Team 39

C.A. No. 13-01234

In the United States Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Appellant and Cross-Appellee,

v.

SHIFTY MALEAU,

Appellant and Cross-Appellee,

v.

STATE OF PROGRESS,

Appellant and Cross-Appellee.

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

BRIEF FOR JACQUES BONHOMME
Appellant and Cross-Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Courts of Appeals

United States District Courts

Federal Rules of Civil Procedure

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment in the United States District Court for the District of Progress. The district court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 (2012) *et seq.*, a law of the United States, and federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 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 for the District of Progress. 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Whether a private landowner and regular user of federal wetlands is a real party in interest to bring a citizen suit under the Clean Water Act (CWA) where the discharge of arsenic into waters running through the landowner's property, and flowing into wetlands, adversely affects his interests, regardless of the potential implication of related corporate interests.

II. Whether a foreign national, who privately owns property and operates a business in the U.S., is a "citizen" under the citizen suit provision of the CWA, where his interests as landowner and regular user of a wetland are adversely affected by a discharge of pollution originating upstream from a neighboring landowner.

III. Whether mining waste piles, transported and deposited adjacent to a drainage ditch, constitute a "point source" discharge where rainwater erodes the waste piles and creates a channeling system discharging arsenic into the ditch.

IV. Whether a drainage ditch is a "water of the U.S." under the CWA when it is a tributary that flows directly into a navigable waterway, it contains water for nine to 11 ½ months of the year, and its status as a point source does not disqualify it as such.

V. Whether a creek is a "water of the U.S." under the CWA when it flows across state lines, provides water for an interstate travel center, is used for irrigation of crops sold in interstate commerce, and flows into a wetland supporting interstate and foreign recreators.

VI. Whether a landowner who neither causes nor controls the addition of pollutants is liable for a point source discharge into a navigable water when the discharging culvert is located on his property.

STATEMENT OF THE CASE

The plaintiff-appellant, Jacques Bonhomme, brought a citizen suit in the District Court of the State of Progress against defendant-appellee, Shifty Maleau, for the discharge of arsenic into a navigable waterway without a permit, a violation of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. §§1251-1387 (2012). (R. at 4.) Bonhomme alleged that overburden piles from Maleau's mining operations create a point source that discharges arsenic into a navigable waterway. (R. at 5.) The State of Progress intervened on behalf of its citizens and defendant-appellee alleging Bonhomme was in violation of the CWA for the discharge of arsenic from Maleau's overburden into Reedy Creek byway of a culvert on Bonhomme's property. (R. at 5.) Maleau intervened as a matter of right in Progress's action and the cases were consolidated. (R. at 5.)

Defendants in each action filed motions to dismiss and on July 23, 2012 the District Court entered an order for summary judgment in favor of Maleau. (R. at 10.) The court held that: (1) Bonhomme is not the real party in interest; (2) Bonhomme does not qualify as a citizen under the CWA; (3) Maleau's mining overburden piles are not point sources under the CWA; (4) Ditch C-1 is not a navigable water under the CWA; (5) Reedy Creek is a navigable water under the CWA; and (6) Bonhomme is liable for the point source discharge into Reedy Creek. (R. at 2-3.)

All parties filed a Notice of Appeal. (R. at 1.) Bonhomme appeals from the district court's holding and argues: he is a real party in interest; he is a "citizen" for purposes of the citizen suit provision of the CWA; Maleau's overburden piles are point sources; and Ditch C-1 is a navigable waterway. (R. at 2-3.) Maleau appeals from the district court's holding that Reedy Creek is a navigable waterway. (R. at 2.) The State of Progress appeals from the district court's holding that Ditch C-1 is not navigable. (R. at 2.)

STATEMENT OF THE FACTS

The CWA was enacted to protect and maintain the integrity of waters of the United States. 33 U.S.C. § 1311. The Act allows citizens to bring suit against a polluter in order to carry out the purpose of the Act. Bonhomme brings suit because his interests are adversely affected by Maleau's unpermitted discharge of arsenic into Ditch C-1. 33 U.S.C. § 1365.

Shifty Maleau owns a gold mining operation ("Operation") in the State of Progress. (R. at 5.) The Operation sits on the banks of the Buena Vista River, a traditionally navigable waterway. (R. at 5.) The extraction process produces overburden and slag composed of arsenic-contaminated soil. (R. at 5.) Maleau trucks the overburden to his personal property in Jefferson County, Progress. (R. at 5.) The piles are placed so that during precipitation events, channels form between them. (R. at 5.) Rainwater runoff erodes the piles, carrying arsenic into Ditch C-1. (R. at 5.) Ditch C-1 contains running water for nine to 11 ½ months of the year. (R. at 5.) It flows through several agricultural properties, including Bonhomme's, and discharges into Reedy Creek through a culvert located on his property. (R. at 5.) Restrictive covenants in Maleau and Bonhomme's deeds require the maintenance of Ditch C-1. (R. at 5.)

Reedy Creek is a 50-mile long waterway beginning in the State of New Union, flowing through the State of Progress and ending in Wildman Marsh. (R. at 5.) Its water is used to supply Bounty Plaza, a service area on Interstate 250 (I-250), which provides supplies for interstate travelers. (R. at 5.) Additionally, farmers in both New Union and Progress divert water from Reedy Creek to irrigate agricultural fields whose resulting products are sold in interstate commerce. (R. at 5.) Wildman Marsh is an extensive wetland located within Wildman National Wildlife Refuge, maintained by the United States Fish and Wildlife Service (USFWS). (R. at 6.) It provides essential migratory habitat for millions of ducks and waterfowl throughout the year.

(R. at 6.) The area is a major destination attracting interstate and international duck hunters, generating over $25 million for the local economy. (R. at 6.)

Bonhomme, a French national, owns a lodge that fronts the marsh and is primarily used for hunting activities. (R. at 6.) His hunting parties, composed of friends, family, and business associates related to Precious Metals International (PMI) have been affected by the presence of arsenic in the marsh, reducing them from eight to two a year. (R. at 6.) Bonhomme is the president and 3% shareholder of PMI, which is headquartered in New York, incorporated in Delaware, and owns five gold mining operations, two of which are located in the U.S. (R. at 6, 7.)

Bonhomme believes the arsenic from Maleau's piles fouls the waters of Ditch C-1, Reedy Creek, and Wildman Marsh. (R. at 6.) With the financial assistance of PMI, Bonhomme tested those waters for the presence of arsenic. In Ditch C-1, arsenic is undetectable in the water upstream of Maleau's property but detectable in high concentrations directly below, with arsenic concentrations decreasing in proportion to the increase of water in the Ditch as it travels downstream. (R. at 6.) In Reedy Creek, above the discharge from Ditch C-1, arsenic is undetectable. Below the discharge of Ditch C-1, arsenic is present in the creek in high concentrations. (R. at 6.) Arsenic is also detectable in low levels throughout Wildman Marsh. (R. at 6.) USFWS has detected arsenic in three Blue-winged Teal in the marsh. (R. at 6.) At this stage in the proceedings, it is assumed to be true that the arsenic originates from Maleau's overburden piles. (R. at 6.) Maleau does not contest this allegation, but instead suggested that the decrease in Bonhomme's hunting parties are due to the declining economy rather than an increase in arsenic in Wildman Marsh.

STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. Summary judgment is appropriate where "there is no genuine issues as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Therefore, the issues before this court are questions of law and should be reviewed *de novo. Pierce v. Underwood*, 487 U.S. 552, 557 (1988). Accordingly, this court should afford no deference to the opinions and conclusions of the lower court. *Id*.

