Schoon v. Smith*, 953 A.2d 196, 201 (Del. 2008). Accordingly, PMI has the legal right, enforceable under substantive law, to sue in its own corporate name for injuries the corporation has suffered.

With no real injury to Bonhomme, and true injury to PMI, the real party in interest with the power to enforce the lost use of the marsh lands is PMI. PMI has suffered an injury as to its ability to access the marsh lands for business-related hunting parties. Where the corporation has suffered the injury, the court should not permit Bonhomme to replace the corporation as the real party in interest. Finally, including PMI as the real party in interest accords with Rule 17's policy of protecting the defendant from repetitious litigation. Allowing Bonhomme to bring an action without PMI would violate that policy by leaving Maleau open to further lawsuits from PMI. The corporation, not Bonhomme, actually suffered the injury and has the power to enforce the loss of the right to use the marsh lands. Therefore, this Court should affirm the District Court's grant of Maleau's motion to dismiss.

B. The Court Properly Dismissed the Action when Bonhomme Failed to Join PMI as a Party to the Suit Despite Notice.

The real party in interest to the proceeding is PMI, which Maleau raised in his answer to Bonhomme's complaint. Rule 17 provides that no action shall be dismissed on the grounds that suit was not brought by the real party in interest until after "a reasonable time." Fed. R. Civ. P. 17(a)(3) (2013). The advisory committee's note emphasizes that the provision should not be misunderstood or distorted. Rather, "it is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made." Fed. R. Civ. P. 17 advisory committee's note (1966); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997) (district court retains discretion to dismiss action where there was no reasonable basis for naming incorrect party).

Here, no honest mistake has been made. Maleau's answer to Bonhomme's complaint raised the issue that PMI was the real party in interest. (R. at 7). Bonhomme had multiple opportunities to join PMI to the action: when Progress brought its action against Bonhomme; when Maleau intervened in that action; when Progress and Maleau moved to consolidate; and even when the Court granted the motion to consolidate the cases. (R. at 5). Rather, PMI chose to use Bonhomme as the plaintiff, even when carrying the expenses of the litigation. (R. at 7). This expanse of time and PMI's actions behind the scenes of the litigation demonstrate that PMI's avoidance of joining the litigation was no "mistake." PMI purposely avoided joining the litigation as was proper and necessary.

PMI, not Bonhomme, is the real party in interest, and the suit should not proceed without joining the corporation. Furthermore, Bonhomme had notice of the real party in interest issue and intentionally failed to join PMI. For the above reasons, the District Court properly granted Maleau's motion to dismiss.

II. BONHOMME FAILS TO QUALIFY AS A "CITIZEN" UNDER THE CWA CITIZEN SUIT PROVISION AND SO CANNOT PROPERLY BRING SUIT.

The second issue on appeal is whether Bonhomme, as a foreign national, is a "citizen" under § 1365 who may bring suit against Maleau. The CWA's further definition of "person" in § 1362(5) should not be read to strip "citizen" of its ordinary and plain meaning in CWA's citizen suit provision.

The CWA citizen suit provision authorizes "any citizen" to maintain suit against violations of the statute. 33 U.S.C. § 1365(a). That same provision defines "citizen" to include a "person having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The CWA further defines "person" to include "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). These definitions, however, do not strip the term "citizen" of its ordinary meaning.

Courts have similarly dealt with the issue of statutory interpretation within the CWA. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) ("SWANCC"). In *SWANCC*, the petitioner, a consortium of suburban Chicago municipalities, selected a solid waste disposal site and contacted the Army Corps of Engineers to determine whether a landfill permit was required under § 404(a) of the CWA. The CWA defines "navigable waters" as the "waters of the United States." *Id.* at 162. The Corps issued regulations defining the term "waters of the United States" to include intrastate waters such as "intrastate lakes, rivers, [and] streams . . . which are or would be used as habitat by other migratory birds which cross state lines." *Id*. at 164. The Corps attempted to strip "navigable" of its limiting nature, but the Supreme Court rejected this proposition. The Supreme Court held that the Corps' interpretation was not supported by the CWA. The court reasoned, "[w]e cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute." *Id.* at 172.

Similar to the Corps' argument in *SWANCC*, Bonhomme argues that "citizen" in § 1365 includes any person regardless of nationality. (R. at 8). However, just as "navigable" did not lose its full classical meaning, neither should "citizen" lose its full meaning here. The Court in *SWANCC* reasoned "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Id*. at 172. The express enlargements created by Congress in allowing "citizen" to include an individual person, corporation, partnership, etc. does not include non-citizens of the United States. Congress stated its objective and policies in the CWA as being to: (1) "restore and maintain the chemical, physical and biological integrity of the *Nation's* waters;" and (2) "recognize, preserve and protect the primary responsibilities and rights of *States* to prevent, reduce and eliminate pollution." 33 U.S.C. §§ 1251(a) and (b). The express goals of Congress limit the authority granted under the CWA to the United States

and its "citizens" under both the original meaning and the statutory broadening. Therefore, Bonhomme, as a foreign national, does not qualify as a "citizen" under the CWA.

The separate definition of "person" within the CWA does not strip "citizen" of its ordinary meaning. Consequently, Bonhomme, as a foreign national, does not qualify to bring suit against Maleau under the CWA. Therefore, this court should affirm the District Court's grant of Maleau's motion to dismiss.

III. EVEN IF THIS COURT FINDS THAT DITCH C-1 IS A NAVIGABLE WATER, MALEAU IS STILL NOT SUBJECT TO CWA JURISDICTION AS THE OVERBURDEN PILES ARE NOT POINT SOURCES.

