Team No. 4

IN THE
UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 13-01234

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU
Defendant-Appellant, Cross-Appellee,

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

v.

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

v.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee,

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

Brief for the STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

This case is on appeal from the United States District Court for the District of Progress, which had proper original and subject matter jurisdiction, because the issues in this case arise under the Clean Water Act ("CWA"), a law of the United States. 33 U.S.C. § 1331 (2012). The District Court issued an order on July 23, 2012 finding against Jacques Bonhomme ("Bonhomme") on all issues except whether Reedy Creek is a "navigable water." Bonhomme, Shifty Maleau ("Maleau"), and the State of Progress ("Progress") all filed timely notices of appeal. The District Court's order was a final decision, therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Whether Bonhomme is a real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA.

II. Whether Bonhomme, a foreign national, is considered a "citizen" under CWA § 505 who may bring suit against Maleau.

III. Whether Maleau's mining waste piles are classified as "point sources" under CWA § 502(12).

IV. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA §502(7).

V. Whether Reedy Creek is a "navigable water/water of the United States" under CWA § 502(7).

VI. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

This is an appeal from the final order of the United States District Court for the District of Progress denying Bonhomme's motion to dismiss and granting Maleau's motion to dismiss

without prejudice. R. at 10. Bonhomme brought a civil action under the Clean Water Act's ("CWA") § 505 citizen suit provision, seeking all relief available against Maleau for violating § 301 of the Clean Water Act ("CWA") by discharging a pollutant into a navigable water. 33 U.S.C. § 1365 (2012); 33 U.S.C. § 1311 (2012); R. at 4-5. Subsequently, Progress brought a citizen suit against Bonhomme under CWA § 505 for violating § 301 by discharging a pollutant from a point source into a navigable water. R. at 5. Maleau intervened as a matter of right in Progress's action against Bonhomme pursuant to CWA § 505(b)(1)(B). 33 U.S.C. § 1365; R. at 5. Progress and Maleau moved to consolidate their case with *Bonhomme v. Maleau* because of the analogous facts and law, and Bonhomme did not object. R. at 5. The United States District Court for the District of Progress granted the motion to consolidate. R. at 5.

After this, Bonhomme and Maleau both filed motions to dismiss. R. at 5. The district court granted Maleau's motion to dismiss, holding that Bonhomme is not a proper plaintiff. R. at 10. The court further found that if Bonhomme could maintain his suit, it would find that (1) Bonhomme is not a "citizen" under §§ 505(g) and 502(5) of the CWA; (2) the waste piles are not "point sources" under §§ 502(12), (14) of the CWA; (3) Ditch C-1 is not a "water of the United States" under §§ 502(12), (14) of the CWA; (4) Reedy Creek is a water of the United States under §§ 502(7), (12) of the CWA; and (5) Bonhomme is liable regardless of who added the arsenic to Ditch C-1. R. at 10. The district court further denied Bonhomme's motion to dismiss reasoning that Progress adequately stated a cause of action. R. at 10.

Following the district court's opinion, Bonhomme, Progress, and Maleau each filed a Notice of Appeal. R. at 1. Bonhomme is challenging the district court's holdings that Bonhomme is not a real party in interest, Bonhomme is not a "citizen" entitled to file suit under the CWA, Maleau's mining waste piles are not "point sources" under the CWA, Ditch C-1 is not a

navigable water because it is a point source, and Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert. R. at 1-2. Maleau is challenging the district court's holding that Reedy Creek is a water of the United States. R. at 2. Progress is challenging the District Court's holding that Ditch C-1 is not a water of the United States. R. at 2.

STATEMENT OF FACTS

Maleau operates an open pit gold mining operation in the state of Progress. R. at 5. He transfers the overburden and slag from his property in Lincoln County to an area adjacent to Ditch C-1 in Jefferson County. R. at 5. The area has accumulated large piles of overburden over time, and when it rains, rainwater runoff flows down and percolates through the piles. R. at 5. This rainwater runoff and percolation discharges from channels created by gravity into Ditch C-1. R. at 5. Ditch C-1 is a three-foot across and one-foot deep drainage ditch dug into saturated soils to promote agricultural use. R. at 5. Ditch C-1 contains running water except during annual drought periods, which can last from several weeks to three months. R. at 5. The water in the Ditch is derived from saturated soil drainage and rainwater runoff. R. at 5. Ditch C-1 runs three miles across several agricultural properties before emptying into Reedy Creek. R. at 5.

Reedy Creek is a fifty-mile long body of consistently flowing water that begins in the State of New Union, and ends in the State of Progress. R. at 5. Reedy Creek is used as a water supply for Bounty Plaza, a service area on the federally funded Interstate 250. R. at 5. Farmers in both states divert the water from Reedy Creek for agricultural purposes such as irrigation, later selling their agricultural products in interstate commerce. R. at 5. Reedy Creek ends in Wildman Marsh ("Wildman"). Wildman is a wetland that is essential to over a million waterfowl during their twice-annual migrations. R. at 5-6. Much of the wetlands are within Wildman National

Wildlife Refuge, which is federally owned and maintained. R. at 6. The area is a major destination for hunters from all over the country and abroad, adding over twenty-five million dollars to the local economy. R. at 6.

Bonhomme's property fronts Wildman, and he therefore has created a hunting outfit, complete with a lodge for hunters to spend the night. R. at 6. Bonhomme's primary customers are his business and social friends and his acquaintances. R. at 6.

Prior to suing Maleau, Bonhomme tested the water in both Ditch C-1 and Reedy Creek. R. at 6. None of the samples were taken on Maleau's property. R. at 6. The poison arsenic, commonly used in gold mining operations, was not detected in Ditch C-1 above Maleau's property, but high concentrations were found just below. R. at 6. Further findings proved that the concentration of arsenic decreased in proportion to the increasing flow of Ditch C-1 as it proceeded closer to Reedy Creek. R. at 6. Arsenic was undetectable above Ditch C-1's discharge into Reedy Creek. R. at 6. However, significant concentrations of arsenic were found below the discharge point. R. at 6. Additionally, even though there have been no notable changes in the flora and fauna surrounding Bonhomme's hunting lodge, lower levels of arsenic were detectable in Wildman Marsh, with two Blue-winged Teal being contaminated by the poison. R. at 6.