SUMMARY OF THE ARGUMENT

1. The Federal Rules of Civil Procedure provide that an action must be brought in the name of a real party in interest. Fed. R. Civ. P. 17(a). The rule provides that a plaintiff, authorized to bring a cause of action by statute, is a real party in interest. *Id*. The shareholder standing rule places an equitable restriction on the real party in interest determination. The rule prohibits "shareholders from initiating actions to enforce the rights of the corporation." *Franchise Tax Board of California v. Alacan Aluminium Ltd.,* 493 U.S. 331, 336 (1990). However, there is an exception to this general rule whereby, a shareholder may maintain a suit even if the rights of the corporation are implicated, provided the shareholder's rights are also implicated separate from their status as shareholder. Here, Bonhomme is authorized to bring a citizen suit under the CWA in his individual capacity because his interests as a landowner and regular user of Wildman Marsh are adversely affected by Maleau's discharge of arsenic into Ditch C-1. The shareholder standing rule does not apply to this case because the rights of PMI are not implicated. However, if this Court finds that the rights of PMI are implicated, Bonhomme falls within the exception to the rule because his individual rights are implicated separate from his status as 3% shareholder.

2. The citizen suit provision of the CWA allows, "any citizen [to] commence a civil action on his own behalf" against another person who violates the Act. 33 U.S.C. § 1365. The purpose

of the provision is to ensure enforcement of the Act. The provision defines "citizen" as, "any person with an interest which is or may be adversely affected" by a violation. 33 U.S.C. § 1365(g). Arsenic, a toxic pollutant, flowing through Ditch C-1 on Bonhomme's private property adversely affects his interest as landowner, and the presence of arsenic in Wildman Marsh adversely affects his interests as a regular user of the area. Under this definition, Bonhomme is a "citizen" and may bring suit in his individual capacity. To find otherwise merely because Bonhomme is a French National, would be counter to the policy of the provision.

3. The CWA prohibits the discharge of a pollutant from a point source into waters of the U.S. 33 U.S.C. § 1311(a). The CWA defines point source as: "Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container." 33 U.S.C.A. § 1362(14). The definition is to be broadly interpreted in order to regulate identifiable sources of contamination. *Cordiano v. Metacon Gun Club*, *Inc*., 575 F.3d 199, 220-221 (2d Cir. 2009). Overburden from coal mine operations have been held as a point source when miners initially collect the materials and the piles create channels of water which discharge pollutants into nearby water. *Sierra Club v. Abston Cons. Co*., *Inc*., 620 F.2d 41 (5th Cir. 1980). The arsenic-laden overburden trucked from Maleau's mining operation and placed into piles on his personal property constitute a point source. Rain water flowing over Maleau's piles cause water channels to form between the piles, resulting in a discharge of arsenic into Ditch C-1 and Reedy Creek. Therefore, the lower court's decision should be reversed to hold Maleau's piles constitute a point source.

4. The CWA prohibits the discharge of pollutants into "navigable waters" 33 U.S.C. § 1311(a). The term "navigable waters" is broadly defined as "waters of the United States" under the CWA. 33 U.S.C. § 1362(7). By this broad definition, Congress intended to regulate non-navigable waters to protect navigable waters that they will eventually reach. *U.S. v. Deaton*, 332

F.3d 698, 707 (4th Cir. 1997). Ditch C-1 is a tributary of a navigable water and its regulation is necessary to protect Reedy Creek. Additionally, Ditch C-1 qualifies as a water of the U.S. under either test established by the U.S. Supreme Court in *Rapanos v. U.S.*, 547 U.S. 715 (2007). Ditch C-1 qualifies under Justice Scalia's tests as a "relatively permanent" body of water because it contains water more often than not. Ditch C-1 qualifies under Justice Kennedy's "significant nexus" test because it flows directly into a navigable water. Should this Court determine that Ditch C-1 is a point source, its status as such does not exclude it from also being a navigable water.

5. The CWA has authority over all interstate waters and all waters that contribute to interstate commerce. 40 C.F.R. 122.2 (2013). Additionally, the CWA has authority over waters that are used by interstate or foreign travelers for recreating. *Id*., *U.S. v. Byrd*, 609 F.2d 1204 (7th Cir. 1979). Reedy Creek flows across state lines and is therefore subject to CWA regulations. In addition, Reedy Creek is the water source for agricultural irrigation with resulting products sold in interstate commerce and is also the water source for interstate travelers. Moreover, Reedy Creek is a tributary of Wildman Marsh, a major destination for interstate and foreign travelers. Thus, the lower court properly ruled that Reedy Creek is a navigable water.

6. Civil liability for a CWA violation is generally held to a strict standard. *Kelly v. U.S. E.P.A*., 203 F.3d 519 (7th Cir. 2000). The purpose of imposing civil penalties is to punish culpable individuals and deter future violations. *Id.* at 523. Bonhomme is not the culpable party in this case and therefore should not be liable for the discharge of a pollutant. Maleau's mining waste discharges arsenic into Ditch C-1 which ultimately flows through a culvert lying on Bonhomme's property. Maleau should not escape liability because Bonhomme's culvert discharges the mining waste contaminants, "the fact that the defendant may discharge through conveyances owned by another party does not remove him from the scope of this Act." *U.S. v.*

Velsicol Chemical Corp., 438 F.Supp. 945 (W.D. Tenn. 1976). To impose liability on Bonhomme for the discharge of Maleau's mining waste would not deter future violations nor would it hold the offending violator liable for the discharge of a pollutant. Therefore, the lower court's decision finding Bonhomme in violation of the CWA for a point source discharge should be reversed.

ARGUMENT

I. Bonhomme is the real party in interest because he has direct and personal interests which are adversely affected by Maleau's discharge of arsenic, he is authorized by statute to bring suit in his individual capacity, and being a shareholder of PMI does not preclude him from bringing suit.

The judicial interpretation and application of Rule 17(a) of the Federal Rules of Civil Procedure (FRCP) does not support the lower court's dismissal on these grounds. The FRCP provides that an action must be prosecuted in the name of a real party in interest. Fed. R. Civ. P. 17(a). Generally, the substantive law which creates the right being sued upon determines the real party in interest. *Martin v. Morgan Drive Away, Inc*., 665 F.2d 598, 604 (5th Cir. 1982). Where an issue involves the interpretation and applicability of a federal statute, or where there is a significant federal interest in uniformity, federal law governs who has the substantive right. *U.S. for Use and Benefit of Allen Const. v. Corp. of Verrier*, 179 F. Supp. 336, 340 (D. Me. 1959). Bonhomme is bringing this action to enforce his own personal rights as a private property owner and as a regular user of Wildman Marsh. He is authorized to bring suit in his individual capacity against Maleau under the citizen suit provision of the CWA. 33 U.S.C. 1365.

A. Bonhomme is the real party in interest because he has a direct, personal interest in abating the arsenic that flows across his private property, and his use and enjoyment of Wildman Marsh has been adversely affected as a direct result of arsenic in the water.

The FRCP provides that a party authorized by statute to bring a cause of action is a real party in interest. Fed. R. Civ. P. 17. The primary function of Rule 17 is to enable defendants to

assert defenses against a real party in interest. This protects from the cost of subsequent litigation on the same matter, and ensures the judgment will have the proper *res judicata* effect. *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp*., 485 F.2d 78, 83 (4th Cir. 1973). "The meaning and object of the real party in interest principle . . . is that the action must be brought by a person who possessed the right to enforce the claim and who has a significant interest in the litigation." *Id*. The citizen suit provision of the CWA requires only that the person bringing the claim has an adversely affected interest. 33 U.S.C. 1365(g). Bonhomme has a significant interest as a private property owner and regular user of Wildman Marsh in abating the arsenic that flows across his property through Ditch C-1. "Environmental plaintiffs adequately allege [injury] when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged the activity." *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). Bonhomme's interests are adversely affected due to Maleau's discharge into Ditch C-1 and meet the requirement to bring suit under the citizen suit provision.

