Team 40

C.A. No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee.

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

and

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

v.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

Plaintiff-Appellants Jacques Bonhomme and the State of Progress (Progress) each filed suit in the United States District Court for the District of Progress for claims arising under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387. The district court properly asserted jurisdiction over a federal question, 28 U.S.C. § 1331 (2012), and rendered a final order and judgment on July 23, 2012 in D.C. No. 155-CV-2012 and D.C. No. 165-CV-2012. This Court has jurisdiction over the appeal and cross-appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether, due to the economic and noneconomic injuries suffered, Bonhomme is the real party in interest under Federal Rule of Civil Procedure 17(a), and is therefore entitled to bring suit against Maleau for a violation under CWA § 301(a), 33 U.S.C. § 1311(a).

II. Whether Bonhomme, a foreign national who resides and works in the United States and who has suffered a harm that would otherwise be actionable, may bring suit under CWA § 505(a), 33 U.S.C. § 1365(a).

III. Whether Maleau's waste piles, which are subject to rainwater erosion and placed next to Ditch C-1, are "point sources" under CWA §§ 502(12), (14), 33 U.S.C. §§ 1362(12), (14).

IV. Whether Ditch C-1 is a "navigable water"/"water of the United States" under CWA §§ 502(7), (12), 33 U.S.C. §§ 1362(7), (14).

V. Whether Reedy Creek is a "navigable water"/"water of the United States" under CWA §§ 502(7), (12), 33 U.S.C. §§ 1362(7), (12).

VI. Whether Bonhomme violated CWA § 301(a), 33 U.S.C. § 1311(a) when arsenic from Maleau's waste piles traveled through his culvert into Reedy Creek, an interstate, navigable water.

STATEMENT OF THE CASE

After proper notice, Jacques Bonhomme sued Shifty Maleau for violating the Clean Water Act (CWA or the Act), 33 U.S.C. §§ 1251-1387 (2012), under § 505(a), the citizen suit provision, 33 U.S.C. § 1365(a). (R. 4.) Bonhomme requested all relief available under that section. (R. 4.) In his suit, Bonhomme alleged that Maleau piled mining overburden adjacent to Ditch C-1 (or the Ditch) in the State of Progress and continues to do so. (R. 4.) He also alleged

that Maleau arranged the waste piles such that rainwater runoff from them has eroded channels between the piles, and between the piles and the Ditch. (R. 4.) Thus, when it rains, arsenic is added into Ditch C-1. (R. 4-5.) Finally, Bonhomme alleged that the Ditch carries the arsenic through a culvert under his farm road into Reedy Creek (or the Creek), an interstate, navigable water. (R. 5.) Bonhomme asserted that the Ditch is a navigable water because it is a tributary of Reedy Creek. (R. 5.)

After proper notice, Progress filed a citizen suit against Bonhomme, alleging that he violated the CWA by discharging arsenic from his culvert into Reedy Creek. (R. 5.) Maleau intervened as a matter of right under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B). (R. 5.) Progress and Maleau moved to consolidate their case with *Bonhomme v. Maleau*, and Bonhomme did not object. (R. 5.) The district court granted the motion. (R. 5.) The defendant in each suit filed motions to dismiss. (R. 5.)

Regarding the procedural issues, the district court dismissed Bonhomme's suit because he was not a proper plaintiff and because as a French national, he was not authorized to bring a citizen suit. (R. 7-8, 10.) For the CWA issues, the district court held that Maleau's waste piles were not point sources, but that Ditch C-1 and the culvert were point sources and Reedy Creek was a navigable water. (R. 8-10.) Thus, the district court denied Bonhomme's motion to dismiss because Progress adequately stated a cause of action. (R. 10.) Following the district court order dated July 23, 2012, Bonhomme, Progress, and Maleau each filed a Notice of Appeal. (R. 1.)