Furthermore, Bonhomme's hunting parties have decreased from eight a year to two. R. at 6. There has been a corresponding decline in the economy in the past few years, mirrored by declining profits in local businesses such as Precious Metals International, Inc. ("PMI"). PMI is incorporated in Delaware and headquartered in New York City. R. at 6.

STANDARD OF REVIEW

Appellate courts review a district court's dismissal pursuant to Rule 17 under an abuse of discretion standard. *Icon Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 476 (3d Cir.

1987); *see also Haas v. Jefferson Nat'l Bank of Miami Beach*, 442 F.2d 394, 395 (5th Cir. 1971) (using an abuse of discretion standard for Rule 19, which has the same primary purpose as Rule 17). For issues of statutory construction, an appellant court reviews under a de novo standard. *Pathfinder Mines Corp. v. Hodel*, 811 F. 2d 1288, 1290 (9th Cir. 1987). However, review of the EPA's regulations are set aside only if the agency's actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with [the] law." *Id.* (*citing* 5 U.S.C. § 706(2)(A) (2012)).

SUMMARY OF THE ARGUMENT

Maleau maintains that the district court properly dismissed the case Bonhomme filed against him. As the district court held, Maleau is not the real party in interest because the underlying substantive law does not allow citizen suits by foreign nationals and because Bonhomme's is a front for Precious Minerals Incorporated. Additionally, Bonhomme, because he is a foreign national, cannot sue under the CWA's citizen suit provision because he does not met the definition of "citizen." The district court properly held that Maleau's mining waste piles are not "discernible, confined and discrete conveyances" as required under the definition of "point sources." The district court erred in granting Maleau's motion to dismiss because Ditch C-1 is a navigable water under the CWA. Ditch C-1 is a "tributary" of a navigable water and is therefore a "water of the United States." Additionally, even if this Court applies *Rapanos*, Ditch C-1 satisfies Justice Scalia's plurality opinion and is thus a "water of the United States." The district court properly held that Reedy Creek is a navigable water under the CWA because the EPA's definition and persuasive authority declare Reedy Creek to be a "water of the United States." Reedy Creek satisfies EPA's definition of a "water of the United States" because it is an interstate water and used in interstate commerce. Furthermore, Reedy Creek is directly

analogous to the Rito Seco Creek in *Earth Sciences*. Finally, the district court properly held that Bonhomme violated the CWA by adding arsenic to Reedy Creek through a culvert on his property because it is established that ownership of a point source triggers liability.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED BONHOMME'S SUIT BECAUSE HE IS NOT A REAL PARTY IN INTEREST.

Bonhomme has failed to establish that he was a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure. Rule 17 requires that every action is "prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The purpose behind Rule 17 is to protect defendants from future actions by the party actually entitled to recover and to guarantee that the res judicata effect of the judgment is carried out. Fed. R. Civ. P. 17 advisory committee's note; *Pac. Coast Agric. Exp. Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975); *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 84 (4th Cir. 1973). Under Rule 17 a real party in interest is one "who possesses the right to enforce the claim and who has significant interest in the litigation." *Va. Elec. & Power Co.,* 485 F.2d at 83. A court must look to the underlying substantive law to determine whether the plaintiff is a real party in interest. *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 256 (5th Cir. 1980); *Va. Elec. & Power Co.*, 485 F.2d at 83; *Johnson v. Price*, 191 F. Supp. 2d 626, 628 (D. Md. 2001).

The rule also allows "a party authorized by statute" to "sue in their own names without joining the person for whose benefit the action is brought." Fed. R. Civ. P. 17(a). Here the CWA is both underlying substantive law and the statute that would authorize a party to sue on this issue. Therefore, the analysis for each is the same.

A. Bonhomme is not a real party in interest because the underlying substantive law does not allow citizen suits by foreign nationals.

Bonhomme filed suit under § 505 of the CWA—the citizen suit provision. 33 U.S.C. § 1365 (2012). The citizen suit provision allows "an individual, corporation, partnership, association, State, municipality, commission, or a political subdivision of a State, or any interstate body" to sue to enforce the CWA. *See* 33 U.S.C. §§ 1362(5), 1365(g); *see also* discussion *infra* Part II. All of these words connote entities within the jurisdiction of the United States. The CWA does not explicitly nor implicitly authorize citizen suits by foreign nationals. Although the CWA gives a broad definition of "citizen," this definition does not stretch so far as to encompass non-citizens. *See* discussion *infra* Part II.

B. Bonhomme should not be granted real party in interest status because he is a front for Precious Metals International, Inc.

Bonhomme filed this lawsuit in the interest of PMI. PMI is in direct competition with Maleau's mining operation. R. at 7. Although the property where the alleged violation occurred is owned by Bonhomme, he holds this property for PMI's benefit. The property is used to entertain business clients and associates of PMI. R. at 7, 8. Because of this interest PMI has bankrolled Bonhomme's suit against Maleau. PMI has paid the expenses of this litigation including sampling and testing cost as well as attorney and expert witness fees. R. at 7.

The failure of Bonhomme to include PMI as a real party in interest did not have to be fatal though. "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest . . . ." Fed. R. Civ. P. 17(a). To avoid dismissal for failure to include a real party in interest the plaintiff must make "a reasonable, good-faith effort to comply" with the requirements of Rule 17. *Icon Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 477 (3d Cir.1987).

In *Icon Group*, Icon was suing the defendants for, inter alia, unpaid rent on a group of condos. *Id.* at 475. Icon was one of many investors who owned the condos; owning 40% Icon was the largest owner. *Id.* The trial court dismissed the suit after Icon tried but was not able to get all the real parties in interest to join the suit or agree to its res judicata effect. *Id.* at 477. Even though Icon failed in this, the Third Circuit overturned the dismissal because Icon had made a good faith effort to obtain ratification from the other real parties in interest. *Id.*

Here, Bonhomme has not made a good faith effort to join PMI as a party. Maleau put Bonhomme and PMI on notice that PMI should be included as a real party in interest when Maleau first answered their complaint. R. at 7. PMI has a significant interest in the suit because Maleau's alleged violation affects PMI's client entertaining arrangement. There is no indication that Bonhomme ever tried to include PMI as a party in this suit. Therefore, this Court should uphold the district courts dismissal of Bonhomme's suit because Bonhomme was not a real party in interest.