Here, Ditch C-1 flows through Bonhomme's personal property and PMI has no stake or interest in the title to the property. This is adequate to show Bonhomme's interest in his individual capacity as a private landowner. The facts show that Bonhomme fears using Wildman Marsh for hunting parties due to the presence of arsenic and the potential effects on wildlife including levels of arsenic found in three Blue-winged Teal tested by USFWS. Further, the standard for environmental plaintiffs set out in *Sierra Club* does not require that Bonhomme lives on the property full time to assert an adversely affected interest due to the presence of toxic pollutants in waters running through the property. Bonhomme is a private property owner and a frequent user of Wildman Marsh. Thus, he is the real party in interest in this suit.

Maleau argues that PMI is the real party in interest because PMI paid for the testing of Ditch C-1, Reedy Creek, and Wildman Marsh, and the corporation is paying attorney and expert

fees for this litigation. However, the real party in interest analysis does not require an inquiry into who bears the financial burden of litigation. This question is most commonly addressed in insurance cases whereby a defendant alleges the insurance company is the real party in interest because it has agreed to pay the costs of litigation. In *Armour Pharmaceuticals Co. v. Home Ins. Co.*, 60 F.R.D. 592 (N.D. Ill. 1973) the defendant claimed that the insurer, rather than the insured, was the real party in interest because the insurer had agreed to pay the court expenses and attorney fees. The court highlighted that the parties in this case had not wholly or partially subrogated and there was no absolute duty on the part of the insurance company to pay. *Armour Pharmaceuticals*, 60 F.R.D. at 594. The court held, "the mere fact that court expenses and attorney's fees are paid by [an entity] does not make [that entity] a real party in interest. *Id*. Here, there is no indication that PMI has provided Bonhomme with an absolute guarantee of payment, and there is no absolute duty on the part of PMI to pay for the costs and attorney fees of the litigation. Thus, PMI is not the real party in interest and these facts do not preclude Bonhomme from being a real party in interest.

Maleau further alleges that Bonhomme's lodge is used primarily for hunting parties composed of clients and associates of PMI, thus the corporation rather than Bonhomme has suffered the injury and will receive the benefit of recovery. However, it has been established that the determination of the real party in interest is not governed necessarily by the "person who will ultimately benefit from the recovery." *Best v. Kelly*, 39 F.3d 328, 329 (D.C. Cir. 1994) *citing* Charles Alan Wright et al, Federal Practice and Procedure Volume 6A § 1543 (3d ed.) (West 2013). This general rule assumes that "joinder of those beneficially interested in the action is not otherwise required" in accordance with Fed. R. Civ P. 19. *Id*. Required joinder is not at issue here. Thus, the mere fact that PMI may incidentally benefit from the litigation does not make it the real party in interest.

Finally, the CWA requires that the violation be ongoing in order to maintain a suit. *Gwaltney of Smithfield, Ltd. V. Chesapeake Bay Foundation, Inc*., 484 U.S. 49 (1987). If Bonhomme prevails in this action, the ongoing CWA violation would cease and there would be no subsequent opportunity for, or risk of, duplicative litigation on this matter. Allowing Bonhomme to maintain this suit is in accordance with the policy behind Rule 17 because there is no risk of duplicative litigation if Bonhomme prevails and the judgment would have the proper *res judicata* effect. Bonhomme has a significant personal interest in enforcing the CWA provisions as a landowner and regular user of Wildman Marsh and thus he is a real party in interest.

B. Bonhomme's personal interest is adequate to overcome limitations set by the shareholder standing rule because the cause of action is brought to enforce his individual rights, not the rights of the corporation.

The shareholder standing rule limitation does not apply to Bonhomme under these facts. However, if this Court finds that it does, Bonhomme meets the exception to the general rule and remains the real party in interest. The rule places an equitable restriction on the real party in interest determination by prohibiting "shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgments." *Franchise Tax Board,* 493 U.S. at 336. The plaintiff-shareholder may then seek relief on his own behalf when the plaintiff has been injured other than in his capacity as shareholder. *Rawoof v. Texor Petroleum Co., Inc.,* 521 F.3d 750, 754 (7th Cir. 2008). Here, Bonhomme has been personally injured, and his injury is distinct from that of a shareholder. Regardless of his status as shareholder, Bonhomme is injured in his individual capacity and is the real party in interest because of his status as both a private property owner and regular user of Wildman Marsh. Therefore, only his individual rights are implicated not the rights of the corporation.

Alternatively, if it is found that the rights of the corporation are implicated, Bonhomme fits into the exception to the shareholder standing rule which states that a shareholder who has been directly and personally injured may bring a cause of action, even where the rights of the corporation are implicated. *Franchise Tax Board,* 493 U.S. at 336. Thus, regardless of whether the rights of PMI are implicated in this cause of action, Bonhomme is the real party in interest because of his personal injury and interest in the case, and he is not precluded by the shareholder standing rule to bring suit. For the reasons set forth above, this Court should find that Bonhomme is a real party in interest and is allowed to maintain this suit in his individual capacity against Maleau.

II. The statutory construction and policy of the CWA support finding that Bonhomme is a "citizen" whose interests are adversely affected by Maleau's discharge of arsenic, and Bonhomme is not precluded from bringing suit under the citizen suit provision even though he is a foreign national.

The citizen suit provision of the CWA allows, "any citizen [to] commence a civil action on his own behalf" against another person who violates the Act. 33 U.S.C. § 1365. Congress included the citizen suit provision to assist the Environmental Protection Agency (EPA) in enforcement to achieve the goals the Act. Under the CWA's definition of "citizen," Bonhomme is a person who has "an interest which is or may be adversely affected" by Maleau's unpermitted discharge of arsenic into Ditch C-1. 33 U.S.C. § 1365(g). Arsenic flowing through Ditch C-1 on Bonhomme's privately owned property adversely affects his interest as property owner, and the presence of arsenic in Wildman Marsh adversely affects his interests as a regular user of the area. In accordance with the policy and plain language of the statute, Bonhomme is a "citizen" and may bring suit in his individual capacity. To find otherwise merely because Bonhomme is a French national, would contradict the plain language and policy of the Act and the citizen suit provision.

A. Bonhomme's interest as a private property owner and regular user of Wildman Marsh support the finding that he is a "citizen" under the citizen suit provision in accordance with the plain language of the statute and Congress' intended meaning of the term.

Bonhomme qualifies as a "citizen" for purposes of the CWA because Maleau's unpermitted discharge of arsenic into a navigable waterway adversely affects Bonhomme's interests. Prior to enacting the CWA, Congress engaged in extensive debate regarding the definition and the scope of the word "citizen." As proposed, the provision was modeled after other citizen suit provisions in environmental statutes such as the Clean Air Act (CAA) and the Noise Control Act (NCA). These provisions state, "any person may commence a civil action on his own behalf." 42 U.S.C. §7604 (1990); 42 U.S.C. § 4911 (1988). When Congress proposed the citizen suit provision to the CWA in 1971, the Senate bill adopted this same language. S. 2270, 92d Cong. (1971). However, the House, concerned about frivolous litigation, proposed a more limited definition replacing the word "person" with the word "citizen" and defining "citizen" as a person "from the geographic area and directly affected" by the alleged violation. H.R. 11896, 92d Cong. (1972).