The third issue on appeal is whether Maleau's overburden piles are "point sources" under §§ 1362(12) and (14). Point sources and nonpoint sources are distinguished by how the pollutants travel from their source to navigable waters, not whether the pollutant emanates from a single identifiable source. Maleau's overburden piles are not point sources because the stormwater runoff travels from the piles to Ditch C-1 uncollected and unchanneled. Further, even though the stormwater naturally erodes channels to Ditch C-1, the piles are still not point sources because the channels are not a component of a mine drainage system. As such, the District Court correctly granted Maleau's motion to dismiss on this issue.

A. The Overburden Piles are not Point Sources because the Stormwater Runoff Moves from the Piles to Ditch C-1 Entirely "Uncollected And Unchanneled."

The CWA prohibits, absent an NPDES permit, the "discharge of any pollutant by any person." 33 U.S.C. § 1311(a) (2006). In enacting the CWA, Congress recognized that some pollution-causing activities were beyond the federal government's reach because the solution was infeasible short of direct land use control—a traditional province of state regulation. S. Rep. No. 92-414 at 3706 (1971); *See* Robin Kundis Craig, *Local and National? The Increasing Federalization of Nonpoint Source Pollution Regulation*, 15 J. Envtl. L. & Litig. 179, 195 (2000). As such, § 1311(a) only regulates

pollutant discharges from a "point source." 33 U.S.C. § 1362(12). Nonpoint sources, on the other hand, are expressly left to regulation by each state's own tracking and targeting methods. 33 U.S.C. § 1329 (2006).

The CWA provides that a "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . ." 33 U.S.C. § 1362(14). The EPA's NPDES regulations provide that a "discrete conveyance" occurs when pollutants are "collected or channeled by man." 40 C.F.R. § 122.2 (2013). Neither the CWA nor the law's legislative history define a nonpoint source. The EPA's published guidance, however, emphasizes that nonpoint source pollution "generally results from land runoff, precipitation, atmospheric deposition, or percolation." EPA Office of Water, *Nonpoint Source Guidance* (December 1987).

In applying the CWA and EPA's definitions, courts elucidate that a "discrete conveyance" exists, or does not, depending on the manner in which the pollutants travel from the polluting source to a navigable water. *Trustees for Alaska v. E.P.A*, 749 F.2d 549, 558 (9th Cir. 1984). That focus on pollutant transportation, not pollutant production, accords with the statutory language's emphasis on the human effort exerted over the pollutants' movement (". . . channeled by man . . ."). Further, the enumerated point sources in § 1362(14) transport pollutants rather than produce them. Likewise, both conventional and legal dictionaries define "conveyance" as "a means of transport." Black's Law Dictionary 383 (9th ed. 2009). In enforcing that focus on pollutant transportation, courts have rejected point source arguments that focus on pollutant production. *E.g., Trustees for Alaska*, 749 F.2d at 558 (adopting the Fifth Circuit's position that point and nonpoint sources are not distinguished by the activity causing the pollution); *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 223 (2d Cir. 2009)

(holding that a berm does not constitute a point source merely based on it being an identifiable source from which lead pollution reaches wetlands).

As such, whether Maleau's overburden piles are point sources depends on the manner in which the stormwater runoff travels from the piles to Ditch C-1. Case law establishes that stormwater runoff is not a point source discharge when "it runs off and dissipates in a natural and unimpeded manner." *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1326 (2013); *Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, 940 F. Supp. 2d 1005, 1023 (D. Alaska 2013). In fact, unconfined stormwater running over polluted areas is the quintessential example of nonpoint source pollution. Craig, *supra*, at 180. In contrast, a point source discharge requires some human effort to "change the surface, direct the waterflow, or impede its progress." *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 44-45 (5th Cir. 1980).

For instance, in *Cordiano*, 575 F.3d at 223, the court held that a manmade berm collecting fallen lead shells at a shooting range was not a point source. The court held that the point source inquiry disregards whether the berm was manmade or whether it was an identifiable source of lead pollution; instead, the court held that the berm was a nonpoint source because no evidence showed that the gun club exerted any human effort in transporting the lead from the berm to the water. *Id.*

Here, Bonhomme's complaint first fails for what it concedes outright: the stormwater reaches Ditch C-1 through land runoff and percolation alone. As such, the complaint itself establishes that Maleau did not direct the stormwater flow or impede its progress, as *Sierra Club* requires. Instead, the water traveled to Ditch C-1 in a "natural and unimpeded manner" through land runoff and percolation, two natural occurrences that the EPA declared to generally cause nonpoint source pollution.

Second, just as in *Cordiano*, Bonhomme's complaint also fails for its incorrect focus. Like in *Cordiano*, the complaint erroneously focuses on the manmade nature of the piles themselves rather than

the manner in which the water moves from the piles to Ditch C-1. Bonhomme misconstrues the statutory language and case law by vaguely alleging that Maleau may have strategically configured the piles to encourage the naturally created channels. Intentional piling of materials is indistinguishable from alleging that the piles are manmade, again an argument which *Cordiano* expressly rejected as insufficient. Also, though rejected by the court in *Trustees for Alaska*, Bonhomme mistakenly asserts as definitive that the overburden piles are an identifiable source of arsenic.

As the polluted stormwater reaches Ditch C-1 uncollected and unchanneled, the District Court correctly granted Maleau's motion to dismiss on this issue.