STATEMENT OF THE FACTS

Jacque Bonhomme owns a parcel of land in Progress abutting Reedy Creek and Wildman Marsh (or the Marsh). (R. 5.) Reedy Creek runs for approximately fifty miles, traveling through New Union into Progress and finally into Wildman Marsh. (R. 5.) Water from the Creek is the

main supply for a service area on federally funded interstate highway 250 (I-250). (R. 5.) Water is diverted from the Creek for agricultural and commercial purposes in both Progress and New Union. (R. 5.) Finally, Reedy Creek flows into Progress where it passes Bonhomme's property and into Wildman Marsh. (R. 5.) The Marsh is an extensive wetland mostly contained within the Wildman National Wildlife Refuge, a crucial habitat for migratory birds, which is owned and managed by the U.S. Fish and Wildlife Service. (R. 5-6.) Bonhomme's property sits at the intersection of the Creek, the Marsh, and another minor tributary. (R. 5.)

Ditch C-1 was built in 1913. (R. 5.) It runs through several properties and flows through Bonhomme's property and directly into Reedy Creek and Wildman Marsh. (R. 5.) Three miles upstream, Maleau owns a parcel of land that the Ditch also runs through. (R. 5.) The Ditch contains a regular flow of water, with the exception of the annual dry season, which lasts from several weeks to three months in the most extreme drought conditions. (R. 5.) Maleau operates an open pit gold mine adjacent to the traditionally navigable Buena Vista River. (R. 5.) He hauls the overburden and debris to his property that is adjacent to Ditch C-1. (R. 5.) The debris piles are placed next to the Ditch. (R. 6.) Bonhomme has tested the water for toxins in the Ditch before it reaches Maleau's property, and it did not show signs of pollutants. (R. 6.) However, the water downstream of Maleau's property tested positive for arsenic, a pollutant under the CWA that requires a NPDES permit. (R. 6.) It is uncontested that Maleau does not have a permit for discharging arsenic into the Ditch, Reedy Creek, or Wildman Marsh. (R. 6.)

As Ditch C-1 flows from Maleau's property toward Reedy Creek, the concentration of arsenic decreased in proportion to the increasing flow in the Ditch. (R. 6.) Reedy Creek tested negative for arsenic above the point where the Ditch flows into the Creek, but just below the point where the Ditch meets the Creek, arsenic is present in significant levels. (R. 6.) Arsenic

has also been detected in Wildman Marsh. (R. 6.) The toxic chemical is frequently associated with gold mining and the debris created from gold mining extraction. (R. 6.)

Due to the arsenic in Wildman Marsh, which fronts Bonhomme's property, he reduced his regular bird hunting trips. (R. 6.) The Marsh's pristine environment at one time attracted national and international visitors estimated to generate over $25 million to the local economy. (R. 6.) Now, Bonhomme has had to reduce his use of the Marsh for business and pleasure hunting trips by seventy-five percent because he is concerned about the toxic effect of the arsenic in the wetland. (R. 6.) Maleau does not contest that there is economic decline in the local economy as a result of the reduced use of Wildman Marsh. (R. 6.)

STANDARD OF REVIEW

In its final order and judgment, the district court granted Maleau's motion for summary judgment and dismissed the action filed by Bonhomme without prejudice. On appeal and cross-appeal, the parties do not contest the facts in this case. On appeal, this Court must conduct a *de novo* review of the legal conclusions made by the lower court. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001). In reviewing a grant of summary judgment, this Court should review the evidence "in the light most favorable to the nonmoving party," to determine whether "there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000).

SUMMARY OF THE ARGUMENTS

I. The district court erred when it held that PMI, rather than Bonhomme, was the real party in interest under Rule 17(a). The real party in interest is the party that possesses the right sought to be enforced under the substantive law. Here, as a property owner near the contamination site and as a regular user of the area for hunting and recreation, Bonhomme

possesses the types of interests that the Clean Water Act seeks to protect. Further, a finding that PMI has an interest in the outcome of the litigation does not preclude a finding that Bonhomme is the real party in interest. This Court may also resolve the real party in interest issue by finding that Bonhomme has standing under Article III of the Constitution. Here, Bonhomme meets the elements for Article III standing because he has personally suffered injury to both his property and his recreational interests, which includes hunting in and around Wildman Marsh. These injuries are "fairly traceable" to Maleau's mining activities and will be redressed by the relief sought in this litigation because the violations are ongoing.