II. THE DISTRICT COURT PROPERLY HELD THAT BONHOMME IS NOT A "CITIZEN" AS DEFINED BY 33 U.S.C. 1365.

Section 505(a) of the CWA, the "citizen suit" provision, states that "any citizen may commence a civil action on his own behalf" to enforce the CWA. 33 U.S.C. § 1365(a) (2012). Section 505(g) defines "citizen" in § 505(a) as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2012). Section 502(5) defines "person" to mean "an individual, corporation, partnership, association, State, municipality, commission, or a political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (2012). While Congress intended an expansive definition of "citizen," the drafters did not intend to render this term meaningless.

A. Congress, though defining "citizen" broadly did not strip "citizen" of all its meaning.

To determine a statutory term's meaning a court must look to the language and structure of the statute as a whole. *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 417 (1992). When the definition of "person" in § 502(5) is taken as a whole it indicates that Congress intended to expand "person" beyond a single individual and to include other entities within its definition. Although expansive, all of the terms in the § 502(5) definition of "person" refer to entities within the jurisdiction of the United States. Section 502(3) defines "State" as States and territories of the United States. 33 U.S.C. § 1362(3) (2012). Section 502(2) defines "interstate agency" to mean "an agency of two or more States . . . ." 33 U.S.C. 1365(3) (2012). Finally, § 502(4) defines "municipality" as smaller public bodies "created by or pursuant to State law . . . or an Indian tribe . . . ." 33 U.S.C. 1365(4) (2012). All of these terms point to entities within the jurisdiction of the United States. While giving "citizen" this broad definition, Congress neither explicitly nor implicitly authorized citizen suits by foreign nationals in the CWA, including § 505(g) and § 502(5). *See* 33 U.S.C. §§ 1362(5), 1365(g).

Similarly, concerning the CWA's definition of "navigable waters," the Supreme Court has held that Congress defined "navigable waters" broadly while still retaining some meaning to the word "navigable." In § 502(7) Congress defined "navigable waters" in the CWA as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2012). The Court held that by defining "navigable waters" in this way that Congress intended to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Untied States v. Riverside Bayview Homes,* 474 U.S. 121, 133 (1985). *Riverside Bayview Homes* went on to hold that non-navigable waters adjacent to navigable waters were within the definition of "waters of the United States." *Id.* at 135. Defining "navigable waters" this way gave

the word "navigable" a "limited effect." *Id.* at 133. *See also Rapanos v. United States,* 547 U.S. 715, 716 (2006). While § 502(7) greatly expands the meaning of navigability in the CWA it does not read "navigable" out of the CWA completely. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC),* 531 U.S. 159, 172 (2001). In *SWANCC*, the Court held to consider isolated, manmade ponds as "navigable" would render the word "navigable" completely meaningless. *Id.*

For this Court to hold that Bonhomme is a citizen as defined in the CWA, would be to read the word "citizen" complete out of the statute. Just as Congress expanded on the definition of navigable waters in § 502(7) to include bodies of water that would not normally be deemed navigable, *Riverside Bayview Homes*, 474 U.S. at 133, Congress expanded "citizen" in § 505 to include entities that would not normally be considered a citizen of the United States. It expanded this definition to include groups and entities made up of citizens of the United States. To allow foreign nationals to fit in the definition of "person" in § 502(5) would deprive the word "citizen" of any independent significance. *See SWANCC*, 531 U.S. at 172.

B. It is bad policy to allow foreign nationals to enforce the environmental laws intended to protect the citizens of the United States.

Allowing foreign nationals the opportunity to sue under the § 505 citizen suit provision will cause unnecessary harm to the American economy. The purpose of the citizen suit provision is to allow United States citizens and their organization to act as private attorney generals when the United States government cannot or will not enforce the CWA. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62 (1987). The citizen suit provision was enacted to further the interest of the United States and its people. *Id.* To allow parties outside of the United States to sue would conflict with the purpose of the CWA. It would allow them to pursue an interest that may not be aligned with the interest of the United States and its people.

Therefore, this Court should affirm the district court's holding that § 505 of the CWA does not grant foreign nationals a right to sue under the CWA.

III. THE DISTRICT COURT PROPERLY HELD THAT MALEAU'S MINING WASTE PILES ARE NOT "POINT SOURCES" UNDER THE CWA.

The Clean Water Act of 1972 provides that, absent a permit, "the discharge of any pollutant by a person shall be unlawful." 33 U.S.C. § 1311(a) (2012). The CWA further defines the "discharge of a pollutant" in § 502(12) to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). A "point source" is defined in the CWA 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) (2012). The term excludes agricultural storm water discharges and return flows from irrigated agriculture. *Id*.

The jurisdiction of the CWA is limited to the regulation of *point sources* through the National Pollution Discharge System (NPDES) permit program. 33. U.S.C. §§ 1362(12)(A), 1342; *see, e.g.*, *Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) ("the [CWA] provides no direct mechanism to control nonpoint source pollution"). Mining waste piles are not "discernible, confined and discrete conveyances," or "surface water runoff collected or channelled by man," therefore, they should be considered nonpoint sources under the CWA. Accordingly, the CWA has no jurisdiction to regulate Maleau's mining waste piles, and the district court properly dismissed Bonhomme's claim alleging that mining waste piles are point sources.

A. The plain language of the statute indicates that mining waste piles are not "discernible, confined and discrete conveyances."

While the term "point source" has been interpreted broadly by the courts and the EPA to promote the purpose of the CWA, *see, e.g., Beartooth Alliance v. Crow Butte Mines*, 904 F. Supp. 1168, 1173 (D. Mont. 1995), the supposed "plain purpose" of the legislation cannot be invoked at the expense of specific terms in the statute itself, *American Mining Congress v. EPA*, 824 F.2d 1177, 1185 n.10 (D.C. Cir. 1987). Allowing specific terms in a statute to be overlooked ultimately prevents the effectuation of congressional intent. *Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986). In fact, when interpreting a statute, a court should adhere to the chief canon of statutory interpretation and first look to the plain language of the legislation. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). If the words of the statute are unambiguous, "judicial inquiry is complete." *Id.* at 254; *see also Rubin v. United States*, 449 U.S. 424, 430 (1981).