B. Bonhomme's Reliance on *Sierra Club* Fails because the Naturally Eroded Channels on Maleau's Property are not a Component of a Mine Drainage System, but Rather Constitute Mere Erosion over the Material Surface.

Bonhomme alleges that *Sierra Club* stands for the proposition that overburden piles are always point sources even when natural erosion, rather than man, creates the "discrete conveyance." Such an overly broad reading of *Sierra Club* would effectively obliterate an important distinction between point and nonpoint sources that Congress clearly intended and that jurisprudence such as *Cordiano* enforced. As such, *Sierra Club* is cabined by its facts.

In *Sierra Club*, a strip coal mining plant separated coal from rock and then pushed the rock into overburden piles. 620 F.2d at 43. Rainwater flowed over the piles creating naturally eroded channels. *Id.* To catch the runoff before it reached an adjacent creek, the miners constructed sediment basins below the spoil piles, but the basins failed to halt all overflows. *Id.* The court overturned the lower court's grant of summary judgment in favor of the coal mining plant and offered the lower court guidance in reexamining the point and nonpoint source distinction. First, naturally eroded channels may be considered conveyances when they constitute but a "component of a mine drainage system." *Id.* at 45. Second, however, erosion alone over the material surface is definitively a nonpoint source. *Id.*

Contemporaneous cases accord that a natural occurrence such as erosion is a discrete conveyance when part of an integral drainage system. In *Concerned Area Residents For Environment v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994) ("Southview"), the court found that a liquid manure spreading operation on a large dairy farm discharged pollutants through a discrete conveyance. The conveyance consisted of a swale (a natural depression in the ground) that "collected" the liquid manure spread by the farm and a pipe that then "channelized" the pollutants under a stonewall into a ditch connected to an adjacent stream. *Id.* at 119.

The circumstances here are distinguishable because the extensive operations in *Sierra Club* and *Southview* simply do not exist in this instance. Maleau did not create a drainage system for the purpose of channeling or directing pollutant discharges from his mining operations. (R. at 5). The piles on his Jefferson property are not integral or adjacent to any such operations. Ditch C-1 begins before Maleau's property and exists for agricultural drainage, not mine drainage. (R. at 5). Maleau also exerted no effort to direct the stormwater flow other than to place the material on his property. (R. at 5). As discussed earlier, *Cordiano* rejected the argument that manmade piles automatically constitute point sources. Maleau's circumstances analogize to *Sierra Club* only in the sense that both cases involve natural erosion over piles of material, an instance which *Sierra Club* in fact affirms as a nonpoint source.

Indeed, Bonhomme would have the court ignore *Sierra Club*'s affirmation that erosion alone over the material surface is insufficient to constitute a point source discharge. He attempts to evade that holding by creating a hypothetical situation to cast *Sierra Club* on all fours with this case. Bonhomme's complaint alleges that if Maleau left the rock material adjacent to his mining operations in Lincoln County, the runoff from the waste piles would clearly fall within CWA permitting. (R. at 7). The rock piles, however, are not in Lincoln. Rather, they sit on property in Jefferson County, entirely unconnected from any mine drainage system. (R. at 5). As such, this is a case of erosion alone over a

material surface, a circumstance that *Sierra Club* concluded is outside CWA § 1311(a)'s jurisdiction. Consequently, the District Court correctly granted Maleau's motion to dismiss on this issue.

IV. THE DISTRICT COURT PROPERLY FOUND THAT DITCH C-1 WAS NOT A NAVIGABLE WATER BECAUSE IT WAS NOT THEN, NEVER HAS BEEN, AND CANNOT REASONABLY BE MADE NAVIGABLE-IN-FACT AND IT LACKS ANY NEXUS TO A NAVIGABLE-IN-FACT BODY OF WATER.

Justice Kennedy's controlling opinion in *Rapanos v. United States* makes clear that jurisdiction under the CWA requires that regulated waters have, at minimum, a connection to "waters navigable in fact or susceptible of being made so." 547 U.S. 715, 778 (2006) (Kennedy, J., concurring). Moreover, this holding is consistent with the plain meaning, history and purpose of the CWA, and lower court precedent has properly affirmed this view. In light of this legal foundation, the EPA and Corps' regulations asserting a more expansive interpretation of the CWA are not entitled to deference by this Court. Accordingly, this Court should decline Bonhomme's invitation to expand federal jurisdiction over navigable waters to a one-foot deep by three-foot wide drainage ditch that lacks any connection to navigable-in-fact waters. (R. at 5).

A. CWA Jurisdiction Demands, at Minimum, a Significant Nexus to Waters that Are, Were, or Reasonably Could Become Navigable-In-Fact.

Rapanos constitutes binding precedent that CWA jurisdiction requires at least a connection to waters that are or were navigable-in-fact in the traditional sense of that term. Waters are navigable-in-fact when they are "used, or are susceptible of being used . . . as highways for commerce, over which trade and travel are or may be conducted." *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 406 (1940) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1871). Specifically, Justice Kennedy held that a water or wetland can only be navigable under the CWA if it possesses a significant nexus to waters that are or were navigable in fact or that could reasonably be so made." 547 U.S. at 759 (Kennedy, J., concurring).

Though no opinion in *Rapanos* garnered the support of a majority of Justices, the narrowest ground of decision constitutes binding precedent. *Marks v. United States*, 430 U.S. 188, 193 (1977). As explained below, Justice Kennedy's opinion therefore constitutes the binding ruling of the Court.