II. The district court erred in finding that Bonhomme did not meet the definition of "citizen" contained within § 505(g) of the CWA, 33 U.S.C. § 1365(g), because he is a foreign national. The term "citizen" can properly be understood to imply a *private* citizen, rather than a U.S. citizen. This reading does not deprive the term "citizen" of its meaning, but rather offers an interpretation that conforms to the dual policies of private enforcement and environmental protection. This analysis further accords with the clear statements by Congress and the Supreme Court that standing under the citizen suit provision of the CWA should only be limited by the requirement that the plaintiff demonstrate an "injury in fact." As demonstrated in Part I.B., Bonhomme has suffered both economic and noneconomic harm and therefore satisfies the injury-in-fact requirement for the purposes of Article III standing.

III. The district court erred when it held that Maleau's mining waste piles were not a point source. Under the CWA, "point source" is to be interpreted broadly to include anything that is readily identifiable as a pollutant, only excluding a narrow class of "non point source" pollutants. Consequently, a point source can exist where, as here, a mining operation has simply discarded tailings and overburden from their operations near a navigable water and then

rainwater washes the sediment into the water. Maleau's waste piles are point sources because they contain arsenic and because rainwater runoff collects in the piles, eventually entering navigable waters. Additionally, the congressional record for the CWA shows that mining was intended to be covered by § 304(f)(B), 33 U.S.C. § 1314(f)(B), and thus, a finding that Maleau's waste piles are not point sources would frustrate the intent of the CWA.

IV. The district court erred when it held that Ditch C-1 was a point source, instead of a navigable water. The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." The broadest definition interpreted by courts, in accordance with Congress's intent, includes regulating waters that would not be deemed navigable under the classical understanding of that term. As articulated by Justice Kennedy in *Rapanos*, a water that is not traditionally navigable can be subject to CWA jurisdiction if it possesses a "significant nexus" to a navigable water. Ditch C-1 is a navigable water because it is a tributary to a navigable water and adjacent wetland and has a significant nexus to Reedy Creek, an interstate, navigable water.

V. The district court did not err when it held that Reedy Creek was a navigable water. Congress chose to define waters covered by the CWA broadly, and as such, EPA regulations defined "waters of the United States" to include traditional navigable waters, that is, waters that are currently used, or were used, or may be susceptible to use in interstate or foreign commerce, and wetlands adjacent to covered waters, including tributaries. Reedy Creek is a navigable water since its waters is used in interstate commerce as a water source for businesses on a federally funded highway and for farmers as part of their agricultural enterprises. Moreover, Reedy Creek ends in Wildman Marsh—a wetland that is a "water of the United States" because it has a

significant nexus to water that may reasonably be made navigable, is a wetland that affects interstate commerce, and it is a refuge on federal property.

VI. The district court erred when it held that Bonhomme's culvert was a point source. The CWA does not forbid the addition of pollutants *directly* to navigable waters from any point source, but rather, it forbids the addition of any pollutant *to* navigable waters. Here, the evidence clearly shows that Maleau's waste piles are the point source and Bonhomme's culvert is merely a *through conveyance* upon which the arsenic traveled to reach navigable waters. In the alternative, if this Court finds that the culvert is a point source, then Bonhomme nevertheless did not violate the CWA because he did not *add* pollutants to a navigable water. It is undisputed that the arsenic originated from Maleau's waste piles, and when the rainwater runoff containing the arsenic reached the culvert, it already had arsenic in it. Without a point source or an addition of a pollutant, the Clean Water Act does not apply. Bonhomme's culvert is not a point source, nor did he add pollutants to a navigable, and as such, the district court erred when it held otherwise.

ARGUMENTS

I. BONHOMME IS THE PROPER PLAINTIFF UNDER RULE 17 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND FOR THE PURPOSES OF ARTICLE III STANDING.

Bonhomme has suffered injury to his interests and property as a result of Maleau's mining operations. Therefore, he is the real party in interest under Rule 17 of the Federal Rules of Civil Procedure (Rule 17) and satisfies the test for standing under Article III of the Constitution. The district court erred when it found that PMI is the real party in interest.

A. Bonhomme is the real party in interest because he suffered injury that is separate and distinct from any claims that might arise in connection with PMI.