In looking to the plain language of the CWA, the definition under § 502(14) does not enumerate "pile" as a point source. 33 U.S.C. § 1362 (14). Although the examples provided in the definition are not an exclusive list, the word must go hand-in-hand with those expressly enumerated in order for the court to read "pile" into the definition of "point source." *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 169 (2003).

An analysis of the definition indicates that a pile of dirt and stone is incongruous with the examples Congress provided. Specifically, the words used to define the term "point source" (i.e. "discernable, confined and discrete") and examples such as pipe, ditch and container, "evoke images of physical structures . . . that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). For example, in *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979), the court classified a mining reserve sump as a point source. The court

reasoned that a "pit or well in which liquid collects" should be identified as a point source when, as a result of inadequate size or flaws in construction, a discharge occurs. *Id*. City drain systems that collect storm water runoff have also been designated as point sources. *See* 33 U.S.C. § 1342(p) (2012). A pile, on the other hand, is completely different in structure and purpose from a man-made pit designed to collect water like the reserve sump in *Earth Sciences*. Similarly, a pile is neither discrete nor identifiable like the pipes in a drainage system that channels water through a constricted and confined structure. 33 U.S.C. § 1342(p).

Essentially, a pile of dirt and stone does not go hand-in-hand with the enumerated examples in § 502(14) because a pile is not a "discernable, confined and discrete conveyance." Even if a pile may be discernible in certain situations, the plain language still indicates that it should not be classified as a point source. The use of the connector "and" in the phrase "discernable, confined and discrete conveyance" requires all three adjectives to be applied to the term. 33 U.S.C. § 1362(14). A pile, while sometimes discernible, is neither a confined nor a discrete structure. The nature and structure of a pile is at odds with the plain language of the statute, *Id*., therefore, the district court properly held that mining waste piles are not point sources.

Further, although the definition of a point source is meant to be interpreted broadly, the phrase "discernible, confined and discrete conveyance" cannot be interpreted so broadly as to read the point source requirement out of the statute. *Coridano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). It must still be an identifiable, localized, and single source. A pile of dirt and stone does not meet this requirement, therefore, the district court properly dismissed Bonhomme's suit.

B. Surface water runoff from Maleau's mining waste piles should be classified as nonpoint source pollution because it is not "collected or channelled" by man.

Congress intended to distinguish between point sources and nonpoint sources when it limited the CWA's jurisdiction to the regulation of point source pollution. 33 U.S.C. §§ 1311(e), 1314(b) (2012). Nonpoint source pollution is distinct from point source discharge in that it results from diffuse land activities such as agriculture, construction and mining. *Coridano*, 575 F.3d at 220. Pollution arising from nonpoint sources enters water primarily through *indiscrete* and less identifiable natural processes including precipitation, percolation, and runoffs. *Id*. (emphasis added). The Tenth Circuit has noted that "[n]onpoint source pollution is not statutorily defined, although it is commonly understood to be pollution arising from dispersed activities over large areas that is not traceable to a single, identifiable source or conveyance." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) ("[G]roundwater seepage that travels through fractured rock would be nonpoint source pollution . . . ."). It is the association with a discrete conveyance that ultimately distinguishes a point source from a nonpoint source. *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1358 (D.N.M. 1995).

Although not defined by the CWA, Congress has classified nonpoint source pollution as "runoff caused primarily by rainfall around activities that employ or create pollutants." *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). EPA guidance further indicates that nonpoint source pollution results from "rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants into lakes, rivers, streams, wetlands, estuaries, other coastal waters, and ground water." Nonpoint Source Program and Grants Guidelines for States and Territories, 68 Fed. Reg. 60653-02 (2003).

The discharge that occurs from Maleau's mining waste piles is associated with rainwater runoff. R. at 5. Specifically, rainwater runoff flows down the piles of dirt and stone, percolating

through them before discharging. R. at 5. Since rainfall runoff itself is a typical trigger of nonpoint source pollution, *Friends of Santa Fe County,* 892 F. Supp. at 1358-59, this is a strong indication that the runoff from the mining waste piles is nonpoint source pollution. The Second Circuit provides reasoning for this general rule by stating that natural processes such as "precipitation, percolation," and runoffs are indiscrete and not sufficiently identifiable to be classified as a point source. *Cordiano*, 575 F.3d at 220.

The extent to which surface runoff can constitute point source pollution is outlined by the EPA's NPDES regulations as "runoff collected or channelled by man." 40 C.F.R. § 122.2 (2013). Similarly, the Fourth Circuit held that although the definition of point source is to be interpreted broadly, it does *not* include unchannelled and uncollected surface waters. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1371 (4th Cir. 1976) (emphasis added); *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979). Therefore, surface runoff that is neither collected nor channelled constitutes nonpoint source pollution. *Cordiano*, 575 F.3d at 221.

Although the runoff from Maleau's mining waste piles is discharged through "channels eroded by gravity," R. at 5, simple gravitational flow of water resulting in the discharge of material into navigable waters without more does not constitute a point source. *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir. 1980). The Fifth Circuit indicates that there must be some effort to direct the flow of water for a point source to be found. *Id*. Any channel or rill that forms in Maleau's mining waste piles is natural and does not constitute an effort by Maleau to direct the flow of rainwater runoff. Since the runoff is not collected or channelled by Maleau, it should be considered nonpoint source pollution. *Cordiano*, 575 F.3d at 221.

However, even if this Court determines that the water is channelled and collected by Maleau, the inquiry into whether a pile constitutes a "point source" is not complete. Although

the Fifth Circuit held that rainwater runoff collected or channelled by miners in connection with mining activity may constitute a point source, the court recognized that "[t]he *ultimate* question is whether pollutants were discharged from 'discernible, confined and discrete conveyance.'" *Abston*, 620 F.2d at 47 (emphasis added). As discussed *infra*, it is the association with a discrete conveyance that distinguishes point source and nonpoint source pollution. *Friends of Santa Fe Cnty.*, 892 F. Supp. at 1358-59. Since rainwater runoff through piles of dirt and stone is an indiscrete discharge, even a broad reading of the "point source" definition will not encompass this source.