The plurality's opinion begins by affirming that the qualifiers "navigable" and "of the United States" impose a limit on the government's jurisdiction under the CWA. *Id.* at 731. However, the plurality never fully explored the contours of this jurisdiction because the plurality could not find, based on the record before the Court, that the ditches and drain at issue in *Rapanos* even constituted "waters" in the "ordinary sense of containing a relatively permanent flow." *Id.* at 757. In language particularly relevant to the present case, the plurality specifically criticized the Corps' assertion of jurisdiction over "wet meadows . . . , drain tiles [and], man-made drainage ditches," holding that such an interpretation stretched the term "'waters of the United States' beyond parity." *Id.* at 734. Thus, the plurality's opinion casts doubt on whether Ditch C-1, a man-made drainage ditch dry for up to three months per year constitutes "waters," let alone waters that satisfy the added requirement they be *navigable* waters, or waters *of the United States*. (R. at 5).

In contrast, Justice Kennedy's concurring opinion sidesteps the plurality's inquiry as to what constitutes "waters" and determines more narrowly that the limitation imposed by the word "navigable" means that "a water or wetland can only be navigable under the [CWA] if it possesses a significant nexus to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759. As noted by the Eleventh Circuit in *United States v. Robison*, the Third, Seventh, Ninth, and Eleventh Circuits have all confirmed that Justice Kennedy's opinion is the narrowest ground and thus controls. 505 F.3d 1208, 1221 (11th Cir. 2007).

Justice Kennedy's controlling opinion cannot save Bonhomme's argument because the evidence fails to reveal *any* nexus to current or former navigable-in-fact waters, let alone a *significant* nexus to

such waters. Specifically, Ditch C-1 terminates at a culvert on Bonhomme's property. The culvert then deposits water into Reedy Creek, a watercourse that no party asserts is navigable-in-fact. The creek then terminates in non-navigable marsh land. (R. at 5). Accordingly, Ditch C-1 has no nexus to navigable-in-fact waters and fails Justice Kennedy's jurisdictional test.

B. The Plain Meaning and Original Interpretation of the CWA Necessitates a Connection to Navigable-In-Fact Waters.

The plain meaning of the CWA requires the limited jurisdiction advanced by *Rapanos*. First, the CWA conceives of point sources and navigable waters as two separate and largely distinct categories that would "make little sense" if the two categories significantly overlapped. *Rapanos*, 547 U.S. at 735-36 (Scalia, J., plurality). The definitions are separate: navigable waters are defined as the "waters of the United States." 33 U.S.C. § 1362(7). In contrast, point sources are defined as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, . . . [or] channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Moreover, the structure of the CWA logically demands that point sources and navigable waters be different categories given that the "discharge of a pollutant is the addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Because point sources discharge into navigable waters, point sources and navigable waters cannot be one and the same. This Court should therefore reject Bonhomme's request to classify Ditch C-1, an example of a point source *explicitly enumerated in the Statute*, as a water of the United States.

The original interpretation of the CWA further confirms Justice Kennedy's limited reading of jurisdiction. Indeed, immediately after passage of the CWA, the Corps defined "navigable waters" to include only "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce . . . ." Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC*

Be Right: A New Look at the Legislative History of the Clean Water Act, 32 ELR 11042, 11050 (2002). The Corps explained that the key to CWA jurisdiction is the "physical capabilities [of the waters in question] for use by commerce." *Id.* Bonhomme may argue that the EPA (and later the Corps) ultimately took a more expansive view of authority following one district court ruling in *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975). However, the original interpretation of an act of Congress or constitutional provision is at least helpful in understanding Congress' original intent. *See District of Columbia v. Heller*, 554 U.S. 570, 640 (2008) (Stevens, J., dissenting).

Not surprisingly, in SWANCC, the Supreme Court began its own analysis of CWA jurisdiction by looking to the Corps' original view of the CWA. 531 U.S. at 168. The Court found neither "persuasive evidence that the Corps mistook Congress' intent in 1974," nor that Congress "changed course" after originally passing the law. *Id*. Viewed in light of this original understanding of the CWA, a one-foot by three-foot drainage ditch has "none of the physical capabilities of waters . . . for use by commerce" and cannot properly be considered a navigable-in-fact waterway.

C. Constitutional Limitations and Supreme Court Precedent Require that Covered Waters Bear a Significant Nexus to Navigable-In-Fact Waters.

The Supreme Court has repeatedly held that it will not interpret a statute so as to push the boundaries of constitutional limits without a clear statement from Congress it intended such a result. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). However, Congress expressed no such intent when it enacted the CWA. *SWANCC*, 531 U.S. at 174. In fact, in enacting the CWA, Congress expressly declared the contrary goal: to preserve the States' traditional roles in regulating the use of land and water. *Id*. Thus, as explained below, CWA jurisdiction applies only to those waters with a significant nexus to navigable waters. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring).

In *SWANCC*, the Court considered whether the CWA extended to isolated ponds at an abandoned gravel quarry. *SWANCC*, 531 U.S. at 163. The Court warned that extending CWA jurisdiction beyond the "'navigable waters' . . . to which the statute by its terms extends" raises constitutional questions, particularly where it would impinge upon traditional state authority. *Id.* at 734. In order to avoid constitutional problems, after *SWANCC*, courts extending CWA jurisdiction to small drainage ditches have required that those waterways feed traditionally navigable waters. For example, in *United States v. Deaton*, the court held that a drainage ditch superficially similar to Ditch C-1 was subject to CWA jurisdiction only because it ultimately emptied into the Chesapeake Bay and thus affected a "channel of interstate commerce." *Deaton*, 332 F.3d 698, 703 (4th Cir. 2003). In finding jurisdiction, the court heavily relied on the theory that protecting channels of interstate commerce lies at the peak of Congress' power over interstate commerce. *Id.* at 707.