Under Rule 17(a), any plaintiff who brings action in federal court must be the "real party in interest." Fed. R. Civ. P. 17. In order to meet this requirement, the plaintiff must show that he

or she "actually possess, under the substantive law, the right sought to be enforced." *United Health Care Corp. v. American Trade Ins. Co.*, 88 F.3d 563, 568 (8th Cir. 1996). This finding is necessary to "protect the defendant against a subsequent action by the party actually entitled to recover and insure that the judgment will have its proper effect as res judicata." *Id.* (quoting Fed. R. Civ. P. 17(a) advisory committee's note). For example, in the corporate context, a shareholder who only suffers injury insofar as the corporation suffered a loss would not be entitled to sue in his own name because his injury is not separate or distinct from the injury suffered by the firm. *Weissman v. Weener*, 12 F.3d 84, 86 (7th Cir. 1993) (quoting *Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago,* 877 F.2d 1333, 1335-36 (7th Cir.1989)).

However, if two parties have been separately injured by the same action, both may be entitled to recover. *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Mgmt., Inc.*, 620 F.2d 1, 4 (1st Cir. 1980); *Weissman*, 12 F.3d at 86. This is true, even where the plaintiff is an agent of or is simply affiliated with another injured party. For example, the Second Circuit found that a company acting as the agent and guarantor of a lease agreement on behalf of another party could nevertheless sue in its own name because it held an interest in the outcome of the suit. *Cinema North Corp. v. Plaza at Latham Assocs.*, 867 F.2d 135, 139 (2d Cir. 1989). The First Circuit has noted that in the shipping context, a party may bring suit irrespective of whether he may be found to be an agent or consignee of another entity, assuming he has suffered a personal injury and there is no threat of double recovery for the same harm. *Prevor-Mayorsohn Caribbean*, 620 F.2d at 3. Similarly, as one district court has noted:

> [A]n agent who has contracted in his own name for a disclosed or undisclosed principal, or who acted as an agent during the course of the transaction involved in the litigation, may sue for damages suffered by the principal. Such an agent is a proper plaintiff even though the damages were sustained by another, he claims no financial interest in the transaction or litigation, and even though he did not have title to, or more than a transient possessory or custodial interest in, the

> property forming the subject of the dispute. *Mitsui & Co. v. P.R. Water Resources Auth.*, 528 F. Supp. 768, 776 (D.P.R. 1981).

Lastly, in an unreported decision, one district court dismissed the argument that the plaintiffs could not simultaneously act as the agents for a limited partnership and be the real parties in interest. *Abbell Credit Corp. v. Banc of America Sec., LLC*, 2001 WL 1104601, at *2 n.2 (N.D. Ill. 2001) ("Again, defendants focus on the agency relationship between Abbell and the limited partnerships, and do not explain why, as general partners, Abbell and Holland would not be real parties in interest.").

These examples show that where the plaintiff suffers a harm that is separate and distinct from that suffered by the affiliated entity, that plaintiff retains the right to bring his own cause of action. Therefore, a finding that PMI is an interested party does not necessarily preclude the finding that Bonhomme is the real party in interest. In reaching its conclusion that PMI is the real party in interest, the district court ignored the fact that Bonhomme, rather than PMI, owns the property in question and that he will be personally affected by the quality of water. Rather, the sole finding that the district court made that may have any bearing on Bonhomme's interest was on the issue of payment of attorney's fees and other costs associated with the litigation. However, this does not negate the harms suffered by Bonhomme, or preclude this Court from finding that he is the real party in interest in this suit. *See, e.g.*, *Michigan Alkali Co. v. Bankers Indem. Ins. Co.*, 103 F.2d 345, 348 (2d Cir. 1939) (rejecting the argument that insured was not the real party in interest because insurer had agreed to defray attorneys fees and other costs).

The following discussion on standing resolves the real party in interest issue by addressing the actual and imminent injuries suffered by Bonhomme as a direct result of Maleau's conduct. *See infra* part I.B.

B. Bonhomme has standing to bring suit under the Clean Water Act because he has suffered injury that is "fairly traceable" to Maleau's conduct.