The definition proffered by the House significantly restricted the scope of the provision. The House wanted to ensure an open door only "for those who [had] a legitimate interest in the courts, and encourage more meaningful participation in the legislative process." Staff of H. Comm. on Public Works, 92d Cong., The Federal Water Pollution Control Act Amendments of 1972 (Comm. Print 1972). Congress compromised by maintaining the word "citizen" in the provision, but defining the term as any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Thus, Congress' use of the word "citizen" was aimed at ensuring only those with an interest, or in other words, an injury, would be given a private right to sue under the Act.

It is clear from the legislative history that the phrase "citizen" was "intended by Congress to allow suits by all persons possessing standing under [the U.S. Supreme Court's] decision in *Sierra Club v. Morton*." *Middlesex Cnty. Sewerage Auth. V. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) *citing* S. Conf.Rep. No. 92-1236, p. 146 (1972). The extensive debate and definitional departure from similar citizen suit provisions hinged on whether the plaintiff had standing, not on whether the plaintiff was a citizen of the U.S. It follows that if Bonhomme has standing, then he is a citizen for purposes of the citizen suit provision of the CWA. In accordance with the standing analysis below, Bonhomme does have standing to bring this suit and the district court improperly dismissed his cause of action.

Although constitutional standing is not an issue raised in this appeal, it is not waiveable, and a court may resolve a constitutional standing issue at any point *sua sponte. City of Los Angeles v. County of Kern*, 581 F.3d 841, 845 (9th Cir. 1990). A brief standing analysis must be done to show that Bonhomme meets the requirements under the citizen suit provision. Constitutional standing requires "a case or controversy" and the plaintiff must show an injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact occurs where a plaintiff suffers, "an invasion of a legally protected interest which is concrete and particularized, actual or imminent, not conjectural or hypothetical. *Id*. at 560. Second, the injury must be "fairly traceable to the challenged action of the defendant, and not of the independent action of some third party not before the court. *Id. citing Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). Finally, "it must be likely, as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision*." Id.* Where Congress enacts a statute creating a legal right, as it has done with the CWA, the invasion of that legal right confers standing. *Id.* at 577.

Here, Bonhomme's injury in fact is the adverse effect that Maleau's discharge of arsenic has on his private property interest and his use and enjoyment of Wildman Marsh. In environmental cases, it is enough to allege that the recreational value of an area is lessened by the challenged activity to constitute injury in fact on behalf of the plaintiff. *Morton*, 405 U.S. at 735. The injury is traceable to Maleau's trucking of gold mining overburden to his property along Ditch C-1, and the pattern of pollution is consistent with the allegation that Maleau's piles are the only possible source of arsenic in the waterways. Finally, a judgment in Bonhomme's favor would require that the discharge be permitted and subject to subsequent regulation under the CWA. Thus, Bonhomme has alleged an injury in fact, caused by Maleau's CWA violation, and the violation is redressable by a judgment in Bonhomme's favor.

In addition to constitutional standing, there are prudential standing considerations, none of which are applicable to this case. Bonhomme's constitutional standing is not limited by prudential considerations and because he has Article III standing to bring suit he is a "citizen" under the citizen suit provision of the CWA.

B. Allowing Bonhomme to bring suit under the CWA furthers the policy of the citizens suit provision to ensure the enforcement of, and compliance with, the broader goals of the Act.

To deny Bonhomme, a private property owner and regular user of Wildman Marsh, the right to bring suit under the citizen suit provision of the CWA would conflict with the broad policy and purpose of the Act. The primary purpose 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 CWA was enacted with the "goal of maintaining and improving water quality" as a means for preserving the natural function and structure of ecosystems. *U.S. v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 132 (1985). In furtherance of these goals, Congress made the discharge of any pollutant into navigable waters unlawful except as authorized by the Act. 33 U.S.C. §

1311(a). To assist the EPA in the enforcement of the Act, Congress incorporated a citizen suit provision. Citizen suits are "a very important tool for keeping industry and Government alike from letting standards and enforcement slip." Staff of H. Comm. on Public Works, 92d Cong., The Federal Water Pollution Control Act Amendments of 1972 (Comm. Print 1972). It would be counter to the primary goal of the CWA to deny an individual the right to sue where their personal interests were adversely affected by a violation.

Allowing Bonhomme to bring suit under the CWA furthers the goals of the Act by allowing an individual with a direct interest to assist the EPA in the enforcement of their own statutes. "Congress' intent in enacting this chapter was to establish an all-encompassing program of water pollution and regulation." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981). If Congress' primary concern is to eliminate pollution in waters of the U.S., and the citizen suit provision was enacted in furtherance of this goal, it logically follows that Bonhomme should be able to maintain a suit against Maleau, regardless of whether Bonhomme is a U.S. citizen or not. Bonhomme owns property within the U.S. and his use of that property is affected by Maleau's discharge of arsenic. In accordance with the law and policy, Bonhomme should be allowed to bring suit, especially where it furthers the protection of waters of the U.S. Thus, Bonhomme's classification as a French national should not affect his ability to utilize the citizen suit provision under the CWA and the lower court's decision should be reversed.

III. Overburden and slag trucked from Maleau's gold-mining operation and deposited on his personal property adjacent to a tributary of a navigable waterway constitute a point source leaching arsenic into waters of the U.S.

The CWA prohibits the discharge of a pollutant, from a point source, into the waters of the United States. The Act defines point source as:

> Any discernible, confined and discrete conveyance, including but not limited *to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

33 U.S.C. § 1362(14). The statute lists possible point sources but does not limit the definition only to those listed. Because pollutants are often difficult to ascribe to a single polluter, the point source element limits liability to those responsible for actual pollution discharge. The point source definition is to be broadly interpreted; the CWA requires "those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste." *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

Maleau's mining waste piles are a discernible and discrete conveyance of pollution. The soil and rock contaminated with arsenic is purposely removed from his place of business which sits next to a traditionally navigable water, the Buena Vista River. Maleau transports the overburden to his private land and deposits the contaminated material into piles. The mounds of overburden result in a stormwater channeling system discharging arsenic into Ditch C-1 and ultimately Reedy Creek. The discharge affects surrounding private properties, and Wildman Marsh. The lower court's decision should be reversed to hold Maleau's mining waste piles as a point source.

A. Maleau is liable for the discharge of a pollutant from a point source because the overburden deposited into piles on his personal property leach arsenic into a navigable water.

Water pollution comes from a variety of sources. Most parts of the economy—manufacturing, mining, construction, municipalities—generate and discharge processed wastewater and stormwater. *The Clean Water Act Handbook* 1, (Mark A. Ryan ed., 3d ed., ABA 2011). Passing the CWA in 1972, Congress intended to limit contamination of the Nation's water by proscribing the discharge of pollutants. Unless permit requirements are met, the law imposes liability for those discharging pollutants into the waters of the U.S. from a point source. 33 U.S.C § 1311. The point source element narrows the scope to those violations which are discernible, discrete, and confined rather than dispersed and untraceable.

The term point source is defined in the Act as: "any discernible, confined and discrete conveyance [of a pollutant]" . . . including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container . . . from which pollutants are or may be discharged." However, "agricultural storm water discharges and return flows from irrigated agriculture" are excluded. 33 U.S.C.A. § 1362(14). Congress allowed an exemption for farmers and agricultural production to lessen the burden of regulatory compliance for the Nation's farmers and ranchers. Andrew Hanson & David Bender, *Irrigation Return Flow or Discrete Discharge? Why Water Pollution From Cranberry Bogs Should Fall Within The Clean Water Act's NPDES Program*, 37 Envtl. L. 339, 352 (2007). Here, the point source discharge results from mining overburden, not from agricultural discharge or irrigation. Therefore, the agricultural exemption does not apply.