Indeed, the court reasoned that Congress' power to protect the channels of interstate commerce under the first prong of *United States v. Lopez*, 514 U.S. 549 (1995), is extremely broad. *Id.* Thus, the court reasoned that if Congress could prevent the channels of interstate commerce from being used for "immoral uses," such as transporting a mistress over interstate highways, then Congress could prevent the flow of pollutants into channels of commerce. *Id.* (citing *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). Moreover, the court held that regulating the channels of interstate commerce avoids impinging upon traditional state authority because it lies at the heart of Congress' plenary commerce power and so exists alongside states' traditional role. *Id.*

Here, Ditch C-1 has no connection to channels of interstate commerce because it ends in non-navigable marsh land. (R. at 5). So, it is more analogous to the isolated ponds in *SWANCC* than the man-made tributary of Chesapeake Bay in *Deaton*. Therefore, this Court should not push the limits of Congress' constitutional authority by extending the CWA to Ditch C-1.

D. Precedent from Other Circuits Supports Justice Kennedy's Jurisdictional Test Requiring a Significant Nexus to Navigable-In-Fact Waters.

Other Circuits have affirmed the narrower federal jurisdiction demanded by *Rapanos*. In particular, the Eleventh Circuit explicitly abrogated its previous ruling in *United States v. Eidson*, 108 F.3d 1336 (11th Cir. 1997), in light of Justice Kennedy's opinion in *Rapanos*. *Robison*, 505 F.3d at 1215-16. Until it was abrogated, *Eidson* was one of the foundational cases cited to justify an expansive reading of CWA jurisdiction. *See e.g., United States v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007) (citing *Eidson)*; *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001) (citing *Eidson).* Accordingly, its renouncement confirms that previous cases justifying broad jurisdiction under the CWA can no longer be sustained after *Rapanos*. As relevant here, *Robison* specifically overturned a jury instruction because it failed to require that a non-navigable tributary could only be covered by the CWA if it "possesse[d] a significant nexus to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 1222 (internal citations omitted).

Similarly, *Northern California River Watch v. City of Healdsburg* also illustrates that post-*Rapanos* analysis requires courts to determine CWA jurisdiction based on a connection to a navigable-in-fact water. 496 F.3d 993, 1001 (9th Cir. 2007). In *Healdsburg*, the court held that the CWA covered a non-traditionally navigable artificial pond precisely because water from the pond regularly seeped into the adjacent Russian River, an undisputedly navigable-in-fact water. In sum, *Healdsburg* and *Robison* illustrate that the jurisdictional litmus test after *Rapanos* is a close connection, or a "significant nexus," to traditionally navigable waters. *See also S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 702 (9th Cir. 2007) (holding the CWA does not extend to an artificial pond that lacks connection to a navigable-in-fact tributary).

Moreover, the Supreme Court's two most recent decisions on the reach of the term "navigable waters" have limited the broad interpretation previously given to the Court's earlier holding in *United*

States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). In *Riverside Bayview* the Supreme Court found jurisdiction over a wetland that was so connected to navigable waterways that one could "swim directly from [Riverside Bayview, Inc.'s] property into the Great Lakes." Albrecht & Nickelsburg, *supra*, at 11051. In a quote often misconstrued by subsequent lower court decisions, the Court acknowledged that "Congress intended the phrase navigable waters to include at least some waters that would not be deemed navigable under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133-34. However, the Court's decision had only limited applicability based on the facts before the Court and the reasoning used. Specifically, the ruling was based on the "inherent ambiguity at choosing the precise point at which the water ends and the land begins" given that wetlands have a gradual transition from open water to "shallows . . . , swamps," and dry land. *Id.* at 132. On this basis, the Court allowed CWA jurisdiction over wetlands—waters that would not be deemed navigable under the classical understanding of that term—when they are adjacent to navigable-in-fact waters.

Indeed, *SWANCC* clarified that *Riverside Bayview* did not stand for the proposition that the qualifier navigable should be read out of the statute. *SWANCC*, 531 U.S. at 172. Instead, the term "navigable" demonstrated Congress' intent in the CWA: "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." *Id.*

In sum, even the Supreme Court's most expansive reading of CWA jurisdiction over non-traditionally navigable waters has been limited to cases where there is a physical connection to navigable-in-fact waters. And, two subsequent Supreme Court decisions confirm this view. Thus, even the most expansive high court decisions would not extend CWA jurisdiction to Ditch C-1 because there is no ambiguity about where the ditch ends and a navigable water begins.

E. EPA Guidance Contradicting the Clear Precedent Tying CWA Jurisdiction to Navigable-In-Fact Waterways is Not Entitled to Deference.

The EPA and Corps' formally promulgated regulations assert jurisdiction over tributaries of navigable waterways. 40 C.F.R. § 122.2. They then interpret these regulations to include tributaries if they directly or indirectly contribute flow to either a traditionally navigable or an interstate water, and also meet certain other specified conditions, including that the tributary has an ordinary high water mark. Environmental Protection Agency, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* 11 (2011). As explained below, these twice-rejected regulations are not entitled to deference by this Court. Moreover, even under these regulations Ditch C-1 may not be considered a "navigable water."

