Team 38

CA. No. 13-01234

UNITED STATES COURT OF APPEALS
FOR THE TWEFLTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,
Defendant-Appellee, Cross-Appellee

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

Appeal From The United States District Court
For the District of Progress
Case Nos. 155-CV-2012 & 165-CV-2012
The Honorable Judge Romulus N. Remus

BRIEF OF THE PLAINTIFF-APPELLANT, CROSS-APPELLEE, JACQUES BONHOMME

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant, Cross-Appellee Jacques Bonhomme filed a complaint in the United States District for the District of Progress seeking review under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365, pursuant to 28 U.S.C. § 1331. Plaintiff-Appellant, Cross-Appellee State of Progress also filed a complaint in the United States District for the District of Progress seeking review under 33 U.S.C. § 1365 and 28 U.S.C. § 1331; and this action was joined by Intervenor-Plaintiff-Appellant, Cross-Appellee Shifty Maleau. After consolidating the cases, on July 23, 2013 the District Court granted the State of Progress' motion for dismissal and denied Jacques Bonhomme's motion for dismissal. The District Court's order is final, and jurisdiction is proper in this court 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 Shifty Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

2. Whether Jacquess Bonhomme—a foreign national—is a "citizen" under CWA § 505, 33 U.S.C. § 1365, who may bring suit against Shifty Maleau.

3. Whether Shifty 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), (12).

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 Jacques Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Shifty 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 the District of Progress granting the State of Progress' (Progress) motion for dismissal and denying Jacques Bonhomme's (Bonhomme) motion for dismissal. (R. 10.) Bonhomme brought a civil action under the CWA's citizen suit provision, 33 U. S.C. § 1365, against Shifty Maleau (Maleau) seeking all relief available under the statute. (R. 4.) Subsequently, Progress also brought a civil action under the CWA's citizen suit provision, 33 U. S.C. § 1365, seeking all relief available under the statute. (R. 5.) Maleau then intervened on Progress' claim under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B). *Id.* The parties agreed to consolidate the cases. *Id.* The defendant in each suit filed motions to dismiss. *Id.*

The District Court held that: (1) Bonhomme is not the real party in interest under FRCP 17 to bring suit against Maleau; (2) Bonhomme is not a "citizen" for purposes of the CWA; (3) Maleau's mining waste piles are not "point sources" for purposes of the CWA; (4) Ditch C-1 is not a "navigable water/water of the United States" for purposes of the CWA; (5) Reedy Creek is a "navigable water/water of the United States" for purposes of the CWA; and (6) 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. (R. 7–10.)

Bonhomme filed a Notice of Appeal challenging holdings (1–4) and (6) of the District Court. (R. 1–2.) Maleau filed a Notice of Appeal challenging holding (5) of the District Court. (R. 2.) Progress filed a Notice of Appeal challenging holding (4) of the District Court. (R. 2.)

STATEMENT OF THE FACTS

Bonhomme filed a citizen suit against his neighbor, Maleau, whose upstream property contains mining waste piles. (R. 5.) This suit arose because Maleau arranged piled gold mining

overburden, waste rock, and dirt adjacent to Ditch C-1 in such a configuration that rainfall runoff flows directly though channels eroded from the piles into Ditch C-1, directly adding arsenic in rainwater runoff into Ditch C-1. (R. 4-5.) The water, polluted with arsenic, then flows downstream towards Bonhomme's property. (R. 5.) This polluted water flows through Bonhomme's culvert into Reedy Creek, a fifty mile long, interstate, navigable water directly effecting interstate commerce. *Id*. Finally, the arsenic polluted water makes its way into Wildman Marsh, an extensive wetland and essential stopover to over a million ducks and other waterfowl during biannual migrations. *Id*. Unfortunately, arsenic has been detected in three Blue-winged Teal in Wildman Marsh. (R. 6.)

Bonhomme owns property upon the intersection of Ditch C-1, Reedy Creek, and Wildman Marsh. *Id*. Bonhomme, as a property owner, was concerned about the flow of arsenic into Reedy Creek because of its detrimental effects on the waterfowl in Wildman Marsh. (R. 6.) Bonhomme has a significant interest in the health of the waterfowl because he frequently takes business and social parties duck hunting on his property. *Id*. Additionally, much of these wetlands now tainted with arsenic are within the Wildman national Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service. *Id*. Wildman Marsh attracts hunters from around the world and these hunters add over twenty-five million dollars ($25,000,000.00) to the local economy. *Id.*

Concerned for the safety of the wetlands, Bonhomme tested the water in Ditch C-1 upstream and downstream of Maleau's property. *Id*. Arsenic levels are undetectable upstream of Maleau's property, but highly concentrated just below Maleau's property. (R. 7.) Similar results were found where Ditch C-1 pours into Reedy creek, nothing upstream, but downstream arsenic is detectable in significant concentrations. *Id*. There are several other neighbors downstream of

this pollution, their agricultural properties sharing this arsenic tainted ditch due to Maleau's gold pilings. (R. 6.) The Ditch has been in place and protected under a restrictive covenant for one-hundred (100) years. *Id*. The ditch was constructed in 1913 for the purpose of draining rainwater through saturated soils to drain them for agricultural use; and a covenant was entered into by both the predecessors in interest of Bonhomme and Maleau's property requiring them to maintain the Ditch on their properties. *Id*.

Instead of adhering to this restrictive covenant, Maleau decided to move his overburden and slag from his local gold mine, which operates on a known navigable water, next to the Ditch in an effort to avoid paying for permits and properly disposing of his waste. (R. 6, 8.) Whenever it rains, rainwater runoff flows down the waste piles and percolates through them picking up arsenic, and flows directly into Ditch C-1 through channels eroded naturally by rainwater. *Id*.

The Attorney General has asserted an interest in protecting the waters of the state as well as Maleau, because he is a citizen of the state, and also one of the regieon's largest employers. (R. 7.) However, Maleau was a major financier in the Attorney General's election campaign. *Id.* Also, Bonhomme's company Precious Metals International is a competitor of Maleau. (R. 7.)

STANDARD OF REVIEW

The District Court granted Progress' motion for dismissal. This court reviews a district court's order of dismissal *de novo*. *See e.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

SUMMARY OF THE ARGUMENT

The District Court's erred in dismissing Bonhomme's claim because he is a proper plaintiff with a legitimate controversy as envisioned under the CWA's citizen suit provision. The District Court erred in finding against Bonhomme's capacity to sue. Bonhomme is the real party interest because he has been injured by Maleau's actions and is under a duty by deeded covenant to maintain Ditch C-1. He is the holder of the substantive claim as a property owner, and any assertion that his claim is somehow connected to his company is a projection of the faults within Maleau's claim and Progress' misguided prosecution. Bonhomme is a "citizen" as defined by the CWA. The legislative intent of the CWA was to expand the availability of private prosecution for environmental damage to bolster the effect of the law. Furthermore, there is no citizenship requirement under the CWA and the use of "citizen" is nothing more than a legal term of art that is out of place in the context of the environmental regulatory scheme.

The District Court also erred in their findings because Maleau's mining waste piles, or in the alternative the eroded channels which extend from them, are "point sources" because they introduce a pollutant from the outside world into a water system which ultimately pollutes navigable waters, threatens local economies, and impacts wildlife. The trickle-down pollution of Maleau is injurious and illegal and courts have reasoned on multiple occasions that waste or debris piles, or the channels which extend from them, are in fact "point sources."