The EPA promulgates regulations to aid in the definition of a point source discharge. The definition specifies that the addition of pollutants into waters of the U.S. from surface runoff, which is collected or channeled by man, is a point source, and further excludes any "indirect discharger." 40 C.F.R. § 122.2.

Courts interpret the point source element broadly, yet are careful not "to read the point source element requirement out of the statute." *Cordiano v. Metacon Gun Club*, *Inc*., 575 F.3d 199, 222 (2d Cir. 2009). In *Cordiano*, the court refused to find a point source discharge where a berm on the site of a shooting range was assumed to cause lead to migrate into nearby waters. The plaintiff failed to show that surface water runoff from the berm was collected and channeled which caused contaminants to leach into nearby waters. *Cordiano*, 575 F.3d at 223. The court clarified that its holding did not disqualify a berm as a point source. However, where surface water runoff was not initially collected and channeled, and no evidence of actual leaching occurred, the element of a point source discharge is not satisfied. *Cordiano*, 575 F.3d at 224.

Cordiano was decided after *Sierra Club v. Abston*, a leading case in defining point source discharge.

Whether a point source existed was the main dispute in *Abston,* Defendants were a group of coalmine corporations who used similar strip-mining techniques resulting in large piles of overburden. During rain events, the piles eroded depositing silt and acid into a nearby creek. Sediment basins were constructed to catch runoff and would occasionally overflow causing the pollutants to discharge into the creek. The mining corporations argued that because natural events caused the discharge into navigable waters, they were not liable. *Abston*, 620 F.2d at 44. The court disagreed, recognizing a point source can be present when gravity flow over piles of excess mining material results in a discharge into a navigable body of water, if the miner initially collected or channeled the water and other materials. *Abston*, 620 F.2d at 45. Even if the miners do nothing but collect the rock and soil into piles, a point source is present when those piles erode and discharge into navigable water. The pile construction becomes the conveyance of a pollutant.

Maleau's mining waste piles replicate those in *Abston*. Both cases involve mining operations which deposit overburden into piles. In each case, the overburden contains contaminants which reach a navigable waterway after channeling through a series of intersections from pile placement. The evidence here shows that Maleau's mining waste piles directly cause the arsenic contamination in Ditch C-1 and Reedy Creek. Moreover, Maleau's mining piles actually leach contaminants into nearby waters; where the plaintiff's in *Cordiano* could not show lead actually migrated into nearby water.

Further, piles of overburden and the resulting discharge are easy to ascertain to their owner. The discharge is not from diffuse runoff, untraceable to its source. Maleau trucks the overburden and slag to his personal property where mine workers construct the piles. The piles

are confined to his property and precipitation events cause the contaminants to leach into Ditch C-1 and ultimately Reedy Creek and Wildman Marsh. Therefore, Maleau's mining waste piles constitute a point source and require a CWA permit.

B. To hold the purposeful collection and relocation of contaminated materials, which result in a discharge of pollutants into waters of the U.S., as a non-point source would contradict the purpose of the CWA and the judicial interpretation of point source.

Maleau and Progress rely on the argument that unchanneled and uncollected surface waters are not included in the point source definition and therefore rainwater runoff cannot constitute a discharge from a point source. *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249-250, (4th Cir. 1979). However, this issue was addressed in *Abston*, and the court responded by stating, "even if the miners have done nothing beyond the mere collection of rock and other materials," a point source can be present when those materials erode during precipitation and discharge into a navigable body of water. 620 F.2d at 45. Congress intended to exclude diffuse runoff from the definition of a point source in their omission of unchanneled and uncollected surface water. They did not intend to release mining operations from liability for the discharge of contaminants.

Abston represents a correct ruling of law defining point source. It holds accountable those who financially benefit from natural resource development by requiring responsible waste management. Maleau operates a mining business which generates economic profit; he should be required to comply with the CWA.

Maleau attempts to distinguish his piles of overburden from the listed examples in the point source definition. It is true that piles of stone and dirt do not constitute a pipe, tunnel, conduit, or well, but the meaning of point source is not this narrow and history supports this view. Maleau's gold-mining operation is positioned near a traditionally navigable river known as the Buena Vista. If the overburden was left at the mining site, these materials would erode and

cause contaminants to reach the Buena Vista River. Instead, Maleau trucks the material 50 miles away to his personal property where the nearest flowing water is a drainage ditch.

The mining waste trucked to Maleau's personal property cause arsenic to reach Ditch C-1, Reedy Creek, and ultimately the Wildman Marsh. This contamination poisons drinking water, water used for agriculture, and exposes wildlife to arsenic from the wetland. The lower court decided not to hold Maleau's waste piles as a point source because a "pile of dirt and stone" do not resemble the examples listed in the statute. This interpretation is not consistent with point source interpretation and their decision should be reversed to find Maleau's mining waste piles as a point source.

IV. Ditch C-1 is a navigable waterway because it conveys a pollutant and is a tributary of Reedy Creek, a navigable waterway, and is not excluded as being navigable even if it is a point source.

The judgment below is not in concurrence with the CWA and its regulations. The objective of the CWA is "to restore and maintain . . . the integrity of the Nation's waters". 33 U.S.C. § 1251. CWA regulations recognize that a body of water is subject to regulation under the CWA if it is a tributary of a navigable water. 40. C.F.R. 122.2. Here, Ditch C-1 is subject to jurisdiction under the CWA because of its significant nexus to a navigable water. First, Ditch C-1 is a tributary of Reedy Creek, a navigable waterway and meets both tests proffered by the U.S. Supreme Court Justices Scalia and Kennedy in *Rapanos*. Second, if a body of water is considered a point source, it does not exclude it from being a navigable waterway. Lastly, even if Ditch C-1 is not considered navigable, it conveys pollutants from a point source into a navigable waterway and should be regulated to further the CWA's objective. Ditch C-1 is subject to regulation under the CWA and the court below erred in granting Maleau's motion to dismiss.

A. Ditch C-1 is a navigable waterway because it is a tributary of Reedy Creek, a navigable waterway and qualifies as such under either test promulgated in *Rapanos* because it is a relatively permanent body of water and has a significant nexus to Reedy Creek.

The CWA prohibits the "discharge of any pollutant" into navigable waters. 33 U.S.C. § 1311(a). Thus, water that is deemed "navigable" is subject to the jurisdiction of the CWA. The term "navigable waters" is defined under the CWA as "water of the United States." 33 U.S.C. § 1362(7). The EPA and The Corps of Engineers (COE) share responsibility for the implementation and enforcement of the CWA. Both agencies have defined "waters of the U.S." in substantially equivalent terms as waters that "may be susceptible to use in interstate or foreign commerce" and the tributaries to those waters. 33 C.F.R. § 328(a) (2013); 40 C.F.R. § 122.2. Maleau alleges that Ditch C-1 is not subject to regulation under the CWA because it is not navigable under the traditional definition of the word. However, regulation under the CWA extends beyond traditionally navigable waters to waters that effect interstate commerce and their tributaries. *Id.*

Prior to the enactment of the CWA, "navigable waters" were only those waters that were "navigable in fact", meaning the water could be used as an interstate highway for commerce. *Rapanos,* 547 U.S. at 732*,* citing *The Daniel Ball,* 77 U.S. 557, 563 (1871). Since, the United States Supreme Court has repeatedly recognized that broadly defining "navigable water" as "waters of the U.S.", Congress intended to expand its powers under the commerce clause and regulate more waters than were traditionally deemed "navigable." *Riverside Bayview Homes,* 474 U.S. at 133. This is evidenced by Representative Dingell's discussion of the bill: "[navigable waters] means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." 118 Cong. Rec. 9124–9125 (daily ed. Oct 4, 1972) (remarks of Rep. Dingell).