This Court may resolve the real party in interest issue by determining that Bonhomme has met the requirements for Article III standing. "[B]oth standing and real party in interest 'are used to designate a plaintiff who possesses a sufficient interest in the action to entitle him to be heard on the merits.'" *Weissman*, 12 F.3d at 86 (quoting 6A Wright & Miller, Federal Practice & Procedure: Civil § 1542, at 643 (2d ed. 1971)). As the Seventh Circuit has noted: "[I]t is settled that once a party is found to have standing to raise a constitutional point, that ruling disposes of any real party in interest objections as well." *Apter v. Richardson*, 510 F.2d 351, 354 (7th Cir. 1975) (internal citations omitted). Here, Bonhomme has suffered injury to both economic and noneconomic interests that are protected under the Clean Water Act and will be redressed by the relief sought. For these reasons, Bonhomme meets the requirements for standing and can therefore be found to be the real party in interest in this action.

In order to satisfy the case and controversy requirement of Article III, a plaintiff must meet the elements of standing set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *Steel Corp. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998). The plaintiff must show an "injury in fact" that is concrete and particularized, and actual or imminent. *Id.* This injury must be "fairly traceable" to the alleged conduct of the defendant. *Id.* Lastly, it must be likely, rather than speculative, that the injury will be redressed by the relief sought. *Id.*

The Supreme Court has held that the threshold for proving injury is low. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689-90 n.14 (1973). This is particularly applicable in the environmental context, including under the Clean

Water Act, where injury to recreational and aesthetic interests will suffice. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 557 n. 23 (5th Cir. 1996) (noting that other Circuit Courts have upheld the "low" threshold for showing injury in fact in the CWA context); *see, e.g.*, *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 988 (8th Cir. 2011) ("Injury in fact necessary for standing 'need not be large[;] an identifiable trifle will suffice.'"). The injuries asserted here are more than sufficient to meet this low threshold.

Bonhomme has suffered multiple injuries as a direct result of Maleau's mining operations. First, there is imminent loss in value of Bonhomme's property as a direct result of the change in water quality. The Supreme Court in *Laidlaw* found that an actual and perceived loss of property value due to environmental degradation constituted sufficient economic harm for the purposes of proving standing to bring suit under the Clean Water Act. 528 U.S. at 182-83. In *Laidlaw*, multiple plaintiffs owned property or had considered buying property in the vicinity of a waste incinerator facility. *Id.* at 175. The Court found the concerns about the facility's discharges "directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 183-84.

Here, the proven arsenic poisoning in the water and wildlife poses an imminent threat to Bonhomme's property, particularly in light of its proximity to the Wildman Marsh and its potential for agricultural use. Ditch C-1, which runs through Bonhomme's property, was originally built for agricultural purposes. The importance of ensuring the agricultural potential of the property is evidenced by the fact that the surrounding properties are also agricultural and the restrictive covenant contained in Bonhomme's deed, which requires him to maintain Ditch C-1. Further, the district court's findings demonstrate a hydrologic connection between the drainage ditch and the groundwater in the surrounding soils. Given these facts, it is indisputable

that the quality of the water in the Ditch and the surrounding groundwater will have a very real impact on the present and future use of his property.

Second, recreational interests, such as a hunting or fishing, are protected interests for the purpose of proving standing. The Supreme Court has affirmed that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). Further, the Supreme Court confirmed in *Laidlaw* that "[e]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." 528 U.S. at 183.

Here, Bonhomme has an interest in preserving the water quality of Wildman Marsh to ensure his continued use of the property for a wide variety of purposes, including the hunting parties that he has long hosted. Specifically, because of the threat of arsenic poisoning, Bonhomme has reduced his hunting parties from eight to two a year. Wildman Marsh is unique in that it is a critical habitat for migratory birds. Arsenic poisoning in the water and birds presents a distinct threat to hunting potential in the area. As the district court has noted, the U.S. Fish and Wildlife Service has detected arsenic in three Blue-Winged Teal in Wildman Marsh. Blue-winged Teal are a species of duck, which can be hunted in accordance with state regulations. *See, e.g.*, Missouri Department of Conservation, *Waterfowl Hunting Digest 2013-2014*, at 26 (2013).[1] Further, assuming *arguendo* that there were no notable changes in the environment around the hunting lodge, this does not preclude a finding of harm to Bonhomme's

[1] *Available at* http://mdc.mo.gov/sites/default/files/resources/2010/05/waterfowl_digest_2013.pdf.

asserted interests. As the Supreme Court has noted, "[t]he relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." *Laidlaw*, 528 U.S. at 181. Here, the asserted injuries to Bonhomme's recreational interests demonstrate harm to the plaintiff, regardless of the actual level of environmental degradation.