Guidance from Congress and the EPA indicates that the discharge from Maleau's mining waste piles should be classified as nonpoint source pollution because it is runoff caused primarily by rainfall. Further, the exception for surface water runoff does not apply because the runoff in this case is neither collected nor channelled by Maleau. Accordingly, the district court properly dismissed Bonhomme's suit.

IV. THE DISTRICT COURT ERRONEOUSLY HELD THAT DITCH C-1 IS NOT A NAVIGABLE WATER.

The CWA prohibits "the discharge of any pollutant by any person . . ." without a permit. 33 U.S.C. § 1311(a). Additionally, the CWA defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). Most relevant to this analysis, the CWA broadly defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). This Court should hold that Ditch C-1 is a "water of the United States" because it is a "tributary" of a navigable water and satisfies Justice Scalia's controlling plurality in *Rapanos v. United S*tates, 547 U.S. 715 (2006).

A. Common law, EPA regulations, and the general purpose of the CWA all establish that Ditch C-1 is a "tributary" of a navigable water, and therefore is a "water of the United States."

Courts have consistently held that tributaries of navigable waters are "waters of the United States" under the CWA, regardless of whether the tributary is "navigable in fact." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1320 (6th Cir. 1974); *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006). A tributary is a body of water that "contributes its flow to" a larger body of water. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (*citing* RANDOM HOUSE COLLEGE DICTIONARY 1402 (Rev. Ed. 1980)). In *Ashland Oil & Transportation*, an oil company discharged a pollutant into a tributary of a "water of the United States." *Ashland Oil & Transp.*, 504 F.2d at 1320. The tributary itself was not navigable in fact because it could not float a boat. *See id.* In holding that the non-navigable in fact tributary was a "water of the United States," the Sixth Circuit asserted that Congress intended the CWA to apply to all "waters of the United States," including streams and their tributaries. *Id.* at 1329.

Similar to the tributary in *Ashland Oil & Transportation*, Ditch C-1 is a tributary of a "water of the United States." Ditch C-1 contributes its flow to Reedy Creek which, as discussed below, is a "water of the United States." R. at 5; *see* discussion *infra* Part V. Therefore, by applying *Ashland Oil & Transportation*, even though Ditch C-1 cannot float a canoe or provide transportation along its waters, it is a tributary of a navigable water and thus should be considered a "water of the United States." R. at 5; *Ashland Oil & Transp.*, 504 F.2d at 1320; *see United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 415 (1940).

Utilizing the same line of reasoning, the EPA has provided guidance by defining "waters of the United States" to include tributaries of navigable waters. 40 C.F.R. § 122.2 (2013). An agency's reasoned decision should be provided deference by a reviewing court. *Citizens to*

Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). As such, this Court should accord deference to the EPA's definition of a "water of the United States." Ditch C-1 is a tributary of Reedy Creek, a navigable water. R. at 5. Therefore, this Court should hold Ditch C-1 to be a "water of the United States" because it is a tributary of a navigable water pursuant to 40 C.F.R. § 122.2.

Finally, a tributary such as Ditch C-1 cannot be regulated as a "water of the United States" because it would decimate the general purpose of the CWA. The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters by eliminating the discharge of pollutants into navigable waters of the United States. *See* 33 U.S.C. § 1251 (2012). Directly on point, the Sixth Circuit has proclaimed that it would "make a mockery of [the CWA's] authority to control pollution [if the CWA's jurisdiction] was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned." *Ashland Oil and Transp.*, 504 F.2d at 1326. Contrary to this principle, the district court below held that a ditch listed as a point source could not also be a "water of the United States," because it could not constitute two elements of the water pollution offense. R. at 9. Affirming this would transform Ditch C-1 into the "open sewer" that Congress designed the CWA to protect against. *Ashland Oil and Transp.*, 504 F.2d at 1326. Allowing a discharge into a tributary of a "water of the United States" would not be acting to restore the chemical, physical, and biological integrity of our nation's waters because the pollutants would flood the waters of the United States on an epic scale. This Court should halt this atrocious utilization of questionable statutory construction to dismantle a statute's overall purpose. In fact, federal courts must construe a statute to avoid absurd results. *See, e.g.*, *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1529 (11th Cir. 1996). Therefore, to comply

with the CWA's overall purpose and avoid absurd results, this Court should overrule the district court and hold that Ditch C-1 is a water of United States under the CWA.

B. Contrary to the district court's understanding, even if this Court applies *Rapanos v. U.S.*, Ditch C-1 satisfies Justice Scalia's plurality opinion, and is thus a "water of the United States."

The First Circuit has proclaimed that federal courts have departed from the *Marks v. United States*, 430 U.S. 188, 193 (1977), doctrine, which provides that the plurality decision on the narrowest ground is controlling. *United States v. Johnson*, 467 F.3d 53, 65 (1st Cir. 2006). Instead, the First Circuit asserted that whenever a decision does not have a majority opinion, "lower courts should examine the plurality, concurring, and dissenting opinions to extract the principles that a majority has embraced." *Id.* (*citing Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 413 (2006). Utilizing this doctrine, the First, Fifth, Sixth, and Eighth Circuits have all concluded that a body of water is a "water of the United States" under *Rapanos* if it meets either Justice Scalia's plurality or Justice Kennedy's concurrence. *Johnson*, 467 F.3d at 60; *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008); *see United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

Furthermore, using the "narrowest grounds" doctrine set out in *Marks* is problematic because there is not an opinion in *Rapanos* on the narrowest grounds. Even though both the Seventh and Ninth Circuits have held that Justice Kennedy's concurrence is controlling because it is the narrowest standard for a "water of the United States," their analysis has one vital flaw. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F. 3d 993, 999 (9th Cir. 2007). This flaw is that Justice Kennedy's opinion is not a logical subset of Justice Scalia's opinion, thus it cannot be the "narrowest" decision. *See*

King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (providing that in order to be a decision on the narrowest grounds, the decision must be a subset of the plurality). In fact, there are circumstances when Justice Scalia's standard would hold a water to not be a "water of the United States" and Justice Kennedy's would permit it, such as when an extremely intermittent stream is directly connected to a navigable in fact river. Justice Kennedy's test would hold that the direct connection provides the significant nexus to the navigable in fact river, while Justice Scalia's plurality would bar federal jurisdiction because of the intermittent flow. *See Rapanos*, 547 U.S. at 733, 767. Because of this, prior to the First, Fifth, Sixth, and Eighth Circuits, Justice Stevens, in his dissent in *Rapanos*, intuitively pioneered CWA jurisdiction over waters that meet either Justice Scalia's plurality standard or Justice Kennedy's concurrence standard. *See* Rapanos, 547 U.S. at 810. Justice Scalia's plurality opinion asserts that "waters of the United States" include only relatively permanent, standing, or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. *Rapanos*, 547 U.S. at 733.