First, the Supreme Court has already held that the jurisdictional definition contained in the CWA was clear and unambiguous. *SWANCC*, 531 U.S. at 172. Accordingly, this court owes no deference to the agency regulation. *Id.* (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")).

Second, even if there is ambiguity, the agency rule pushes the limits of Congress' constitutional authority without a clear indication by Congress that it intended that result. And, an agency interpretation invoking the outer limits of Congress' power is not entitled to deference unless Congress clearly indicated that it intended that result. *Id.* This is particularly true where the interpretation alters the balance between federal and state authority by permitting federal incursion into traditional state powers. *Id.* Here, Congress expressed the opposite intent by choosing to "recognize, preserve, and protect the primary responsibilities and rights of States" to control use of water and land. *Id.* at 173. Accordingly, no deference is owed to the agency's regulation.

Strong language from the Court confirms this analysis: "Five years ago this Court rejected the position of the [Corps] on the scope of its authority. . . . [But,] the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency." *Rapanos*, 547 U.S. at 758 (Kennedy, C.J., concurring). And, in language apt to Bonhomme's argument, Justice Kennedy held: "[T]he dissent would permit federal regulation . . . alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far." *Id.* at 778-79 (Kennedy, J., concurring) (citations omitted).

In sum, the Supreme Court has already rejected regulations that extend the Act's jurisdiction to cover remote tributaries that flow into navigable-in-fact waters. Accordingly, this Court should certainly decline Bonhomme and Progress' invitation to not only rely upon these previously rejected regulations, but to actually extend them one step farther by finding jurisdiction over remote tributaries that never even reach navigable-in-fact waters. (R. at 5).

Further, the District Court's findings do not justify jurisdiction even under the EPA's own interpretation of the government's twice-rejected regulations because there is no evidence that Ditch C-1 has an ordinary high water mark. Environmental Protection Agency, *supra*, at 12 ("[A]gricultural ditches are . . . not tributaries except where they have . . . a ordinary high water mark."). Accordingly, Ditch C-1 should not be considered a jurisdictional waterway.

V. THE DISTRICT COURT IMPROPERLY DETERMINED REEDY CREEK IS A NAVIGABLE WATER BY IGNORING BINDING SUPREME COURT PRECEDENT AND STRETCHING THE CWA BEYOND CONGRESS' POWER TO REGULATE THE CHANNELS OF INTERSTATE COMMERCE.

Bonhomme and Progress' attempts to stretch the CWA's jurisdiction to include Reedy Creek suffers from the same fundamental defects as the attempts to define Ditch C-1 as a navigable water: Bonhomme's complaint shows no evidence that Reedy Creek is navigable-in-fact, was previously

navigable, or is reasonably susceptible of becoming navigable. Further, there is no evidence that Reedy Creek has a significant nexus to a navigable-in-fact body of water. It would thus fail to meet Justice Kennedy's controlling opinion in *Rapanos*. Further, Bonhomme's position is contrary to precedent from both the Supreme Court and other circuits. So, this Court should reverse the erroneous finding that Reedy Creek is a navigable water.

A. Bonhomme and Progress' Arguments to Extend the Definition of Navigable Waters to Reedy Creek Must Fail Because they Mistakenly Rely on the Same Migratory Bird Rule Previously Rejected by The United States Supreme Court in *SWANCC*.

Bonhomme and Progress ask this court to apply jurisdiction over Reedy Creek because it drains into marsh land that is home to migratory birds and is used to irrigate crops sold in interstate commerce. The principles underlying these arguments have already been rejected by the Supreme Court in *SWANCC* and should be similarly rejected by this Court.

In *SWANCC*, the Court took notice that millions of Americans cross state lines and spend more than one billion dollars annually to see migratory birds. *SWANCC*, 531 U.S. at 173. But, the Court deemed this indirect economic impact insufficient to justify the Corps' "migratory bird rule" which asserted jurisdiction over non-navigable waters because they were used by migratory birds or to water crops sold in interstate commerce. *Id.* at 164. Specifically, the Court held that the Corps lacked jurisdiction over a pond and wetland that was home to 121 species of birds. The Court reasoned that the migratory bird rule exceeded the authority granted by the CWA and impinged on the traditional power of States to regulate land and water. *Id.* at 172.

In spite of this precedent, Bonhomme and Progress ask this Court to not only accept the same failed arguments, they ask this Court to go yet one step farther. In *SWANCC*, the pond provided the actual home for the migratory birds. Here, Reedy Creek merely drains into the marsh which provides the actual bird habitat. (R. at 5-6). It is against logic to conclude that the migratory bird rule already rejected by the Supreme Court as applied to habitat could be revived for a creek that is one step

removed from that habitat. Accordingly, the presence of birds in an adjacent marsh cannot provide a basis for asserting that Reedy Creek is a navigable waterway. The full application of Bonhomme's argument would lead to results that are a "far cry, indeed, from the navigable waters . . . to which the statute by its terms extends." *Id.*

B. The District Court Misconstrued and Defied Precedent in Ruling that Reedy Creek is a Water of the United States Because it Flows into Wildman Marsh.

The District Court determined that Wildman Marsh constitutes "waters of the United States" because it is partly owned by the federal government. The Court then deferred to the EPA's classification of "tributaries of waters of the United States" to mean waters of the United States, and concluded that Reedy Creek was therefore a water of the United States.