The District Court was correct to find that Reedy Creek is a navigable water because of its geographic qualities and importance in interstate commerce, as well as its status as a tributary of Wildman Marsh. Reedy Creek's importance is why the CWA was originally envisioned. However, the District Court erred in its reasoning regarding Ditch C-1 because it is used in and

has substantial effects on interstate commerce and is also a tributary of both Reedy Creek and Wildman Marsh and is thus a navigable waterway.

Maleau's discharge of arsenic in Ditch C-1, Reedy Creek, Wildman Marsh, and thus a navigable water, is a violation of the CWA and the District Court erred in finding that Bonhomme and no other person could be liable under the CWA when he introduced no foreign pollutant and has already undertaken the responsibility of prosecuting Maleau, the liable party.

ARGUMENT

I. Bonhomme is the real party in interest under FRCP 17 and is thus able to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

An action must be prosecuted in the name of the real party in interest. F.R.C.P. 17(a)(1) The determination of whether or not a party is a real party in interest begins with rule 17 of the Federal Rules of Civil Procedure. This is a procedural rule requiring that an "action must be brought by the person who, according to the governing substantive law, is entitled to enforce the right."*Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d. Cir. 2003) (quoting Charles Alan Wright, et. al., *6A Federal Practice & Procedure*, § 1543 (2d ed. 1990)).

In determining who is the real party in interest when the Court is exercising federal-question jurisdiction, the question of whether a party has a substantive right of action must be resolved under the statute providing that cause of action. *6A Federal Practice & Procedure*, § 1544 (3d ed. 2013). For example, if the Court is confronted with a question of whether an assignee or a grantee of a patent is the real party in interest in a patent infringement, then that question must be resolved under the Federal Patent Act because the rights created by the statute are federal in nature. *Id*. Similarly, if there is a question of whether a citizen filing a citizen suit

under the CWA, then that question must be resolved under the CWA because it provides governing substantive law as to who is entitled to enforce the rights created by the statute.

A study of F.R.C.P. 17 shows that the purpose of the rule regarding the real party in interest is to (1) prevent those without a right, title or interest in the cause to commence an action; (2) avoid multiplicity of litigation against the defendant(s); (3) to protect the defendants from the same demands, and (4) avail defendants of counter claims. *In re: Jack Hudson, Inc.*, 6 B.R. 153, 155 (Bankr. D. Nev. 1980).

There is no need in this case to prevent Mr. Bonhomme from commencing this action because he has a right of action under the CWA. which states that any citizen may commence a civil action on his own behalf. 33 U.S.C. § 1365(a). Bonhomme, owns property directly downstream from a point source which is proven to have added arsenic to the water that passes through his property, negatively affecting Wildman Marsh, an area in which Mr. Bonhomme has a significant interest because he has used the Marsh to take business associates from his company, Precious Metal International (PMI), duck hunting in the past. Bonhomme has been directly harmed by Maleau introducing arsenic into the water because he has been unable to continue his hunting trips as it is no longer safe to hunt duck in Wildman Marsh. PMI does not own this property.

The assertion that PMI is the real party in interest in this cause of action is misplaced. In *Unification Church,* the court found the church to be the real party in interest rather than the named plaintiff because the church was paying the attorney's fees, and through bearing this financial burden the church stood to receive any attorney's fees the defendant would be liable for. *Unification Church v. I.N.S.*, 762 F.2d 1077, 1092 (D.C. Cir. 1985). Although PMI is paying the attorney fees on behalf of Mr. Bonhomme, economic interest is insufficient to form the real

party in interest, and Bonhomme holds the substantive right to pursue the claim. *New Orleans Public Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 (5th Cir. 1984).

Under the CWA, Mr. Bonhomme is permitted to commence a civil action against any person who is alleged to be in violation of an effluent standard or limitation under the CWA, 33 U.S.C. § 1365(a)(1)(a). The modern function of F.R.C.P. 17 is 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. *Suda v. Weiler Corp.*, 250 F.R.D. 437, 440 (D.N.D. 2008). This action against Mr. Maleau, the owner of the property which holds the point sources that are introducing arsenic into the water, will not result in repeat litigation because it is in regard to the environmental harm caused by his gold pilings. This is not a personal matter in which Mr. Bonhomme will personally receive relief, the purpose of this action is to assert Bonhomme's right to prevent this environmental harm from continuing. The real party in interest holds the substantive right sought to be enforced, but is not necessarily the person who will ultimately benefit from the recovery. *Thigpen v. Cheminova, Inc.*, 992 F. Supp. 864, 872 (S.D. Miss. 1997). PMI may indirectly benefit from this litigation by stopping the pollution that is negatively affecting the health of the ducks which Bonhomme hunts with business associates, however, every agricultural property in between Mr. Maleau's polluting gold pilings and Reedy Creek will also benefit, and as such Mr. Bonhomme is still the real party in interest regardless of the fact there are multiple potential beneficiaries of a declaratory judgment against Mr. Maleau.

Maleau is protected from repeat litigation because the relief sought is declaratory in nature. Similarly, the lasting effects of res judicata are not threatened by this cause of action because this controversy focuses on a particular activity, taking place at a particular time and the

same action can therefore not be commenced in the future. Maleau has already asserted his right to counter claim, eliminating any risk of preventing the defendant of bringing counter claims.

An assertion of a right to commence a cause of action requires that the plaintiff's interest be direct, substantial, and legally protectable. *New Orleans Public Serv., Inc.*, 732 F.2d at 463 (5th Cir. 1984). Mr. Bonhome's interest in this cause of action is direct because he is directly affected as a property owner by the introduction of the pollutant arsenic into Ditch C-1. Bonhomme's interest is substantial because of the threat burdened upon him by Maleau's polluting gold pilings as his property is the last point through which the arsenic flows prior to being introduced into Reedy Creek, leaving him susceptible to liability should the Court rule his culvert to be the point source rather than the gold pilings. Bonhomme is therefore avoiding liability under the CWA by prosecuting the real source of the pollution so that relief can end the pollution. Bonhomme's interest is legally protectable because his right to commence a cause of action is formed under the CWA.

II. Bonhomme—although a foreign national—is a "citizen" as defined in CWA §§ 505(g), 502(5), 33 U.S.C. §§ 1365(g), 1362(5); and is thus able to bring suit against Maleau.

Any citizen having an interest which is or may be adversely affected Clean Water Act § 505, 33 U.S.C. § 1365(a)(1)(a). Citizen is defined as a *person* or *persons* which is or may be adversely affected. 33 U.S.C. 1365(g) (emphasis added). Anyone may initiate a civil suit against any person who is alleged to be in violation of an effluent limitation or a Federal or State abatement order, or against the Administrator for failure to perform a non-discretionary act. S. Rep. No. 92-414, *reprinted in* 1972 USCCAN 3668, 3744. Citizen suits are modeled after the Clean Air Act in order to encourage citizen participation in the enforcement of control

requirements and regulations. *Id.* at 3745. The Clean Air Act states that any *person* may commence a civil action on his own behalf. 42 U.S.C. § 7604 (emphasis added).