To prove the element of causation, it need only be shown that the asserted injury is "fairly traceable" to the defendant's alleged conduct. *Lujan*, 504 U.S. at 560. Further, the plaintiff "need not eliminate any other contributing causes to establish its standing." *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011). Rather, the plaintiff need only prove that the connection between the defendant's alleged conduct and the injury is not "tenuous or abstract." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 860 (9th Cir. 2005). Lastly, for the purposes of proving standing, "the causal connection . . . cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of litigation as to demonstrate that the plaintiffs would succeed on the merits." *Id.*

Here, the injury to Bonhomme's interests derives from the arsenic found in the water and in the birds near his property. Maleau runs a gold mining operation adjacent to the Buena Vista River, and arsenic contamination has long been associated with gold mining. *See, e.g.*, *Ackels v. EPA*, 7 F.3d 862, 866 (9th Cir. 1993); *Trustees for Alaska v. EPA*, 749 F.2d 549, 552 (9th Cir. 1984). Both parties and the district court acknowledge that arsenic is undetectable in the water upstream of Maleau's property, but is present in high concentrations downstream. Although the water directly on Maleau's property has not been tested, and it is therefore conceivable that the contamination could come from elsewhere, given the strong correlation between gold mining and arsenic and the clear proof of contamination downstream of Maleau's property, there is ample

evidence to find that the causal connection here is neither speculative, nor the product of conjecture, and that the harm is "fairly traceable" to Maleau's conduct.

Lastly, although there has been no challenge to the redressability of Bonhomme's claims here, a favorable ruling in this action would halt the illegal discharge of arsenic into Ditch C-1 and Reedy Creek, thereby mitigating and abating the harms suffered by Maleau.[2] *WildEarth Guardians v. Public Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012).

II. BONHOMME IS A PRIVATE CITIZEN THAT HAS SUFFERED AN ACTIONABLE HARM UNDER THE CLEAN WATER ACT AND THEREFORE MEETS THE DEFINITION OF "CITIZEN" UNDER CWA § 505(a).

Under § 505(a) of the Clean Water Act, "any citizen may commence a civil action." 33 U.S.C. § 1365(a). Section 505(g) defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). A foreign national who resides and works in the United States and has suffered harm otherwise actionable under the Clean Water Act is nevertheless a *private* citizen for the purpose of bringing suit under § 505(a), and the district court therefore erred in finding that Bonhomme did not meet the definition of "citizen."

A. The term "citizen" in the context of a citizen suit provision of the Clean Water Act implies private, rather than public enforcement.

When taken in the context of § 505, the term "citizen" can rightly be understood to connote a *private* citizen, rather than a *United States* citizen, in accordance with the understanding that a citizen suit provision implies private, rather than public enforcement. 33 U.S.C. § 1365(a). The Supreme Court affirmed on multiple occasions that a citizen suit provision is intended to permit enforcement by citizens acting as "private attorney generals." *Middlesex Cnty Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981); *Bennett v.*

[2] In this action, the alleged conduct by Maleau is ongoing. Therefore, the redressability issues that frequently arise in citizen suit challenges in which only a civil penalty will be assessed are not present. *See Steel Co.*, 523 U.S. at 106; *Laidlaw*, 528 U.S. at 179.

Spear, 520 U.S. 154, 165 (1997). As the legislative history of the CWA shows, this type of private enforcement is intended to allow the general public to seek "vigorous enforcement action" where "Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. 92-414, at 3730 (1971).

In *Bennett*, the Supreme Court analyzed the implications of the citizen suit provision as a means of permitting private enforcement. 520 U.S. at 165-66. Addressing the citizen suit provision of the Endangered Species Act (ESA), the Supreme Court stated:

> [T]he obvious purpose of the particular provision in question is to encourage enforcement by so-called 'private attorneys general'—evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation (including even expert witness fees), and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later. *Id.* at 165.