This broad definition allows for regulation of all waters not navigable in the traditional sense in order to protect the navigable waterway that it will eventually reach. *Deaton*, 332 F.3d at 707, *U. S. v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1325 (6th Cir. 1974) (stating "we believe Congress knew exactly what it was doing and that it intended the Federal Water Pollution Control Act to apply, as Congressman Dingell put it, 'to all water bodies, including main streams and their tributaries.'"). The regulation of non-navigable waterways is necessary when regulation is needed to protect a navigable waterway. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 526 (1941). Although Ditch C-1 is not navigable in the traditional sense, it is a tributary of Reedy Creek, a navigable waterway as set forth below and its regulation is necessary to protect it.

Maleau cites *Rapanos* to argue the contrary. *Rapanos'* lack of majority opinion makes it difficult to discern an applicable standard to determine the navigability of water. Justice Scalia's plurality and Justice Kennedy's concurrence each determined a different test for navigability. A number of federal appellate courts have addressed which jurisdictional test applies. Many have determined jurisdiction is established where Justice Kennedy's test is met. *See N. California River Watch v. City of Healdsburg;* 496 F.3d 993, 995 (9th Cir. 2007); *U.S. v. Gerke,* 464 F.3d 723 (7th Cir. 2006); *U.S. v. Bailey,* 571 F.3d 791 (8th Cir. 2009); U.S. *v. Robison,* 521 F.3d 1319 (11th Cir. 2008); *U.S. v. Johnson,* 467 F.3d 56 (1st Cir. 2006). Many courts have found that jurisdiction may be established by either test. *See U.S. v. Bailey,* 571 F.3d 791 (8th Cir. 2009); *U.S. v. Johnson,* 467 F.3d 56 (1st Cir. 2006).

Here, we need not determine which test applies because Ditch C-1 meets the jurisdictional requirements of both. Under Scalia's test, waters of the U.S. are defined as "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams. . . rivers, [and] lakes.' *Rapanos*, 547

U.S. at 739. The Court notes that this includes waters that are at least "*relatively* continuous" flowing bodies of water. *Id* at 736, n.7 (emphasis added). Ditch C-1 meets this criterion.

Ditch C-1 is a relatively continuous flowing body of water that forms a channel through agricultural properties. In *Rapanos,* Justice Scalia listed types of waters that he would have held outside the regulation of the CWA, including intermittent flow of surface water through natural streams and manmade ditches; a roadside ditch; irrigation ditches and drains. *Id.* at 727. The waters in this list all have one thing in common: they rarely contain water. The record states that Ditch C-1 flows the majority of the year except during periods of drought lasting several weeks to three months. Conversely, this indicates that the ditch *usually* contains water, flowing for nine to 11½ months per year. While the plurality specifically states that "ditches" would not qualify as navigable waters, Scalia notes that "ditches" holding water permanently are usually called "streams or canals." *Rapanos,* 574 U.S. at 736 n. 7. This qualifies Ditch C-1 as a relatively permanent body of water and its name "Ditch C-1"does not automatically disqualify it as a navigable waterway.

Justice Kennedy took a broader view and wrote that the applicable test is the "significant nexus" test as set forth in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) ("*SWANCC*"). *Rapanos,* 547 U.S. at *759.* Under this test, in order for a water to be navigable, the "water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id*. This nexus may be applied to tributaries and navigable water. *Deaton,* 332 F.3d at 707. In *Deaton*, the court determined that a nexus between navigable waters and their tributaries is sufficient to allow regulation of a whole tributary of a navigable waterway. There, the court held that a roadside ditch eventually connecting to a navigable river was subject to CWA regulation. *Id.* Finding that, in light of Congress's concern for the protection of water quality, the discharges into non-

navigable tributaries have a substantial effect on water quality in navigable waterways. *Id.* Moreover, the Supreme Court held that non-navigable waters actually abutting a navigable waterway are regulated under the CWA. *SWANCC,* 531 U.S. at 167.

Here, Ditch C-1 has a direct connection to a navigable waterway as it flows directly into Reedy Creek. Water flowing from Ditch C-1 into Reedy Creek has the ability to change its water quality. The arsenic in the water from Ditch C-1 is now present in Reedy Creek and Wildman Marsh. Thus, Ditch C-1 has substantial impact on Reedy Creek. Ditch C-1 is not a traditionally navigable waterway, but is a tributary to a navigable waterway, has substantial impact on the water quality of a navigable waterway, and actually abuts a navigable waterway. This meets Justice Kennedy's test as there is a significant nexus between Ditch C-1 and Reedy Creek.

B. A body of water may be both a point source and a navigable waterway because neither statutory construction nor judicial interpretation require the two be mutually exclusive.

Citing *Rapanos*, Maleau contends that Ditch C-1 cannot be considered a navigable waterway because the CWA's definition of "point source" includes the word "ditch" in its list of types of "confined and discrete conveyances." However, it does not follow that ditches are precluded from being waters of the U.S. Neither the *Rapanos* plurality nor the statutory language of the CWA establish that "point source" and "navigable waters" are mutually exclusive. *Rapanos* states that it "would make little sense if the two categories *significantly* overlapped." *Id*. at 735. The plurality recognizes that most of the time point sources and navigable waters do not overlap; but it does not specifically hold that they cannot. Therefore, the plurality does not exclude certain point sources from also being a navigable water. Additionally, Justice Scalia stated that ditches can be navigable waters, but under those circumstances are usually referred to by a different name. *Id*. at 736 n. 7.

The CWA does not state that a point source cannot be a navigable waterway. The definition of "navigable water" does not exclude ditches or point sources. In fact, the definition of "point source" includes a list of examples, one of which is "any . . . channel . . . from which pollutants are or may be conveyed." 33 U.S.C. §1362(14). If Maleau's reading is held correct, it would result in an absurd and unwanted precedent. For example, navigable-in-fact shipping channels would not be considered a "water of the U.S." because "channel" is also listed as a type of point source. Further, sections of waters apart of a tributary system of a traditionally navigable river would lose its status as "water of the U.S." for the sole reason that it flows through a ditch or a channel.

Moreover, many federal courts have upheld CWA regulation on ditches, canals, and drains that are smaller with less of an impact on navigable waterways than Ditch C-1. *See* 332 F.3d; *Treacy v. Newdunn Assocs.,* 344 F.3d 407, 417 (4th Cir. 2003) (man-made roadside ditches were tributaries because they flowed into a traditionally navigable waterway); *Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 954-55 (9th Cir. 2002) (joint drain was subject to CWA regulation because it fed water directly and through tributaries into a navigable river); *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 533 (9th Cir. 2001) (irrigation canals diverting water from surface streams are under CWA jurisdiction); *U.S. v. TGR Corp.,* 171 F.3d 762, 765 (2d Cir. 1999) (natural brook that was channeled into underground pipes to accommodate development was subject to CWA regulation). Ditch C-1 is a waterway just as substantial or more so than the waterways previously held to be navigable. In the cases cited above, each court had the opportunity to hold that ditches could not be navigable waters and all declined to do so.

Ditch C-1 is not a point source. However, if this Court determines it is a point source, it may also be categorized as a navigable water. Classifying a body of water as a point source does

not automatically exclude it from having concurrent status as a navigable waterway. Maleau's construction is contrary to the plain language of the CWA and years of appellate court precedent holding ditches, channels and conduits may be waters of the U.S.

C. Even if Ditch C-1 is not a water of the U.S., it should be regulated under the CWA because it conveys a pollutant from a point source into Reedy Creek, a navigable waterway.