Furthermore, the crux of Justice Scalia's standard is the flow of the water body, not the labels such as "stream" and "river." Proving this, Justice Scalia asserted that ". . . it suffices for present purposes that *channels* . . . are plainly within the definition" of waters of the United States." *Rapanos*, 547 U.S. at 733 n.5 (emphasis added). Justice Scalia's use of the diluted word "channels" instead of tracking his "stream" and "river" language demonstrates that Justice Scalia deemed the flow of the water to be the determinative part of the standard, not the arbitrary labels of a water body.

As applied to the case *sub judice*, Ditch C-1 satisfies Justice Scalia's plurality opinion and is thus a "water of the United States." Applicable to Ditch C-1, Justice Scalia's plurality asserts

that "relatively permanent" waters do not exclude bodies of water that might dry up in extraordinary circumstances, such as drought, or [bodies of water] which contain continuous flow during some months of the year but no flow during dry months . . . ." *Rapanos*, 547 U.S. at 734 n.5.

Applying footnote 5, Ditch C-1 is a relatively permanent flowing body of water and is therefore a "water of the United States" subject to CWA jurisdiction. R. at 5. As the facts describe, Ditch C-1 contains running water except during droughts, which can last up to several weeks to three months. R. at 5. Therefore, Ditch C-1 squarely fits within the plurality's definition of a "relatively permanent" water and is a "water of the United States" within the CWA.

V. THE DISTRICT COURT PROPERLY HELD THAT REEDY CREEK IS A NAVIGABLE WATER BECAUSE IT SATISFIES THE EPA'S DEFINITION OF, AND PERSUASIVE AUTHORITY DECLARES IT TO BE A "WATER OF THE UNITED STATES."

The CWA prohibits "the discharge of any pollutant by any person . . ." without a permit. 33 U.S.C. § 1311(a) (2012). The "discharge of a pollutant" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). Significant to the case *sub judice*, the CWA broadly defines "navigable waters" as "the waters of the United States . . ." 33 U.S.C. § 1362(7) (2012). This Court should affirm the district court in holding that Reedy Creek is a "water of the United States" because Reedy Creek is an interstate water, used in interstate commerce, and is analogous to persuasive authority found in *United States v. Earth Sciences Inc.*, 599 F.2d 368 (10th Cir. 1979).

A. Reedy Creek is a "water of the United States" pursuant to the EPA's definition found in 40 C.F.R. § 122.2 (2013), because it is an interstate water, and is used in interstate commerce.

The EPA promulgated its final informal rulemaking defining "waters of the United States" at 40 C.F.R. § 122.2. As an informal rulemaking, § 706 of the Administrative Procedure Act (APA) applies to a reviewing court's determination of the agency's rulemaking. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983); 5 U.S.C. § 706 (2012). Section 706 provides, in relevant part, that a court shall set aside agency findings, conclusions, and actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2). Deference should be granted to an agency's final decision. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

In *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia instructed that under the arbitrary and capricious standard, reviewing courts should determine whether the "agency decision was rational and based on consideration of the relevant factors." *Id.* at 36. The court cautioned that this must be performed with a "conscientious awareness of [the] limited nature" of the court's function and the need to defer to the agency's expertise. *Id.*

In this case, the EPA's definition of "waters of the United States" is not arbitrary or capricious. 40 C.F.R. § 122.2. This definition was rational and based on consideration of relevant factors. Further proving this is the fact that the EPA completed a notice and comment procedure to promulgate 40 C.F.R. § 122.2. Notice and comment rulemaking requires an agency to publish a notice of a proposed rulemaking, and then allow for comment before publishing a final rulemaking that includes a discussion of the comments received. *See generally* 5 U.S.C. § 706. Thus, pursuant to § 706 of the APA, the EPA's regulation defining "waters of the United States" should be given deference.

With deference provided to the EPA's definition of "waters of the United States," this Court should affirm the district court's holding that Reedy Creek is a "water of the United States" because Reedy Creek is an "interstate water." 40 C.F.R. § 122.2. Reedy Creek begins in the state of New Union and flows into the state of Progress. R. at 5. Crossing state boundaries qualifies Reedy Creek as an interstate water, and thus a "water of the United States" pursuant to 40 C.F.R. § 122.2.

Additionally, Reedy Creek is used in interstate commerce. 40 C.F.R. 122.2. Reedy Creek is diverted for use in agricultural irrigation, and the agriculture products are used in interstate commerce. R. at 5. Furthermore, the water in Reedy Creek is used as a water supply for travelers in interstate commerce along Interstate 250. R. at 5. Finally, travelers come from all over both the country and other parts of the world to hunt migratory birds at Wildman's Marsh, the terminus of Reedy Creek. R. at 6.

Providing deference to the EPA's reasoned definition of "waters of the United States," Reedy Creek is a "navigable water" subject to regulation under the CWA. Reedy Creek is both an interstate water, and is used extensively in interstate commerce. Therefore, this Court should affirm the district court's holding that Reedy Creek is a "water of the United States."

B. The similarities between the Rito Seco Creek in *Earth Sciences* and Reedy Creek provide that Reedy Creek is a "water of the United States."

The district court erroneously held that *Rapanos*, 547 U.S. at 715*,* overruled *Earth Sciences*, 599 F.2d at 368. The issue that the Supreme Court decided in *Rapanos* was whether certain isolated "*wetlands* constitute 'waters of the United States'" under the CWA. *Rapanos*, 547 U.S. at 730 (emphasis added). In a formal adjudication after the *Rapanos* decision, the EPA in *In re Adams*, CWA-10-2004-0156, 2006 WL 3406321 (E.P.A. Oct. 18, 2006), held that *Rapanos* has no effect on cases that involve the discharge of a pollutant into streams or creeks, but rather only

applies to issues regarding wetlands. *Id.* at *17. Therefore, application of Justice Scalia's plurality or Justice Kennedy's concurrence in *Rapanos* pertaining to anything but a wetland is dictum, and merely persuasive authority. *In re Bateman*, 515 F.3d 272, 282 (4th Cir. 2008) (asserting that U.S. Circuit Courts treat U.S. Supreme Court dicta as mere persuasive authority). Importantly, the issue in the case *sub judice* is not related to a wetland. Rather the issue in this case is the same issue that was presented in *Earth Sciences*—whether a relatively permanent stream constitutes a navigable water under the CWA. *Earth Sciences*, 599 F.2d at 373.