Based upon this finding, the Court found that the term "any person," should be taken at face value to justify a "conclusion of expanded standing." *Id.* A similar conclusion can be reached here. The citizen suit provision of the CWA contains the elimination of the federal court jurisdictional requirements, the provision for recovery of costs and fees, and the government's rights of first refusal. 33 U.S.C. § 1365(a). Although the CWA provision states that a "citizen" may bring suit, where the ESA states that "any person" may bring suit, the two statutes cannot be meaningfully distinguished on that basis, as the CWA goes on to define the term "citizen" as "a person," limited only by the requirement that that person be adversely affected. *Compare* 16 U.S.C. § 1540(g) (ESA); *with* 33 U.S.C. § 1365(a), (g) (CWA). The 1971 Senate Report to the Act further emphasizes that for the purposes of the CWA, "*[a]ny person* may sue a polluter to abate a violation of water quality standards." S. Rep. 92-414, at 3769 (statements of Sen. Muskie) (emphasis added).

Both the plain language of the CWA and its legislative history further show that Congress did not intend any limitation based upon citizenship status or nationality. First, Congress could have included language specifying U.S. citizenship, but failed to do so. Rather, Section 505(a) specifically states: "*any* citizen may commence a civil action." 13 U.S.C. § 1365(a) (emphasis added). Where Congress could have limited the word "citizen" in any number of ways, it chose instead to add a term that can only be read as broad and all-inclusive. Similarly, although Congress debated the Act at length, the legislative history is silent on the issue of nationality. *See generally* S. Rep. 92-414; S. Conf. Rep. No. 92–1236 (1972). Further, the term "citizen" is inadequate to address the variety of classifications found in modern immigration law. To read this level of specificity into such a broadly phrased statute would be to inject meaning and language that simply does not exist.

B. Any private citizen who meets the injury-in-fact test of *Morton* may bring suit under CWA § 505(a).

Contrary to the district court's conclusion that U.S. citizenship should determine who is an eligible plaintiff under § 505(a), the Supreme Court in *Middlesex* and the Senate in its Conference Report confirmed that the term "citizen" should conform to the "broad category of potential plaintiffs" set forth in *Sierra Club v. Morton*. S. Conf. Rep. No. 92–1236, 3823; *Middlesex*, 453 U.S. at 16-17; *see also Morton*, 405 U.S. at 727. Under this definition, any plaintiff who has been adversely affected by the defendant's actions, and therefore meets the "injury-in-fact" test, may bring suit under the Clean Water Act. *Id.* As demonstrated, Bonhomme meets the injury-in-fact test because he has suffered a concrete and particularized injury, in the form of contamination to the water and natural resources on his property, and to his recreational interest in hunting and fishing in the area. For the full standing argument, see *infra* part I.A.

C. The important environmental policies behind the Clean Water Act underscore the need for a broad reading of citizen suit standing.

As the Supreme Court has noted, the important public policies that underlie all national environmental legislation support a broad interpretation of citizen suit standing. For example, in *Bennett*, the Court relied on the ESA's environmental policies to reach its conclusion of "expanded standing" under the act's citizen suit provision. 520 U.S. at 165-66. Notably, the Court concluded that in the environmental context, "the subject of the legislation makes the intent to permit enforcement by everyman even more plausible," than in the context of unfair housing practices that appeared in the case cited by the Court. *Id.* at 166.

The same important environmental policies are present here. The goal of the CWA is "to establish a comprehensive long-range policy for the elimination of water pollution." S. Rep. No. 92-414, at 3758. To achieve this goal, there is a further policy that underlies the citizen suit provision, which is to allow for private citizens to seek enforcement where state or federal action is lacking. S. Rep. No. 92-414, at 3730. Reading these policies together, this Court can achieve the most consistent result by allowing Bonhomme to proceed in this action. Here, the State of Progress has been made aware of the violations, and yet it has failed to prosecute. By bringing this suit, Bonhomme, a property owner who lives and works in the United States and has suffered direct harm as a result of Maleau's actions, has fulfilled the policies behind the CWA and its citizen suit provision that were intended by Congress.