This decision is without basis in precedent, and its logic is doubly flawed. First, it wrongly assumes the phrase "*of* the United States" is synonymous with "*owned by* the United States." Such a construction has been implicitly rejected by the Ninth Circuit. In *San Francisco Baykeeper v. Cargill Salt Division*, the Ninth Circuit found that a pond located in the middle of the Don Edwards San Francisco Bay Wildlife Refuge did not constitute a water of the United States, despite the fact the United States Fish and Wildlife Service owns the Refuge. 481 F.3d 700, 702 (9th Cir. 2007). In its holding, the court looked only to whether there was a significant nexus between the pond and an adjacent navigable-in-fact tributary of the San Francisco Bay. *Id.* at 707-09. By using the same jurisdictional analysis it would apply to any other water, the court implicitly rejected the District Court's heavy reliance on equating waters located on United States property with "waters of the United States." That reasoning should also be rejected here.

Second, the District Court mistakenly uses what Justice Scalia disapprovingly calls a "Land is Waters" approach in order to define marsh land as waters of the United States. *Rapanos*, 547 U.S. at 734. As noted above, wetlands fall under the jurisdiction of the CWA only where they (1) bear a

significant nexus to a traditionally navigable body of water, *id.* at 779, or (2) have a continuous surface connection to waters of the United States. *Id.* at 742. Here, there is no evidence that Wildman Marsh has any connection to navigable waters. So, it fails the *Rapanos* jurisdictional test and the District Court's holding should be overturned.

C. Extending the Definition of Navigable Waters to Include Reedy Creek on the Basis that it Crosses State Lines Relies on a Regulation that was Twice Rejected by the Supreme Court and is Disconnected from the Language of the CWA.

The District Court additionally justified its finding that Reedy Creek is a navigable water by noting that (1) the Creek runs through two different States (Progress and New Union); and, (2) the EPA's regulations include interstate waters in its definition of waters of the United States. 40 C.F.R. § 122.2. As discussed above, the Supreme Court has twice rejected the regulations on which Bonhomme and Progress rely. *See Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). Moreover, the Court's holdings in both *Rapanos* and *SWANCC*, unlike the language of the regulations, make no reference to interstate waters in determining whether a body of water constitutes a water of the United States. The EPA regulation and the District Court's ruling are thus disconnected from the plain language of the CWA and the Court's binding precedent interpreting the Act. Indeed, the extension of the Act's jurisdiction to the smallest trickle of water that moves between states would improperly shift the Court's focus away from the CWA's "navigability" requirement and far exceed Congress' authority to regulate interstate commerce.

Therefore, applying the District Court's ruling to its logical conclusion would violate *SWANCC*. Instead, the CWA must be read to preserve Congress' deliberately balanced goals of both protecting the traditional authority of States and the biological integrity of the nation's waters. *See SWANCC*, 531 U.S. at 173. Accordingly, the District Court's finding that Reedy Creek is a navigable waterway should be reversed.

VI. EVEN IF THE COURT FINDS THAT REEDY CREEK IS A WATER OF THE UNITED STATES, BONHOMME IS LIABLE FOR THE ARSENIC DISCHARGE BECAUSE HE SATISFIES ALL OF THE § 1311(a) ELEMENTS AND ERRONEOUSLY ASSERTS LACK OF BUT-FOR CAUSATION AS A DEFENSE.

The sixth issue on appeal is 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. Bonhomme does violate § 1311(a) because he satisfies the statute's five elements. Further, contrary to Bonhomme's assertion, lack of but-for causation is not a defense to liability under § 1311(a). The CWA regulates point sources whether that point source creates the pollutant or merely transports pollutants created by a third party. Thus, the District Court correctly denied Bonhomme's motion to dismiss on this issue.

A. If Reedy Creek is a Navigable Water, Bonhomme is Liable under § 1311(a) because the Culvert on His Property is a Point Source Through Which He Discharges a Pollutant into a Water of the United States.

To violate § 1311(a), Bonhomme need only have (1) discharged, i.e. added, (2) a pollutant, (3) into waters of the United States, (4) from, (5) a point source. 33 U.S.C. § 1362(12); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). As noted previously, a "point source" is "any discernible, confined and discrete conveyance, such as a pipe, ditch, channel, or tunnel from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Here, though Bonhomme attempts to assert a defense to the "discharge" element, he satisfies all of § 1311(a)'s elements on their face. Bonhomme acknowledges that arsenic is a "pollutant," thereby satisfying the second element. He asserts that Reedy Creek is a "water of the United States," the third element. There is also no factual dispute that the arsenic "discharges" into Reedy Creek "from" the culvert on his property, which constitute the first and fourth elements.

Further, Bonhomme's culvert is physically and functionally a point source as defined by the CWA and interpreted by case law. In applying Section III(A)'s discussion, Bonhomme's culvert was

built "by man" for the sole purpose of collecting, channeling, and directing the groundwater and stormwater runoff directly to Reedy Creek. 40 C.F.R. § 122.2; *Sierra Club*, 620 F.2d at 44-45. As phrased slightly differently by other courts, Bonhomme's culvert functions to "physically introduce" arsenic into waters of the United States, i.e. Reedy Creek, from the "outside world," which is defined merely as outside navigable waters. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001); *Gorsuch*, 693 F.2d at 177. Indeed, courts commonly recognize a culvert as a discrete conveyance. *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991). As Bonhomme's culvert falls squarely within the purview of the NPDES permitting requirements, the District Court, therefore, correctly denied Bonhomme's motion to dismiss on this issue.

B. Bonhomme Cannot Escape Liability by Asserting that Maleau is the But-For Cause of Arsenic in Reedy Creek because But-For Causation is Not a Defense to a § 1311(a) Violation.