The congressional intent to expand the enforcement of environmental regulations by allowing any person to file a citizen suit is clearly evident as several congressional acts provide this right under the heading of "citizen suit." *See* Safe Drinking Water Act, 42 U.S.C. § 300j-8; Resource Conservation Recover Act, 42 U.S.C. § 6972; CERCLA, 42 U.S.C. § 9659; Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270; Endangered Species Act, 16 U.S.C. § 1540(g); EPCRA, 42 U.S.C. § 11046(a)(1); Noise Control Act, 42 U.S.C. § 4911(a); Toxic Substances Control Act, 15 U.S.C. § 2619(a); Energy Policy and Conservation Act, 42 U.S.C. § 6305; Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435; Outer Continental Shelf Land Act, 43 U.S.C. § 1349; Hazardous Pipeline Safety Act, 49 U.S.C. § 2014; and Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(1). The only regulation to use the term "citizen" instead of "person" is the CWA, however the statute broadly defines "citizen" and is indicative of a larger regulatory framework which encourages local enforcement by people.

It is clear that the congressional intent in using the term citizen in the CWA was to encourage the people who are closest to violations of the CWA will have a conduit through which to commence suit. Citizen suit is a legal term of art meant only to indicate private civil suits in the enforcement of these environmental regulations. Administrative guidance clarifies that "citizen" is synonymous with "any person" and repeatedly refers to causes of action as "citizen suits" indicating the general acceptance and interchangeability of "citizen" and "any person." *See* Office of Solid Waste and Emergency Response, OSWER 9945.1; 1986 WL 296589 (reffering to RCRA "citizen suit notices"); EPA, Office of the General Counsel, Memo Sept. 14, 1973, 1973 WL 21922 (discussing "citizen suit" provision of the Clean Air Act); U.S.

Department of Justice, Office of Legal Counsel, Memo July 16, 1997, 21 U.S. Op. Off. Legal Counsel 109; 1997 WL 1188105 (referencing "citizen suit" provision of the Clean Air Act).

Courts are to entertain citizen suits to vindicate the public's nonconcretre interest in the proper administration of the laws. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580-81 (1992). The terms "citizen" and "person" are interchanged freely by Justice Scalia, a strict textualist, in a Supreme Court opinion in order to describe the plaintiff under a citizen suit. *Bennett v. Spear*, 520 U.S. 154,157, 161, 164, 166, 170, 175, 176, 179 (1997). The environmental regulatory framework provides for foreign claimants who experience extraterritorial environmental harm, not the domestic harm faced by Mr. Bonhomme. 33 U.S.C. §2707(c).

Mr. Bonhomme is a foreign citizen, and he is a citizen under 33 U.S.C. 1365(g) because he is a person with an interest in preventing environmental harm. The statute does not discriminate based on citizenship. Legislative history indicates an endorsement of private prosecution by any person towards the common goal of environmental protection. The Clean Water Act is part of a larger regulatory framework encouraging private enforcement of environmental regulations. The existence of the term "any person" in other legislation enacted by Congress emphasizes the use of "citizen suit" as a legal term of art, not meant to inhibit Bonhomme, who is not a traditional foreign claimant, from asserting his right to pursue a claim under the CWA.

III. Maleau's mining waste piles are "point sources" as defined in CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14), and 40 C.F.R. § 122.2.

The CWA restricts the discharge of pollutants from point sources into navigable waters. 33 U.S.C. § 1311(a). This restricted activity, as well as what constitutes a point source, is also defined within the CWA. 33 U.S.C. § 1362(12), (14). Pursuant to the statute, the Administrator

of the Environmental Protection Agency (EPA) has promulgated regulations which further define these terms. 33 U.S.C. § 1361(a); 40 C.F.R. § 122.2.

A. Maleau's mining waste piles, or in the alternative the erosion gullies that extend from them, are "point sources" as they are conveyances from which arsenic is discharged into a navigable body of water.

Point sources are defined within the CWA to mean "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14); *see also* 40 C.F.R. § 122.2. Piles of debris and construction equipment qualify as point sources under the CWA, regardless of whether or not the erosion gullies were purposefully constructed. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *see also Benham v. Ozark Materials River Rock, LLC*, 2013 WL 5372316, at *6 (D.N.D. Okla. Sept. 24, 2013) (piles of gravel were held to be point sources). However when there is no evidence that a pollutant is not discharging and when surface water runoff is neither collected nor channeled, there can be no finding of a point source. *See Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2nd Cir. 2009). Courts have specifically addressed mining waste piles holding them to be point sources even when the "miners have done nothing beyond the mere collection of rock and other materials" and that pile is subjected to gravity, erosion, and rainfall, which cause a discharge of pollutants into navigable waters. *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (hereinafter *Abston*). Intent is immaterial; any discharge of a pollutant into a navigable body of water is a CWA violation. *Id.; see also Fishel v. Westinghouse Elec. Corp.*, 640 F. Supp. 442 (D.M.D. Pa. 1986) (rainwater overflows which polluted stream were point source discharge, regardless of whether the owner intended discharges to take place).

In *Parker*, the court held that because there were piles of debris with erosion gullies leading to a stream which connected to a navigable waterway, the piles of debris were point

sources because they collected rainwater and leached pollutants that flowed into the stream. *Parker*, 386 F.3d at 1009. This is contrary to *Cordiano* where a target berm at a gun club was not held to be a point source because there was no evidence of pollutants leaching into jurisdictional waters, and no channels existed to facilitate such a discharge. *Cordiano*, 575 F.3d at 222.

The *Abston* controversy began when coal miners placed their overburden from strip coal mining into mining waste piles right next to the mining site, and rainfall carried pollutants from these piles into adjacent streams. *Id.* at 43. The court reasoned that no affirmative conduct was required on the part of the defendants to discharge the pollutants, and the court also found that the defendants were liable despite having constructed catch basins for the pollutants which had ultimately failed. *Id.* However, the natural forces of rain and gravity discharged pollutants from piles which were designed by the defendants who were thus liable under the CWA. *Id.* In fact, all that was required by the court was that the conveyances—although not constructed by the defendants—were "reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* at 45.

Unlike *Cordiano*, the pollutants in Maleau's mining waste piles are actively guided towards a navigable body of water through the eroded channels which carry arsenic into Ditch C-1, Reedy Creek, and ultimately Wildman Marsh. (R. 5.) The haphazard placement of Maleau's overburden piles are similar to the configurations of debris in *Parker*, wherein the court reasoned that the debris piles were point sources which were ultimately discharging pollutants into a navigable body of water. *Id.* However, what is particularly instructive for the present controversy is the court's holding in *Abston* where miners were held liable when they placed mining waste piles in such a manner that the natural forces of gravity and rainfall discharged pollutants from the piles and into a navigable body of water. Maleau has taken considerably less care and

precaution than the defendants in *Abston* because Maleau purposefully trucked his overburden piles from his mine site (which was next to a previously recognized navigable body of water) to his separate property (which is alongside a waterway which has not yet been declared navigable). *Id.* Maleau's intentions are irrelevant. Finally, the record does not indicate that Maleau has ever constructed catch basins, as did the defendants in *Abston*, nor has Maleau made any attempt to contain the pollutants in his mining waste piles from entering a navigable body of water. *Id.*

Because the mining waste piles have caused a discharge of pollutants into a navigable body of water these piles should be considered point sources, just as they were in *Abston* and *Parker*. Unlike *Cordiano*, there is evidence that the pollutants have discharged into multiple navigable bodies of water as well as affected wildlife in Wildman Marsh. (R. 6.) Additionally, Maleau has taken further affirmative action (by trucking the piles to a specific site) and have undertaken less precautions (by not constructing safeguards) than the defendants in *Abston*. (R. 5.) The discharge of pollutants emanates from the mining waste piles, and the action of the natural forces of gravity and rainfall carry these pollutants into a navigable body of water, thus the mining waste pile are point sources under 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.2. (R. 5.) In the alternative, the channels—which have formed amongst the mining waste piles—are "point sources" because they are the conveyances which actually facilitate the discharge of arsenic into a navigable body of water. The finite construction of which particular aspect of the pile or channels is a "point source" is immaterial, because both are on Maleau's property. (R. 5.)