1. The similarities and distinctions between Reedy Creek and the Rito Seco Creek in *Earth Sciences* make *Earth Sciences* more persuasive authority than *Rapanos*.

Reedy Creek is more analogous to the Rito Seco Creek in *Earth Sciences*, than the wetlands at issue in *Rapanos.* In *Earth Sciences*, a toxic substance that normally discharged into a reservoir to be reused in a gold mining operation overflowed into the Rito Seco Creek. *See Earth Sciences*, 599 F.2d at 370. The Tenth Circuit held this creek to be a "water of the United States," and thus subject to regulation under the CWA. Importantly, the Tenth Circuit reasoned that even though the Rito Seco Creek was (1) an intra-state body of water and (2) ended in reservoirs being used for minimal recreation, the water being used for agricultural irrigation coupled with the resulting agricultural products being sold in interstate commerce was sufficient to make the creek a "water of the U.S." *See id.* at 374-75.

Just as the Rito Seco Creek in *Earth Sciences*, Reedy Creek's water is diverted for agricultural irrigation, and the agricultural products are sold in interstate commerce. R. at 5. However, there are three important distinctions between Reedy Creek and Rito Seco Creek that establish Reedy Creek as more of a "water of the United States" than the Rito Seco Creek in *Earth Sciences*. First, unlike the intra-state Rito Seco Creek in *Earth Sciences*, Reedy Creek is an interstate body of water, flowing from New Union into Progress. R. at 5. Second, different

than the agricultural products in *Earth Sciences* being the lone connection to interstate commerce, the actual water in Reedy Creek is used as a water supply for interstate travelers on I-250, making the water itself necessary for interstate commerce. R. at 5. Third, unlike the reservoirs used minimally for recreation at the end of the Rito Seco Creek in *Earth Sciences*, Reedy Creek's terminus is a major recreational destination. R. at 5, 6. Wildman Marsh National Wildlife Refuge is mostly on federally owned land, and is host to over one million ducks and other waterfowl during their twice-annual migrations. R. at 5, 6. As such, the area is a major destination for duck hunters from all over the world, adding over twenty five million dollars to the local economy from interstate hunting activities. R. at 6. Therefore, both the similarities and distinctions between the Rito Seco and Reedy Creek establish that Reedy Creek is a "navigable water," and thus should be subject to regulation under the CWA.

2. Even if this Court applies *Rapanos v. United States*, Reedy Creek satisfies Justice Scalia's plurality, and is thus a "water of the United States."

As analyzed above, *see* discussion *supra* Part IV B, *Rapanos v. United States* is satisfied if either Justice Scalia's plurality or Justice Kennedy's concurrence is fulfilled. *United States v. Johnson*, 467 F.3d 53, 60 (1st Cir. 2006); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008); *see United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). Justice Scalia's plurality opinion asserts that "waters of the United States" include only relatively permanent, standing, or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes. *Rapanos*, 547 U.S. at 733.

Additionally, the crux of Justice Scalia's plurality standard is the relatively permanent flow of the water, not the label of the water body as a "stream" or "river." In fact, a recent decision out of the United States District Court for the Southern District of Texas has found just that. In

United States v. Brink, the court provided that a creek . . . is "*similar in nature* to other bodies of water forming geographical features, such as 'streams, oceans, rivers, and lakes.'" *United States v. Brink*, 795 F. Supp. 2d 565, 578 (S.D. Tex. 2011)(emphasis added)(*quoting Rapanos*, 547 U.S. at 731). Utilizing this, the court asserted that "[a]pplying *Rapanos* in light of common sense it is clear that [a creek is one] which the Corps has jurisdiction over . . . ." *Id*.

In the case *sub judice*, Reedy Creek satisfies Justice Scalia's standard and should therefore be considered a "water of the United States." Reedy Creek is a continuously flowing body of water that runs for fifty miles. R. at 5. Therefore, Reedy Creek satisfies Justice Scalia's controlling test in *Rapanos* because it is a "continuously flowing" body of water. Satisfying Justice Scalia's plurality standard, Reedy Creek should be considered a "water of the United States."

VI. THE DISTRICT COURT PROPERLY HELD THAT BONHOMME VIOLATED THE CWA BY ADDING ARSENIC TO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY.

The CWA prohibits the discharge of any pollutant from a point source unless authorized by a permit under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C. §§ 1311(a), 1342 (2012). Section 502(12) of the CWA defines the key phrase "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). Thus, a NPDES permit is required when: (1) a *pollutant* is (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982).

It is undisputed by the parties that arsenic is a pollutant. R. at 8. Regarding the third requirement, the district court properly held that Reedy Creek is a navigable water because it is "an interstate water, used in interstate commerce, and is analogous to persuasive authority found in *United States v. Earth Sciences Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). *See* discussion *supra*

Section V. Therefore, the pertinent issues are whether arsenic is *added* to Reedy Creek *from* a *point source*. The addition requirement is satisfied through an analysis of statutory language, and the point source requirement is established by Bonhomme's conveyance of arsenic into Reedy Creek. The addition of arsenic to Ditch C-1 by Maleau is irrelevant because of Bonhomme's ownership of the culvert. Accordingly, this Court should uphold the district court's dismissal of Bonhomme's claim.

A. Regardless of whether Maleau is the but-for cause of the arsenic in Ditch C-1, statutory interpretation illustrates that the discharge of arsenic through a culvert on Bonhomme's property is an "addition" to Reedy Creek in violation of the CWA.