Despite meeting the statute's requirements, Bonhomme attempts to avoid his liability by reading a causation requirement into § 1311(a) that simply is not there. *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ("*Huffman*") ("First, and most importantly, there is simply no causation requirement in the statute."). Bonhomme proposes that a "discharge by any person" refers to the person that originally created the pollutant. Consequently, he asserts that he is not liable because his culvert did not produce the arsenic.

Congress, however, determines the role, if any, that proximate cause plays in a statute. *See* Albert C. Lin, *Erosive Interpretation of Environmental Law in the Supreme Court's 2003-04 Term*, 42 Hous. L. Rev. 565, 592 (2005). As such, interpreting the CWA begins with the plain meaning of the statute's text itself while also keeping in mind the context and structure of the statute as a whole. *Cordiano*, 575 F.3d at 218.

When § 1311(a) is read in conjunction with the CWA's definitions in § 1362 and the EPA's regulations, the CWA and EPA do not define "discharge" and "addition" in terms of causation. 33

U.S.C. § 1362(12); 40 C.F.R. § 122.2. For instance, the examples of point sources listed in § 1362(14) only transport and do not themselves create pollutants. The EPA regulations, in § 122.2, define "discharge" by focusing on the owner of the means of transportation, not the person creating the pollutant. 40 C.F.R. § 122.2 ("discharges through pipes, sewers, or other conveyances *owned by a . . . person* which do not lead to treatment works.") (emphasis added).

Courts have concluded the same, soundly disregarding defenses to liability asserting that a third party was the cause-in-fact of the pollutant itself. *E.g., S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 341 U.S. 95, 105 (2004) (rejecting the government's argument that a CWA permit program does not apply when a pollutant originates elsewhere and merely passes through the point source). By way of reasoning, *Miccosukee* points out that the CWA expressly requires permits for parties that merely discharge pollutants created by third parties. *Id.* at 105 (noting § 1311(b)(1)(B)'s permit requirement for municipal wastewater treatment plants, which merely channel and discharge pollutants created by third parties).

Accordingly, courts impose liability by focusing on who has ownership or control over the means by which the pollutant travels and releases into navigable waters. For instance, in *Huffman*, the court required an NPDES permit for a state environmental protection department performing reclamation activities at abandoned coal mining sites, notwithstanding that the third-party former owners of the mines had originally caused the discharges. *Huffman*, 625 F.3d at 167. There, the court held that § 1311(a) bans the discharge of any pollutant by any person "whether that 'person' was the root cause or merely the current superintendent of the discharge." *Id.* The court emphasized that the CWA disregards the person that generated the pollutants and focuses only on the person who is currently causing the pollutants to discharge into navigable waters. *Id.*

Likewise, in a factually similar instance in *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005), El Paso acquired land on which an abandoned mine shaft was located and discharging pollutants. El Paso took no action on its property whatsoever, far less than the agency's reclamation effort in *Huffman*. El Paso attempted to assert as a defense that "addition" under § 1311(a) required affirmative conduct by the property owner, whereas El Paso was a purely passive landowner. The court held that El Paso would in fact need an NPDES permit. *Id.* at 1144. While agreeing that "addition" implies affirmative conduct, the court held that the conduct aspect of the test was satisfied by the contemporaneous introduction of polluted water from El Paso' property, through a point source owned and maintained by El Paso, to a navigable stream. *Id.*

Taking *Huffman* and *El Paso Gold Mines* together, a property owner is liable under § 1311(a) so long as he or she owns a point source which actually channels the pollutants into navigable water, regardless of the owner's passivity and regardless of the pollutants' origin. Though both *Huffman* and *El Paso Gold Mines* involve instances where the subsequent landowners owned both the discrete conveyance and the source of pollution, the opinions focus solely on ownership of the discrete conveyance rather than on any special duties required of a subsequent landowner.

Here, Bonhomme does not deny that he meets the requirements for a § 1311(a) violation. Rather, like the defendants in *Huffman* and *El Paso*, he alleges a complete defense to CWA regulation because Maleau's property, not Bonhomme's culvert, creates the arsenic discharge. Essentially, Bonhomme asks that this court read into § 1311(a) a causation element. *Miccosukee*, *Huffman*, and *El Paso*, however, all expressly rejected the third-party origin defense. Instead, Bonhomme is liable because, as the operator of the culvert, he is the "current superintendent of the discharge," whether or not he is the "root cause" of the arsenic pollutant.

Bonhomme's assertion that he is no more than a passive landowner is unsupported by the *El Paso* decision, which dismissed the notion that a landowner's passivity mitigates liability. As in *El Paso*, Bonhomme is liable under § 1311(a) because Reedy Creek receives a "contemporaneous introduction of polluted water" from Bonhomme's property, through the culvert point source "owned and maintained" by Bonhomme. In fact, Bonhomme is even less passive than the property owner in *El Paso*; he is required to maintain the ditch and culvert on his property, as evidenced by his deed's restrictive covenant to do so. (R. at 5). As such, the District Court correctly disregarded Bonhomme's asserted defense of but-for causation and denied his motion to dismiss on that issue.

CONCLUSION

For the foregoing reasons, Maleau respectfully requests that this Court affirm the District Court's grant of Maleau's motion to dismiss on the first four issues; overturn the District Court's holding in Bonhomme's favor on the fifth issue; and affirm the District Court's denial of Bonhomme's motion to dismiss on the sixth issue.

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