B. The correct application of *Rapanos* still finds Maleau liable under the CWA, notwithstanding the District Court's reasoning regarding what constitutes a "point source."

The plurality opinion in *Rapanos* held that an intermittent waterway may not simultaneously be a "point source" and a "navigable water." *Rapanos v. U.S.*, 547 U.S. 715, 735

(2006). The opinion specifically indicates that "ditch[es]" are among those conveyances which may reasonably be defined as a "point source." *Id.* Furthermore, the terms used in the definition of "point sources" are those words which indicate intermittent water flows. *Id.* at 735–36. However, further judicial interpretations of the CWA and *Rapanos* have held that not every channel must either be a "point source" or a "navigable water" for all purposes. *See Nat'l Assn. of Home Builders v. U.S. Army Corps of Eng'rs*, 699 F. Supp. 2d 209, 216 (D.D.C. 2010). Additionally, a ditch that otherwise falls within the definition of "waters of the United States" may also constitute a point source for a discharge into a different "water of the United States;" and this reasoning is not barred by the *Rapanos* holding. *U.S. v. Vierstra*, 803 F. Supp. 2d 1166, 1173–74 (D. Idaho 2011).

Because the surface runoff, as channeled by the erosion gullies, represent intermittent waterways there is a clear indication under *Rapanos* that these channels for rainfall runoff are therefore "point sources." Alternatively if the *Rapanos* holding is misappropriated—as was by the District Court—to find that Ditch C-1 is a point source, Maleau would still be liable under the CWA because Ditch C-1 traverses several properties and the arsenic is added from Maleau's property. Maleau has the exclusive control over the addition of arsenic to Ditch C-1; and he also maintains responsibility and a degree of ownership, through the covenant, over Ditch C-1. Under the *Vierstra* reasoning, a finding that Ditch C-1 is the point source would not foreclose a finding that Ditch C-1 is also a "navigable water." However, this caveat evades the fundamental reasoning from the plurality in *Rapanos* which focuses on the "intermittent waterway" requirement of a "point source."

The intermittent nature of the surface water runoff, which exists in the erosion gullies that emanate from the mining waste piles, constitutes a "point source" under the plurality holding in

Rapanos. Additionally, a finding that Ditch C-1 is a "point source" does not relieve Maleau of his liability for discharging pollutants in violation of the CWA.

IV. Reedy Creek is a "navigable water/water of the United States" as defined in CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12), and explained in 40 C.F.R. § 122.2.

The CWA restricts the discharge of pollutants from point sources into navigable waters, which are defined as "the waters of the United States." 33 U.S.C. § 1362(7). Pursuant to the statute, the Administrator of the EPA has promulgated regulations which further define these waters. 33 U.S.C. § 1361(a); 40 C.F.R. § 122.2.

A. Reedy Creek is currently used in, or in the alternative has a substantial effect upon, interstate commerce and the waterway is therefore a "water of the United States" as defined in 40 C.F.R. § 122.2.

The EPA has promulgated rules which define "waters of the United States" as those waters "which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce." 40 C.F.R. § 122.2. Because the *Rapanos* decision was a fractured opinion, the District Court erred in finding a requirement that a waterway must be within the first prong of *Lopez*. *Rapanos*, 547 U.S. 715; *U.S. v. Lopez*, 514 U.S. 549, 558 (1995); (R. 9.) Rather, a waterway may fall under the second or third prongs of *Lopez* as either an instrumentality of interstate commerce or as a waterway which has a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 558. Regardless, the regulations governing the CWA additionally protect "all other waters" which could affect interstate commerce. 40 C.F.R. § 122.2.

The Supreme Court has recognized three categories of Congressional regulatory authority: (1) regulating the channels of interstate commerce; (2) regulating the instrumentalities of, and persons engaged in, interstate commerce; and (3) regulating those activities which have a substantial effect on interstate commerce. *Lopez*, 514 U.S. at 558–59. In regards to this final

prong, the authority of Congress under the Commerce Clause, although broad, is not unlimited. *U.S. v. Morrison*, 529 U.S. 598, 608 (2000); U.S. Const. art. 1, § 8, cl. 3. There are four factors to consider when evaluating whether an activity substantially affects interstate commerce: (1) whether the regulated activity is economic in nature; (2) whether the statute contains an "express jurisdictional element" linking its scope in some way to interstate commerce; (3) whether Congress made express findings regarding the effects of the regulated activity on interstate commerce; and (4) attenuation of the link between the regulated activity and interstate commerce. *Morrison*, 529 U.S. at 610–12; *see also Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

Because the majority of NPDES permits (the National Pollutant Discharge Elimination System provides permits for limited exemptions to the CWA, 33 U.S.C. §1342) are issued to, and the majority of enforcement actions are prosecuted against, corporations engaged in business for economic benefit the regulation of pollutant discharges into waterways is economic in nature. Additionally the imposed fines for violations of the CWA are so excessive monetarily, that the activity is clearly economic in nature. 33 U.S.C. § 1319(d) (violations of the CWA and NPDES permitting programs can include fines of up to $32,500 per day). The regulations' definition of "waters of the United States" has a clear and concise jurisdictional element which limits the regulation of waterways to those which effect interstate commerce. 40 C.F.R. § 122.2. The National Commission on Water Quality made express and extensive findings regarding the economic implications and benefits of the CWA. S. Rep. No. 95-370, at 1, 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4327, 4338. There is a strong causal connection between the

pollution of waterways and a subsequent decrease in interstate commerce—as is the case for Bonhomme's decreased hunting trips and the impending threat of losing the over twenty-five million dollars from interstate commerce—thus the activity is economic in nature. (R. 6.)

Furthermore, Reedy Creek is used as a water supply for Bounty Plaza, a service area on Interstate 250, which sells gasoline and food to persons engaged in interstate commerce. (R. 5.) Therefore, Reedy Creek is an instrumentality of commerce and also substantially relates to interstate commerce because the waters of Reedy Creek are necessary for the operation of Bounty Plaza. *See Lopez*, 514 U.S. at 558. The regulations specifically protect those waterways which are used for interstate commerce, as well as "all other waters" which affect interstate commerce. 40 C.F.R. § 122.2. Finally, by irrigating crops which are sold in interstate commerce, Reedy Creek is not only an instrumentality of, but is also a direct link which substantially affects, interstate commerce. 40 C.F.R. § 122.2; (R. 5.)

Because Reedy Creek is used in, as well as exerts a substantial effect on, interstate commerce and is the water source for a rest area which caters to people engaged in interstate commerce, as well as irrigating crops which are sold in interstate commerce, the waterway is a "water of the United States." 40 C.F.R. § 122.2.