Congress has the authority to regulate non-navigable tributaries where there is a significant nexus by which pollution in a non-navigable tributary will degrade navigable waters downstream. *U.S. v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1325–26 (6th Cir.1974). Congress has outlawed the use of navigable waters as dumping grounds for pollutants. 33 U.S.C. §1360 et. Seq. With this, comes the authority to regulate non-navigable waters when necessary to achieve Congressional goals in protecting navigable waters. *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.,* 313 U.S. 508, 525–26 (1941). "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton,* 332 F.3d at 707. Thus, Congress has the authority to regulate discharges into non-navigable tributaries when those tributaries convey pollutants to navigable waters. *Ashland Oil & Transp. Co.,* 504 F.2d at 1326.

Ditch C-1 is a tributary that conveys pollutants into a navigable water, Reedy Creek. Ditch C-1 is moving arsenic, a pollutant, from Maleau's point source to Reedy Creek and degrading the quality of that navigable waterway. Therefore, this Court should hold that Ditch C-1 is a navigable waterway and subject to regulation under the CWA.

V. Reedy Creek is a navigable waterway because it contributes to interstate commerce by providing water to interstate travelers and to agriculture sold in interstate commerce; and it is a tributary to Wildman Marsh.

The summary judgment entered by the court below should be upheld. Reedy Creek is a navigable waterway as defined under the CWA because it is an interstate water. Additionally, its

presence is necessary for interstate commerce because it is the water source for interstate travelers on I-250 and it supplies irrigation for agricultural goods sold in interstate commerce. Further, the CWA maintains jurisdiction over waters used for recreation by interstate or foreign travelers. Here, Wildman Marsh supports interstate recreation and Reedy Creek is a tributary of Wildman Marsh.

A. Reedy Creek is a navigable waterway because it flows across stateliness and provides water directly and indirectly to interstate commerce.

The CWA applies to waters of the U.S. as defined in 40 C.F.R. 122.2. "Waters of the United States means . . . all interstate waters including interstate wetlands." *Id*. The undisputed facts before this Court establish that Reedy Creek originates in the State of New Union and from there, runs east into the State of Progress where it ends in a wetland. Reedy Creek is therefore an interstate water which falls within the definition of "waters of the United States" and is thus a navigable waterway.

Should this Court hold that a water's status as an interstate water is insufficient to establish CWA authority, Reedy Creek is still navigable because it substantially contributes to interstate commerce.

> Waters of the U.S. means. . . all waters such as intrastate lakes, rivers, streams . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters. . . which are used or could be used for industrial purposes by industries in interstate commerce [or] tributaries of waters identified [above].

40 C.F.R. 122.2. The fact that Reedy Creek is not traditionally navigable is inconsequential. Congress's authority to regulate the Nation's waters is grounded in the commerce clause and therefore does not depend on the "navigability" of waters but rather on whether the water may affect interstate commerce. *Kaiser Aetna v. U.S.,* 444 U.S. 164, 174 (1979). Discharges into creeks that may in any way affect interstate commerce should be regulated. *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). The impact the body

of water has on interstate commerce need not be significant. *Id*. at 375. It must merely be shown that there will be "at least some impact to interstate commerce." *Id*. Here, there is no debate that the water from Reedy Creek is used to irrigate agricultural products sold in interstate commerce. In *Earth Sciences*, Rito Seco Creek flowed into a reservoir that was then used for agricultural irrigation and the resulting products sold in interstate commerce. *Id*. at 375. The court there reasoned that Congress intended to regulate discharges made into any body of water that "in any way may affect interstate commerce." *Id*.

Reedy Creek substantially contributes to interstate commerce via agricultural products and via Bounty Plaza. Just as in *Earth Sciences*, the water from Reedy Creek is used for agricultural irrigation and the resulting products are sold in interstate commerce. Further, it is undisputed that Reedy Creek is used as the water source for interstate travelers on an interstate highway. Congress intended the term "navigable waters" to be interpreted in the "broadest possible" sense. This broad intention coupled with the substantial effect Reedy Creek has on interstate commerce is more than enough to show navigability.

The lower court was incorrect in holding that *Earth Sciences* is no longer good law. Although *Earth Sciences* predates *Rapanos,* the plurality in *Rapanos* stated there is no reason its interpretation should significantly affect enforcement of the CWA. *Rapanos* 547 U.S. at 743. Recognizing that "The Act does not forbid the 'addition of any pollutant *directly* to navigable waters' . . . but rather the 'addition of any pollutant *to* navigable waters.'" *Id. citing* 33 U.S.C. § 1262(12)(A). *Rapanos* does not overrule *Earth Sciences* but supports it, and because Reedy Creek is an interstate water and contributes to interstate commerce, this Court should hold Reedy Creek as a navigable water.

B. Reedy Creek is a tributary of Wildman Marsh, which is a water of the United States because it supports interstate and international recreation.

The CWA has authority over waters that are or could be used by interstate or foreign travelers for recreational or other purposes. 40 C.F.R. 122.2. A body of water used for recreational purposes by interstate and foreign travelers has a significant impact on interstate commerce and is subject to regulations under the CWA. *U.S. v. Byrd*, 609 F.2d 1204 (7th Cir. 1979). When the recreational value of a body of water is dependent on the purity and the abundance of wildlife inhabiting it, the pollution of it would deter interstate travelers from using it, thus affecting interstate commerce. *Id*. at 1210. The CWA has authority over waters that provide interstate and foreign recreationalist with the opportunity to hunt, observe and appreciate a variety of birds and animal life. *Utah v. Marsh,* 740 F.2d 799 (10th Cir.1984).

In *Byrd*, the court not only held the CWA had jurisdiction over a lake used for interstate recreation, but extended jurisdiction to adjacent wetlands. The court reasoned that the destruction of the wetlands would "degrade the quality of the lake . . . [and] could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake, thereby indirectly affecting the flow of interstate commerce." *Byrd,* 609 F.2d at 1210. In *Marsh*, Utah Lake was held to be a navigable water because the water was used to irrigate crops sold in interstate commerce. The lake provided interstate travelers with the opportunity to swim, hunt, fish, and observe birds and wildlife and nonresident visitation to the lake contributed to 2% of the total visitation over a 13-year period. *Id* at 804.

Here, Wildman Marsh is an essential stop over to millions of migratory birds during their migrations. The recreational value the wetland provides is dependent on its purity and ability to support these ducks and other waterfowl. Just as the court reasoned in *Byrd*, if Wildman Marsh continues to be polluted, its ability to support ducks and waterfowl will decline and so will its attraction to interstate and foreign hunters, therefore affecting interstate commerce. Reedy Creek

and its connection to Wildman Marsh is analogous to the situation in *Byrd*. The creek's ability to degrade the water quality of the marsh will significantly impair its attraction to interstate and foreign hunters thereby affecting interstate commerce. Additionally, a decrease in interstate and foreign hunters will further hinder the already declining local economy. The marsh is a major hunting destination for interstate and foreign hunters and contributes over $25 million dollars to the local economy, which exceeds the contribution recognized in *Marsh*. Thus, Reedy Creek should be held navigable because it affects interstate commerce.

VI. Bonhomme, a private property owner required by deed to maintain Ditch C-1, is not liable under the CWA for a point source discharge he did not cause, even when the culvert discharging pollutants from the drainage ditch into a navigable waterway lies on his property.

Bonhomme is not in violation of the CWA, therefore he is not liable for the discharge of Maleau's mining waste contamination into Reedy Creek even when the pollutant is discharged through a culvert on his property. Civil penalties under the CWA are generally held to strict liability for a point source discharge, but because Bonhomme cannot control the leaching of arsenic into Ditch C-1 from Maleau's waste piles, Bonhomme is not liable. Penalizing Bonhomme would not deter future violations nor punish the culpable actor. Strict liability is applicable to violators who actually cause destruction to water bodies, whether or not they are aware of the requirements under the CWA. Strict liability is an unjust outcome for a landowner whose culvert discharges water contaminated by an upstream landowner. The only just outcome is to enforce liability on the landowner who causes the contamination.