Ditch C-1 is an agricultural drainage ditch that begins before Maleau's property line and runs three miles before discharging directly into Reedy Creek through a culvert on Bonhomme's property. R. at 5. Testing indicates that arsenic is present in Ditch C-1 just below Maleau's property and that it decreases in concentration as it approaches Bonhomme's property. R. at 6. Whether the discharge of arsenic through a culvert on Bonhomme's property is classified as an *addition* when Bonhomme is not directly adding the arsenic is a question of statutory interpretation.

If the statutory language is not ambiguous, and "the statutory scheme is coherent and consistent," a court's inquiry comes to an end. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), the Supreme Court stated that the plainness or ambiguity of a statute is determined by reference to the language of the statute, the specific context of the language, and the broader context of the statute as a whole. The process of statutory construction is a "holistic endeavor." *U.S. Nat'l Bank v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993).

Beginning with the language of the relevant statute, "discharge" is defined as "any addition of any pollutant to navigable waters from a point source. 33 U.S.C. § 1362(12). The term "addition" is not further defined by the CWA, but it is generally understood as "the act or process of adding." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 24 (Philip Babcock Gove et al. ed., 1971). Next, when examining the specific context of the language, it is noteworthy that the term "addition" is preceded by "any," a determiner that helps orient the term in the context of the definition. Specifically, the phrase "*any* addition" places emphasis on the act of discharge itself, not on who does the discharging. Finally, when analyzing the broader context of the statute, "it is apparent that the liability and permitting sections of the Act focus on the point of discharge, not the underlying conduct that led to the discharge." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2002).

A holistic analysis of the statute indicates that the focus of the CWA is on the act and point of discharge and not the person or underlying conduct. Therefore, the discharge of arsenic from Bonhomme's culvert into Reedy Creek should be considered an addition under the language of the CWA, regardless of whether Maleau added arsenic to Ditch C-1.

B. A point source need only convey the pollutant to "navigable waters," not be the original source of the pollutant.

Once it is determined that pollutants are being added to navigable waters, the next step is to determine whether that addition of pollutants originates from a point source. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004). Section 502(14) provides the definition of a 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) (2012).

It is well established that culverts are point sources. *Dague v. Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). Specifically, a culvert running under a railroad has been classified as a point source under the broad reach of § 301(a) of the CWA. *Id*. at 1355. Similarly, the culvert running under Bonhomme's farm road should be considered a point source. It is clearly a discernible, confined and discrete conveyance, and it is the means by which the water in Ditch C-1 is discharged into Reedy Creek. R. at 5.

Further, the definition of a point source itself makes plain that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.'" *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 105. The examples of point sources enumerated by the CWA are objects that do not generate pollutants themselves but merely transport them. *Id*. The Supreme Court provided a clear example by explicitly rejecting the notion that NPDES permits would not cover municipal wastewater treatment plants simply because they treat and discharge pollutants added to water by others. *Id*. The culvert on Bonhomme's property may not be the original source of the arsenic, but it is the conveyance that transfers the pollutant into Reedy Creek. R. at 5.

Bonhomme argues that he is not liable because Maleau is the but-for cause of the arsenic in Ditch C-1, however, this assertion misconstrues the relevant inquiry by overlooking the fact that arsenic is discharged into Reedy Creek through the culvert on Bonhomme's property. The ultimate question is not the underlying cause of the pollution, but whether, but-for the point source, the pollutants would have been added to the receiving body of water. *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 103. Reedy Creek is the receiving body of water, and the culvert on Bonhomme's property is the point source by which the arsenic is conveyed. R. at 5. Without the

presence of the culvert, the water in Ditch C-1 would not flow under the farm road on Bonhomme's property. R. at 5.

Bonhomme's culvert is a point source, and it is the means by which the arsenic is added to Reedy Creek. Since this point source directly conveys a pollutant to a navigable water, Bonhomme has violated the CWA. *Gorsuch*, 693 F.2d 165. Whether Maleau indirectly added the arsenic to Ditch C-1 is an irrelevant question because it is an underlying cause of the pollution. Accordingly, Bonhomme is liable and his claim was properly dismissed.

C. Ownership of a point source, not the discharge-causing conduct, triggers liability under the CWA.

The CWA's consistent reference to the obligations of "owners and operators" of a point source strongly suggests that those land owners who are responsible for point source are subject to liability under the CWA. *El Paso Gold Mines, Inc.*, 421 F.3d at 1143-44. Specifically, in § 301(g), modifications with respect to the discharge from any point source can be applied for only by the "owner or operator" of the point source. 33 U.S.C. § 1311(g)(2). Further, § 308 allows the Administrator to require the "owner and operator" of a point source to establish and maintain records, make reports, and require other information that may be necessary to carry out the objective of the chapter. 33 U.S.C. § 1318(a)(A) (2012).

Further, regulations promulgated by the EPA also support this argument. The EPA has determined that drainage from abandoned mines can be point source pollution only if the owner can be found; otherwise, it is considered nonpoint source pollution. *El Paso Gold Mines Inc.*, 421 F.3d at 1144; *see* EPA Notice, 55 Fed. Reg. 35248-01 (Aug. 28, 1990). Additionally, the "addition of any pollutant" has been defined as "surface runoff which is collected or channelled by man." *El Paso Gold Mines Inc.*, 421 F.3d at 1144; *see* 40 C.F.R. § 122.2 (2013). This reinforces the idea that ownership will trigger liability, not the discharge-causing conduct.

The culvert/point source in this case runs underneath a farm road on Bonhomme's property. R. at 5. Bonhomme has complete ownership over the culvert, and it is the direct link to Reedy Creek. Since the culvert/point source directly introduces arsenic into Reedy Creek and is owned and maintained by Bonhomme, he is in violation of the CWA and the district court properly denied his motion to dismiss.

CONCLUSION

For the forgoing reasons, this Court should affirm the district court's dismissal of Bonhomme's suit because he was not a real party in interest according to Rule 17(a) of the Federal Rules of Civil Procedure. This Court should also affirm the district court's holdings that foreign nationals are not entitle to sue under the CWA's citizen suit provision, that Maleau's waste piles are not point sources under § 502(12), (14), that Bonhomme violated the CWA by adding arsenic to Reedy Creek through a culvert on his property, and that Reedy Creek is a "water of the United States" under the CWA. Finally, this Court should overturn the district court and hold that Ditch C-1 is also a "water of the United States" under the CWA.

Respectfully submitted,

_____

Counsel for State of Progress