B. Because Reedy Creek begins in the State of New Union and ends in the separate State of Progress, it is a "water of the United States" as defined in 40 C.F.R. § 122.2.

The appropriate canon of construction for statutory interpretation is the commonplace meaning for the literal text of the rule. *See Rapanos*, 547 U.S. at 731–34. An interstate waterway qualifies as a "water of the United States." 40 C.F.R. § 122.2. Interstate is defined as "of, connecting, or existing between two or more states especially of the United States." *Rapanos*, 547 U.S. at 716 (*quoting* Webster's New International Dictionary (2d ed. 1954)). Interstate

waterways possess the plain meaning of a waterway which exists in two or more states. 40 C.F.R. § 122.2.

Because Reedy Creek, a waterway, begins in the State of New Union and ends in the separate State of Progress—thereby existing in two different states—the waterway is interstate and thus Reedy Creek is a "water of the United States." 40 C.F.R. § 122.2.

C. Because Wildman Marsh, a National Wildlife Refuge, is a "water of the United States" as defined in 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2; as a tributary thereof Reedy Creek is a "water of the United States" as defined in 40 C.F.R. § 122.2.

The text of the CWA itself defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The appropriate canon of construction for statutory interpretation is the commonplace meaning for the literal text of the rule. *See Rapanos*, 547 U.S. at 731–34. The natural reading of this phrase indicates that the Act plainly extends to those possessory waters of the United States. 33 U.S.C. § 1362(7). Because it is owned and maintained by the United States Fish and Wildlife Service, and is thus the possessory property of the United States, Wildman Marsh is a "water of the United States. *Id*.; (R. 6.)

1. Because the area is an extensive wetlands, a migratory bird stop, and is a source of foreign and interstate commerce, Wildman Marsh is a "water of the United States" as defined in 40 C.F.R. § 122.2.

The regulations further define "waters of the United States" to include "all other waters" such as wetlands "which are or could be used by interstate or foreign travelers for recreational or other purposes." 40 C.F.R. § 122.2. Although the so-called "Migratory Bird Rule" was held improper by the Supreme Court, this was done so in the context of a dredge-and-fill controversy. 51 Fed. Reg. 41217 (Nov. 13, 1986); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of*

Eng'rs, 531 U.S. 159, 167 (2001) (hereinafter *SWANCC*). Furthermore, this holding focused specifically on "nonnavigable, isolated, intrastate waters." *Id.* at 171.

In *SWANCC*, the Corps of Engineers sought to extend jurisdiction over an abandoned gravel pit which served as a stopover for interstate migratory birds. *Id.* at 164–65. The Court made significant findings on the ecological and economic benefits of protecting habitat for migratory birds, but ultimately determined that this extension of the CWA was improper. *Id.* at 171. The Court's reasoning relied on part on the nature of the gravel pits which were "isolated" from other open bodies of water. *Id.* The Court invalidated the "Migratory Bird Rule" and held that this qualification alone could not extend the CWA to "isolated" bodies of water. *Id.* at 167.

Because Wildman Marsh is connected to other bodies of water, including Reedy Creek and Ditch C-1, it is not isolated. (R. 5.) As an extensive wetlands, Wildman Marsh is substantially distinct from the remote and abandoned gravel pits in *SWANCC*. (R. 5.) Furthermore, this controversy concerns the discharge of pollutants into a waterway and subsequently the ecosystem, and not the dredge and fill of a waterway. *Id.* Because of these factors, the case in controversy is unlike *SWANCC*. Thus, the findings of the *SWANCC* Court cannot be applied here where the danger to migratory birds is greater as evidenced by the discovery of arsenic in three Blue-winged Teal in Wildman Marsh. (R. 6.) Additionally, Wildman Marsh is not merely a stopover for migratory birds; the National Wildlife Refuge is also a major destination source in interstate commerce.

Wildman Marsh is a popular destination for duck hunters from Progress, New Union, and five neighboring states, as well attracting hunters nationally and even foreign hunters. *Id.* The District Court noted that hunting adds over twenty-five million dollars to the local economy from interstate hunters, and the destruction of Wildman Marsh would therefore have a significant

impact on interstate commerce. *Id.* Because it is used by interstate and foreign travelers in the recreational activity of hunting and substantially affects interstate commerce, Wildman Marsh is a "water of the United States." 40 C.F.R. § 122.2.

2. Reedy Creek is a relatively permanent tributary of Wildman Marsh, a "water of the United States," and thus Reedy Creek is also a "water of the United States" as defined in 40 C.F.R. § 122.2.

The regulatory definition for a "water of the United States," also includes the tributaries of those waters. 40 C.F.R. § 122.2. A tributary is a "stream which contributes its flow to a larger stream or other body of water." *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 533 (9th Cir. 2001). The plurality in *Rapanos* held that these waters "include only relatively permanent, standing or flowing bodies of water." *Rapanos,* 547 U.S. at 732.

Because Reedy Creek flows into Wildman Marsh, as well as transmitting arsenic into the marsh, Reedy Creek is a tributary of Wildman Marsh. (R. 5.); *see Headwaters, Inc.*, 243 F.3d at 533. Because Wildman Marsh is a "water of the United States," as a tributary thereof Reedy Creek is also a "water of the United States." 40 C.F.R. § 122.2. Furthermore, because Reedy Creek maintains water flow throughout the year it is a "relatively permanent, standing or flowing bod[y] of water" and is thus qualified to be a "water of the United States." (R. 5.); *see Rapanos*, 547 U.S. at 732. Because of the use in and effect on commerce, and its' nature as a relatively permanent flowing tributary of a "water of the United States," Reedy Creek is a "water of the United States" as defined by the regulations and interpreted by the courts. 40 C.F.R. § 122.2.

V. Ditch C-1 is a "navigable water/water of the United States" as defined in CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).

The CWA restricts the discharge of pollutants from point sources into navigable waters, which are defined as "the waters of the United States." 33 U.S.C. § 1362(7). Pursuant to the

statute, the Administrator of the EPA has promulgated regulations which further define these waters. 33 U.S.C. § 1361(a); 40 C.F.R. § 122.2.

A. Because it drains agricultural properties and thus is currently used or in the alternative is readily susceptible to being used in interstate commerce, and otherwise substantially impacts interstate commerce, Ditch C-1 is a "water of the United States" as defined in 40 C.F.R. § 122.2.

The regulations provide protection for intrastate waters, including intermittent streams, "which are used or could be used for industrial purposes by industries in interstate commerce." 40 C.F.R. § 122.2. Furthermore, the regulations also define "waters of the United States" as those waters which are currently used, or may be susceptible to use in interstate commerce. *Id.* Even if an activity is local, the aggregate substantial effect of that activity on interstate commerce lends itself to the purview of federal regulation. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). This doctrine was recently re-affirmed. *Raich*, 545 U.S. at 32–33.

In *Wickard* a farmer exceeded his acreage allotment for wheat production and was denied his agricultural market card as a result. *Id.* at 114–15. The Court reasoned that although the activity was local in nature—*Wickard* insisted that the extra crops were for personal use on his farm—the aggregate effect of such activity on interstate commerce was substantial enough to warrant federal regulation. *Id*. at 125. The simple removal of those crops and the consumer from the overall marketplace would have a substantial effect on the underlying policies which are designed to protect and regulate interstate commerce. *Id.*at 128–29. Essentially, any substantial effect on interstate commerce may be regulated. *Id.* at 125; *see also Raich,* 545 U.S. at 32–33.