A. Bonhomme is not liable for the discharge of a pollutant because he is not responsible for the discharge of mining waste contaminants into Ditch C-1, and to penalize him would fail to deter future violations.

Liability for point source discharge is generally held as a strict liability offense. *Kelly v. U.S. E.P.A.*, 203 F.3d 519 (7th Cir. 2000). Courts have waived strict liability when it is found the alleged polluter did not actually have any say or control over the discharge. *In Re Carsten*, 211

B.R. 719 (Bankr. D. Mont. 1997). Civil liability under the CWA was held to a strict standard in *Kelly v. U.S. E.P.A.* Kelly argued that he did not knowingly violate the CWA and should not be liable for disturbing swale land on his property. *Kelly*, 203 F.3d at 522. There, the property owner himself acted upon his land in a way that violated the CWA. Kelly was notified by a federal agent to obtain a permit and was later assessed penalties when he failed to do so. The court stated only criminal penalties, not civil penalties, require the element of knowledge or negligence, therefore holding violators under the CWA to a strict liability standard. *Id*. The court reasoned the purpose of imposing civil penalties is to punish culpable individuals and deter future violations. *Kelly*, 203 F.3d at 523.

The *Kelly* court looked to the enforcement statute in the Act when deciding the amount of penalties to assess. Section 1319 states the court shall consider certain factors such as the nature, circumstance, and economic benefit of the violation, the degree of culpability, and other such matters as justice may require. 33 U.S.C. § 1319(g)(3). *Kelly,* 203 F.3d at 523.

Applying the enforcement factors to Bonhomme shows his lack of culpability for the discharge. He does not gain an economic benefit from Maleau's mining operations, nor is Bonhomme responsible for introducing pollutants into navigable waters. The circumstance and nature of the "violation" imposes liability on a non-polluter for a discharge because his property contains the culvert releasing the contaminated ditch water. The purpose of civil liability is to punish culpable individuals and deter future violations. *Kelly*, 203 F.3d at 523. Holding Bonhomme liable for the culvert discharge will further neither of these goals.

In *U.S. v. Velsicol Chemical Corp*., 438 F.Supp. 945 (W.D. Tenn. 1976), the court found the defendant responsible for a point source discharge even though the point source was owned by another party. The defendant argued that its discharge into a city sewer system, which ultimately emptied into the Mississippi River, was not a discharge into navigable water. The

court held, "The fact that the defendant may discharge through conveyances owned by another party does not remove him from the scope of this Act. Defendant knows or should have known that the city sewers lead directly into the Mississippi River." *Velsicol*, 438 F.Supp. at 947.

Maleau and Progress offer a similar argument to that in *Velsicol*. Maleau argues that he is not liable because the conveyance discharging his mining pollutants into Reedy Creek is owned by another party. Further, Maleau and Progress argue that the Act encumbers Bonhomme for this discharge because the contaminants flow through his culvert. This does not coincide with the Act's intention to hold culpable parties liable and to regulate those "needing to use the waters for waste distribution." *Earth Sciences*, 599 F.2d at 373.

The CWA was enacted in order to reduce and eliminate water contamination. 33 U.S.C. § 1311. It would be counter to the policy and purpose of the Act to hold a party liable who cannot himself stop the discharge from occurring. Therefore, Maleau, the party responsible for the discharge and in control of the contamination source, should be held liable for the violation.

B. The holding in *South Fla. Waste Management* does not apply to Bonhomme because he is a private property owner with no decision-making authority over neighboring properties, Ditch C-1, or the culvert.

The lower court relied on *South Fla. Water Mgmt. Dist*. v. *Miccosukee Tribe of Indians,* 541 U.S. 95 (2004) when finding Bonhomme responsible for a point source discharge. In *South Fla.,* the COE developed a system that resulted in the contamination of wetlands in the Florida Everglades. *Id* at 100. The South Florida Water Management District (District) operated the project. *Id*. The District argued that the pumping of water facilitated by the project did not constitute a point source discharge because the District added nothing to the water. *Id*. at 103-104. The Court held that a point source discharge includes point sources which do not themselves generate pollutants, but need only convey the pollutants to navigable waters. *Id*. at 104. The Court was influenced because the District implemented the project and was responsible

for overseeing its day-to-day operations. *Id*. at 105. Moreover, "One of the act's primary goals was to impose . . . [CWA] permitting requirements on municipal wastewater treatment plants." *Id. citing* 33 U.S.C. § 1311(b)(1)(B). The point source in *South Fla*. changed the natural flow of a body of water. *Id*. at 104. The COE and the District had control over the project, as well as the ability to assess the chemical makeup of each body of water before implementing the project. Their failure to evaluate and minimize the transfer of pollutants, and failing to obtain a permit for the project, subjected the District to civil penalties under the CWA.

The case before this Court is distinguishable from *South Fla*. because Bonhomme is a private landowner, not a wastewater treatment plant; he did not construct the culvert on his property nor did he construct Ditch C-1; Bonhomme has no control over what enters Ditch C-1, and he cannot stop the introduction of pollutants by neighboring property owners. Thus, the Supreme Court's ruling in *South Fla*. does not apply to Bonhomme.

The culvert lying on Bonhomme's property should not expose him to liability. Bonhomme is not responsible for ensuring that the water discharged from the culvert is clean for purposes of the CWA. His responsibility as a landowner is to maintain the agricultural ditch on his own property. This includes removing debris and maintaining a ditch wall, it does not include testing for or abating contamination resulting from a neighbor's discharge. Bonhomme is not responsible for discharges originating on neighboring properties. To impose liability on Bonhomme would not affect future discharges and would fail to deter individuals from polluting Ditch C-1.

Lower courts have held that a party is not subject to liability under the CWA where he has no decision making authority, does not participate in planning the project, and has no impact on whether and to what extent pollutants are discharged into waters of the U.S. *In Re Carsten*, 211 at 719. *In Re Carsten* involved a bankruptcy debtor who listed a "disputed" amount owed to

the EPA after being cited for filling a slough with dredge material in order to create a pond. The owners previous to the Carstens had started the project, controlled its outcome, and paid for its completion. The court found that the subsequent purchasers of the property had no say in the projects construction, and therefore were not liable for violating the CWA. *Id.* at 730.

Here, Bonhomme has no control or involvement in the addition of arsenic to Ditch C-1. Maleau tries to take advantage of the fact that Bonhomme's property contains the culvert which discharges the arsenic-laden water into Reedy Creek. Bonhomme is not the culpable party and the CWA does not support the proposition that he should be held liable or punished for Maleau's violation. The district court misapplied the law and its holding is in direct conflict with the policy and precedent behind the CWA. In order to promote effective justice and to regulate discharges of pollutants into navigable waters of the U.S., Maleau must be held strictly liable for his CWA violation. The lower court's decision should be reversed in order to deter this ongoing violation and promote effective justice under the CWA.

CONCLUSION

Because Bonhomme is not liable under the CWA for the discharge of a pollutant, and Reedy Creek and Ditch C-1 are waters of the U.S. subject to regulation under the CWA, summary judgment below cannot be upheld. Maleau is discharging a pollutant from a point source on his property and is liable for the discharge. Moreover, Bonhomme is a "citizen" for purposes of the CWA regardless of his nationality, and he is a real party in interest to this suit. Therefore, the judgment should be reversed and remanded for an entry in favor of Bonhomme.

Respectfully submitted,

_____

Counsel for Jacques Bonhomme