Because Ditch C-1 provides drainage for agricultural properties, it is a "water of the United States" irrespective of whether those particular crops are sold in interstate commerce, because the aggregate impact of agriculture on interstate commerce is a validly recognized

extension of Congress' power to regulate. 40 C.F.R. § 122.2; *see also Wickard*, 317 U.S. at 125. If Ditch C-1 did not drain the agricultural properties there would be an overall decrease in local supply which would put an increased demand strain on interstate commerce and thus the destruction of Ditch C-1 would substantially affect interstate commerce and is thus a "water of the United States." 40 C.F.R. § 122.2. Furthermore, nothing in the record indicates that the products derived from the agricultural properties which Ditch C-1 drains are incapable of entering the stream of interstate commerce. Therefore, Ditch C-1, if not already currently used under the *Wickard* prism, is susceptible to use in interstate commerce and is thus a "water of the United States." 40 C.F.R. § 122.2.

B. As a tributary of a "water of the United States," Ditch C-1 is therefore a "water of the United States" as defined in 40 C.F.R. § 122.2.

The regulatory definition for a "water of the United States," also includes the tributaries of those waters. 40 C.F.R. § 122.2. Although recent Supreme Court opinions which interpret the CWA deal specifically with adjacent wetlands, the underlying reasoning for determining if the Act may be validly extended to a non-traditionally navigable waterway is nonetheless helpful. *See U.S. v. Robinson*, 505 F.3d 1208 (11th Cir. 2007) (applying the "significant nexus" test from Justice Kennedy's concurrence in *Rapanos* to analyze CWA jurisdiction over a non-navigable waterway). The plurality in *Rapanos* held that to extend the Act on a waterway, there should be a continuous surface connection to a relatively permanent flow. *Rapanos*, 547 U.S. at 757. Justice Kennedy's concurrence in *Rapanos*, extolls the "significant nexus" test put forth in *SWANCC*, wherein the extension of the CWA is applied only to those waters which possess a "significant nexus" to navigable waters. *Id.* at 759; *see also SWANCC*, 531 U.S. at 167. A "significant nexus" is a hydrologic connection affecting the chemical, physical, or biological integrity of traditional navigable waters or interstate waters. *See SWANCC*, 531 U.S. at 167; *see also* 33 U.S.C. §

1251(a). Justice Kennedy's "significant nexus" test was the least far-reaching of the fractured opinion in *Rapanos* and is thus the controlling rule of the case. *Robinson*, 505 F.3d at 1221.

1. Reedy Creek and Wildman Marsh are "waters of the United States" as defined in 40 C.F.R. § 122.2, and as a tributary thereof Ditch C-1 is thus a "water of the United States" as defined in 40 C.F.R. § 122.2.

Because Reedy Creek and Wildman Marsh are "waters of the United States," for the reasons set forth in Part IV of this brief, as a tributary thereof Ditch C-1 is also a "water of the United States." 40 C.F.R. § 122.2. Because Ditch C-1 discharges directly into Reedy Creek which ends in Wildman Marsh there is a continuous surface connection to a "water of the United States" and thus passes the muster of the plurality holding in *Rapanos*. *Id.* at 757; (R. 5.) Furthermore, as evidenced by the presence of arsenic there is a hydrologic connection, or "significant nexus," between Ditch C-1 and Reedy Creek and Wildman Marsh. *Id.* at 759; (R. 6.)

2. Ditch C-1 qualifies as a protected waterway under the CWA, notwithstanding its' physical characteristics.

The plurality in *Rapanos* held that waters of the United States "include only relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 732. However, the Court also specifically provided that this definition did not necessarily exclude "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 733. "It does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally." *U.S. v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009). Tributaries of "waters of the United States" with relatively short seasonal flows have been held to be "waters of the United States" themselves. *See U.S. v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007), cert. denied 554 U.S. 918 (2008) (finding that a channel which only held a continuous water flow for two months out of the year qualified as a

"water of the United States" because it ultimately emptied into a river that is a "water of the United States"); *see also Vierstra*, 803 F. Supp. 2d at 1170–71 (finding that man-made tributary which connected navigable waterways for six to eight months of the year was still capable of spreading pollution and met the definition of "waters of the United States" as articulated by the plurality opinion in *Rapanos*).

In *Vierstra*, the court held that the discharge of pollutants into a man-made canal was a violation of the CWA. *Id.* at 1168. The Low Line Canal eventually discharged into Deep Creek, a stream which in turn discharged into the Snake River, a navigable water body. *Id.* Because the Low Line Canal carries water for about six to eight months each year, and has a direct surface water connection to a navigable body of water, the court explained that the waterway met the definition of "water of the United States" and was consistent with both the plurality holding and Justice Kennedy's concurring opinion in *Rapanos*. *Id.* at 1168–72. A controlling factor in Justice Kennedy's reasoning was the connectivity of the waterways in relation to their potential to carry pollution and cause environmental damage. *Id*. at 1170; *see also Moses*, 496 F.3d at 989 (holding that as long as a tributary would flow into a navigable body of water, even during rainfall, it is capable of spreading environmental damage and is thus a "water of the United States").

Ditch C-1 connects to navigable bodies of water such as Reedy Creek and Wildman Marsh within a few miles, and with no greater attenuation than did Low Line Canal in *Vierstra*. (R. 5–6.) Ditch C-1 contains running water for at least nine months out of the year, which is greater than the lengths of relatively permanent continuous surface water connection found in both *Moses* (two months) and *Vierstra* (six to eight months). (R. 5.) Furthermore, consistent with the reasoning in *Moses* and *Vierstra*, Ditch C-1 clearly has the capability of spreading

environmental damage and is therefore a "water of the United States" for purposes of the CWA. *See Moses,* 496 F.3d at 989; *see also Vierstra* 803 F. Supp. 2d at 1170.

C. The upcoming rule proposals regarding CWA refinements and definitions support the finding that Ditch C-1, as a tributary of a "navigable water," is therefore a "navigable water" itself.

Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, particularly when the given situation has depended upon more than ordinary knowledge. *Chevron, U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (hereinafter *Chevron*). An agency's reasonable construction should not be disturbed unless it is apparent from the statute or the legislative history that the construction is not one that Congress would have sanctioned. *Id.* at 845; *see also U.S. v. Shimer*, 367 U.S. 374, 382–83 (1961). Factors to consider when evaluating the deference due to an agency include the agency's care, consistency, formality, relative expertness, and the persuasiveness of the agency's position. *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001); *see also Skidmore v. Swift & Co.*, 323 U.S 134, 139–40 (1944). The starting point for this inquiry is the language of the delegation provision itself, with the deference being afforded in relation to the express delegation given by Congress to that agency. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (hereinafter *Nat'l Cable*). The goal of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The agency responsible for administering the CWA is the EPA. *See id.* § 1251(d). Congress has authorized the EPA to "prescribe such regulations as are necessary" to meet the goals of the CWA. *Id.* § 1361(a).

In *SWANCC*, the Court did not extend *Chevron* deference to the "Migratory Bird Rule" because the extension to an isolated body of water was beyond the scope of the CWA. *SWANCC*,

531 U.S. at 172–73; *see also Chevron*, 467 U.S. at 844. This distinction however was based on the respondents' focus that the regulated activity in *SWANCC* was the petitioner's landfill, an economic activity. *SWANCC*, 531 U.S. at 173. Because of this focus, the Court analyzed the "Migratory Bird Rule" in terms of aggregate economic impact; instead of tying the EPA's guidance to the underlying goals of the CWA to protect the Nation's waters. *Id.*; *see also* 33 U.S.C. § 1251(a). Thus, the agency's guidance was not afforded its due deference because the focus of the controversy was on economic impact instead of environmental damage.

In the present case, there are significant economic impacts (which have been documented in the record unlike the ambiguous impacts in *SWANCC*) that accord within commerce clause analysis. However the issue on point is the environmental damage caused by Maleau's discharge of pollutants from his mining waste piles which ultimately lead to navigable waters. Given the underlying concerns of the CWA to protect the Nation's waters, and the recent confusion surrounding the conflicting holdings of *Rapanos* and *SWANCC*, the EPA has recently proposed new rules which aim to provide clarity in regards to CWA jurisdiction. Amena H. Saiyid, *EPA, Corps Send Proposed Rule to OMB to Clarify Clean Water Act Jurisdiction*, Bloomberg BNA (Sept. 18, 2013), http://www.bna.com/epa-corps-send-n17179877129/.

These rules, which were a response to judicial misinterpretation, are based upon a draft report which synthesized over one thousand peer-reviewed pieces of scientific literature about how smaller tributaries (including isolated waters) have a significant impact on larger waterways which are often the navigable waters which the CWA is designed to protect. Nancy Stoner & Lek Kadeli, *EPA Science: Supporting the Waters of the U.S.*, EPA Connect (Sept. 17, 2013, 2:10 PM EDT), http://blog.epa.gov/epaconnect/2013/09/watersoftheus/; *see also* Office of Research and Dev., U.S. E.P.A., EPA/600/R-11/098B, Connectivity of Streams and Wetlands to

Downstream Waters: A Review and Synthesis of the Scientific Evidence (2013), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/7724357376745F48852579E60043E88C/$File/WOUS_ERD2_Sep2013.pdf (hereinafter Report). Although the Report is in its draft stage, and the proposed rules are currently under review by the Office of Management and Budget, the EPA has made it clear that they intend to protect smaller tributaries which impact navigable waters. *See* Stoner & Kadeli.

Beginning with *Nat'l Cable*, we see that Congress has given express delegation to the EPA to promulgate rules as necessary to effectuate the CWA. 33 U.S.C. § 1361(a). Furthermore, under the *Mead Corp.* factors we see that the EPA has taken great care in formulating these rules because they took seven years after *Rapanos* to formulate the new regulations and have provided the public with a draft report for comment on scientific accuracy and policy implications. The agency's position on the protection of tributaries has been consistent since the CWA was enacted. EPA has not undertaken the formal rulemaking process including the preparation of a report for public comment, and has currently submitted the proposed regulations to the OMB for review before public disclosure. The relative expertness of the report and the subsequent proposed regulations is evident by the massive (over one thousand peer-reviewed pieces of scientific literature) breadth of knowledge that the EPA has synthesized which "represents the state-of-the-science" understanding of these complex issues. Stoner & Ledeki. Finally, the agency has firmly shown the connections between the pollution of tributaries and the subsequent pollution of navigable waters.

Although these rules have not yet become final, it is evident that the agency trend is towards further protecting tributaries which are already covered under 40 C.F.R. § 122.2. Because of the care, consistency, formality, expertise, and persuasiveness of EPA's position that

tributaries (regardless of their size or isolation) should be protected given their ultimate impact on navigable waters, *Chevron* deference should be accorded and Ditch C-1 should be found to be a navigable water. To rule otherwise, given the obvious direction of the EPA in their proposed rulemaking process, would threaten inconsistency and confusion and further impede the goals of the CWA. *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210 (2012).

VI. Bonhomme does not violate the CWA, because Maleau discharges arsenic (a pollutant) from his mining waste piles (point sources) into waters of the United States and therefore Bonhomme is an indirect discharger within unitary waters and is exempt from liability under the CWA, and is also particularly shielded from Maleau's and Progress' prosecution under the doctrine of unclean hands.

A. Bonhomme does not discharge pollutants from a point source, because the point source in the present case is the mining waste piles, or alternatively the channels which extend from them, which are situated on Maleau's property and discharge pollutants into the unitary waters of Ditch C-1, Reedy Creek, and Wildman Marsh.

To establish a violation of the CWA's NPDES requirements, plaintiffs must prove that a defendant 1) discharged, i.e., added, 2) a pollutant 3) to navigable waters 4) from 5) a point source. *See, e.g. Idaho Conservation League v. Atlanta Gold Corp.*, 844 F. Supp. 2d 1116 (D. Idaho 2012); 33 U.S.C. § 1311(a). The CWA does not forbid the addition of pollutants directly to navigable waters, but rather the addition of pollutants to navigable waters. *Rapanos*, 547 U.S. at 743. A point source is the source of the pollutants and not the physical point at which the pollutant enters navigable waters. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1144 (10th Cir. 2005) (hereinafter *El Paso*). The addition of a pollutant by a point source is found when the point source itself introduces the pollutant from the outside world. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174–75 (D.C. Cir. 1982) (giving deference to EPA reasoning that CWA liability should not be extended to dams, or other indirect dischargers, who did not

originally introduce the pollutant into the system from the outside world). The mere passage, or circulation of, navigable waters which were polluted beforehand do not constitute an addition of a pollutant when the waters are returned to their natural course. *See Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988). The reasoning that the owner of a point source need not initially add the pollutants, so long as they convey the pollutants, to be held liable under the CWA is misplaced. *Cf. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (hereinafter *Miccosukee*).

The defendants in *El Paso* owned an inactive mine on property that contained a large vertical mine shaft that is connected to a man-made underground conduit called the Roosevelt Tunnel. *Id*. at 1136. The Tunnel was constructed in 1900 for the purpose of draining the surrounding land to make it suitable for copper mining. *Id.* The Roosevelt Tunnel travels six miles, through several properties, before exiting through a portal which connects to Cripple Creek and eventually to the Arkansas River. *Id.* The vertical mine shaft connects to the Roosevelt Tunnel two and a half miles before the portal connecting to Cripple Creek. *Id.* Although the precise origin of the pollutants was not ascertainable, the defendants had not presented any evidence to rebut the allegation that the mine shaft was the source of the pollutants. *Id.* at 1141. The court held that the mine shaft was a point source because it was the site that pollutants were introduced into the system which would ultimately discharge into a navigable body of water. *Id.* at 1144. At no point, were the owners of the land which sat over the portal (which connected the Tunnel to the Creek) ever implicated for liability under the CWA.

The defendants in *Consumers Power Co.* were drawing in water from Lake Michigan to operate a hydroelectric dam. *Id.* at 585. However, the defendants were also drawing in fish from the lake as well. *Id.* Once the water and fish were passed through the dam's turbines to produce

electricity, the mixture was then ejected back into Lake Michigan. *Id.* The plaintiffs claimed that because the fish were dismembered in the process, the addition of their carcasses as biological pollutants from the plant's discharge pipes was a violation of the CWA. *Id.* However, the court relied on *Gorsuch* to find that there was a mere circulation of water and that no outside pollutants were introduced into circulation. *Id.* at 586. As such, there was no liability for the defendants who did not place the fish in the water, but merely guided the water's passage for industrial use before relinquishing it back to Lake Michigan. *Id.*

In *Miccosukee*, the Supreme Court held that the owner of a point source need only convey the pollutants and that there was no requirement of initially adding the pollutants. *Id.* at 105. However this holding came in the context of the CWA's primary goal of imposing NPDES permitting requirements on municipal wastewater plants. *Id.*; *see also* 33 U.S.C. § 1311(b)(1)(B) (establishing a compliance schedule for publicly owned treatment works). Given these circumstances, the Court ruled that the water management district was liable under the CWA. *Id.*

The present situation is nearly identical to that in *El Paso* because we have a discharge of pollutants that is somewhat attenuated between the actual point of discharge and the navigable body of water. As was the case in *El Paso*, Maleau should be held liable for his discharge, or initial addition, of pollutants which ultimately reach a navigable body of water. Ditch C-1, like the Roosevelt Tunnel, traverses several properties and serves as tributary to larger bodies of water and the addition of pollutants to Ditch C-1 is the ultimate addition of pollutants to a navigable body of water. Furthermore, Bonhomme's culvert which connects Ditch C-1 to Reedy Creek is no different from the portal which connects the Roosevelt Tunnel to Cripple Creek; as such, because the *El Paso* court found no liability for the owners of the portal, there should be no liability for Bonhomme. Finally, because the culvert is not a wastewater treatment plant or other

publicly owned treatment works, the holding in *Miccosukee* cannot be applied here because NPDES permitting requirements for culverts were not envisioned under the CWA.

The mere passage of water should not trigger liability under the CWA. Unlike the defendants in *Consumers Power Co.*, Bonhomme did not actively withdraw and eject the navigable waters of Ditch C-1. In fact, he passively allowed the natural flow of water to continue and cannot be held liable when he himself is a victim of Maleau's pollution. This is unlike Maleau's passive acquiescence to arsenic pollution, because Maleau designed his spoils piles in such a way that channels were formed to transport arsenic. However, the record indicates that Ditch C-1 has been in existence for about a century and thus there was no affirmative action on Bonhomme's part to redirect the water. (R. 5.) Furthermore, there is nothing in Bonhomme's culvert (unlike the arsenic in Maleau's overburden piles) which introduced a pollutant from the outside world. If the operators of a dam who purposefully withdraw and ultimately change the character of navigable waters are not held liable; then the owner of a culvert who is beset by the flow of water which he does not adulterate should similarly not be held liable under the CWA.

B. Prosecution of Bonhomme, by either Maleau or Progress, for Maleau's violation of the CWA is illogical as well as barred under the doctrine of unclean hands.

Congress's stated purpose in enacting the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *SWANCC*, 531 U.S. at 166 (*quoting* 33 U.S.C. § 1251 (a)). The doctrine of unclean hands prevents a plaintiff from prosecuting a claim for relief when that plaintiff has themselves acted in bad faith, or is otherwise attempting to defraud the courts; the underlying purpose of the doctrine is to discourage unlawful activity. *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1183 (D. Idaho 2001). The plaintiff's fault may be relevant in determining the remedy; however, the

doctrine should not be applied to frustrate the purpose of a federal statute or thwart public policy. *U.S. v. Martell*, 844 F. Supp. 454, 459 (D.N.D. Ind. 1994).

In *Bosma*, a non-profit group filed a citizen suit against a chemical waste disposal facility for violations of environmental regulations. *Id.* at 455. The alleged polluters asserted the doctrine of unclean hands as a defense, counter-alleging that the non-profit group was barred from prosecuting their claim because some of their members had engaged in similar violations of environmental regulations. *Id.* at 459. There were no allegations that any members of the plaintiff organization had contributed to or were engaged in the same particular activity of the defendants, only the same kind of activity. Regardless of the inconsistency, the court still held that the doctrine of unclean hands applied. *Id.*

Similar to *Bosma*, Maleau brings his claim against Bonhomme while engaging in similar activities and thus coming to court with unclean hands. Because Maleau is engaged in activities which violate the CWA, and do so in a direct and affirmative fashion, it is illogical to hold Bonhomme liable for Maleau's transgressions simply because Maleau's pollutants pass through Bonhomme's culvert. Furthermore, Maleau acts more egregious than the defendants in *Bosma* because the very same conduct which Maleau attempts to prosecute Bonhomme for, is the exact same specific particular conduct which Maleau himself perpetrates. Finally, because of Maleau's financial-political relationship with the Attorney-General of Progress, there is an extension of uncleanliness unto Progress' claim against Bonhomme. This court has taken judicial notice of Progress' acquiescence of Maleau's pollution and subjugation of undocumented immigrant workers, in the misguided effort to insulate a local employer. (R. 6.) The prosecution of Bonhomme not only undermines the goals of the CWA, but is a collusive effort by unclean

hands to fraudulently misappropriate the judicial system to serve selfish desires which are odds with national environmental policy.

Applying the doctrine of unclean hands would not thwart public policy, because the application of the doctrine would limit the present controversy to the righteous claim of Bonhomme against Maleau for violating the CWA. Bonhomme's culvert is no different than the portal in *El Paso*, and to hold him, an indirect discharger, liable for violating the same environmental statute which Bonhomme himself originally initiated against Maleau (who possesses the point sources which discharge the pollutants) is illogical and outright absurd.

CONCLUSION

We respectfully request this court to reverse in part, remand in part, the decision of the District Court. This court should reverse the District Court's dismissal of Bonhomme's claim because he is a proper plaintiff with a legitimate controversy as envisioned under the CWA's citizen suit provision. The District Court erred in finding against Bonhomme's capacity to sue. Bonhomme is the real party interest because he has been injured by Maleau's actions and is under a duty to maintain Ditch C-1. Bonhomme is a "citizen" as defined by the CWA whose use of the legal term of art was not meant to restrict private prosecution of environmental damage or implicate citizenship as a factor in accessing this important right. The District Court also erred in their findings because Maleau's mining waste piles, or in the alternative the eroded channels which extend from them, are "point sources" because they introduce a pollutant from the outside world into a water system which ultimately pollutes navigable waters, threatens local economies, and impacts wildlife. The District Court was correct to find that Reedy Creek is a navigable water because of its geographic and economic qualities, as well as its status as a tributary of Wildman Marsh. However, the District Court erred in its reasoning regarding Ditch C-1 because

it has substantial economic qualities and is also a tributary of both Reedy Creek and Wildman Marsh and is thus a navigable waterway. Maleau's discharge of arsenic in Ditch C-1, Reedy Creek, Wildman Marsh, and thus a navigable water, is a violation of the CWA and the District Court erred in finding that Bonhomme and no other person could be liable under the CWA when he introduced no foreign pollutant and has already undertaken the responsibility of prosecuting Maleau, the liable party in this controversy. Maleau is clearly attempting, albeit incorrectly, to circumvent CWA jurisdiction by trucking his mining waste and dumping them next to Ditch C-1; and Bonhomme is exercising his rights and fulfilling his duties by prosecuting Maleau who threatens the economy and vitality of Progress, New Union, and the Nation. We respectfully request that this court reverse the District Court's granting of Progress' motion to dismiss, as well as reversing the District Court's denial of Bonhomme's motion to dismiss.

Respectfully submitted,

Counsel for Jacques Bonhomme.

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