III. THE MINING OVERBURDEN PILES ARE "POINT SOURCES" SUBJECT TO REGULATION UNDER THE CLEAN WATER ACT.

Under the CWA, the addition of pollutants to navigable waters is prohibited if it occurs through a "point source" without a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). Point sources include, "*but are 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) (emphasis added). Further, "point source" is to be interpreted broadly to include all readily identifiable sources of water pollution with a narrow exception for "non point source" pollutants. *Dague v. Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991).

The goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This goal has been broadly interpreted to carry out the intent of the Act in cases where storm water runoff has carried industrial debris into navigable waters. *See Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 922 (5th Cir.1983); *Parker v. Scrap Metal Processors*, 386 F.3d 993, 1009 (11th Cir. 2004); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). Alternatively, non-point sources, such as contaminated rainwater runoff from roadways, are too remote and cannot be easily traced back to the polluter. Consequently, the CWA, case law, and public policy suggest that a finding by this Court that Maleau's mining overburden is an identifiable "point source" of pollution is the correct result.

A. Maleau's mine tailing piles qualify as "point sources" under the CWA because they contain pollutants that rainwater runoff transports into Ditch C-1.

Because Maleau's mine tailing piles are the clear and identifiable source of the arsenic entering Ditch C-1 from rainwater runoff, the district court erred when it ruled they were not a

proper conveyance or point source. Congress created two classes of pollutants for purposes of the CWA: point source pollutants, which are subject to NPDES permit requirements, and non-point source pollutants, which are not subject to the same rigorous regulations. *See Earth Sciences*, 599 F.2d at 370-74 (discussing the legislative history and the reasoning behind the classes of pollutants). The two classifications of pollutants were "designed to further [the CWA] by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States" while simultaneously limiting liability for unidentifiable sources of water pollution. *Earth Sciences*, 599 F.2d at 373; *see also Dague*, 935 F.2d at 1354-55 (holding that "point source" should be interpreted broadly to effectuate the intent of the CWA). In contrast, non-point source pollutants, such as vehicle oil that is washed from a roadway, are not regulated because they are too remote and "virtually impossible to isolate to one polluter . . . ." *Earth Sciences*, 599 F.2d at 371.

Maleau's mining waste piles are clearly the identifiable sources of the arsenic in Ditch C-1, and therefore, the waste is subject to regulation under the CWA as a point source similar to the holding in *Sierra Club v. Abston Construction Co.*, 620 F.2d 41 (5th Cir. 1980). In *Abston Construction*, a citizen suit was filed under the CWA claiming that the miner's activities constituted point source pollutants without a permit. 620 F.2d at 42. The miners argued that the CWA did not regulate mining effluent and that rainwater runoff was similarly regulated under the Act. 620 F.2d at 44-45. The court held that mining effluent is regulated under the Act and that rainwater runoff from mine tailings can also constitute a point source under it. *Id.* Significantly, the court held that:

> A point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of

> ditches, gullies and similar conveyances, *even if the miners have done nothing beyond the mere collection of rock and other materials*. *Id.* (emphasis added.)

In the present case, Maleau's discarded mine tailings are piled next to the waterway. The arsenic then seeps into Ditch C-1 during precipitation events through rainwater runoff eroding channels into the piles. Thus, the holding in *Abston Construction* supports the position that the mine tailings are a point source subject to regulation under the CWA.

As previously established, Maleau's waste piles are the undisputed and readily identifiable, originator of the arsenic in Ditch C-1. Maleau relies on the holding in *Appalachian Power* to show that the waste piles are not point sources. In *Appalachian Power Co. v. Train*, the Fourth Circuit determined further that the designation of "non point source" has limited applications. 545 F.2d 1351, 1373 (4th Cir. 1976). In the relevant part of *Appalachian Power*, the power company sought to set aside EPA rules regarding rainwater runoff from stored construction materials. 545 F.2d at 1373. However, the power company agreed that, "contaminated runoff discharges from coal storage and chemical handling areas fell within this definition and should be subject to reasonable controls." *Id.* The disagreement in *Appalachian Power* focused on rainwater runoff from storage areas not mentioned in the CWA's point source definition of EPA guidelines and as a result were not subject to clear rules. *Id.* The court remanded the EPA rule so as to more clearly regulate the issue. *Id.* Here, Maleau's mining activities and associated waste are subject to regulation as point sources because there is no ambiguity regarding the regulation of the mining overburden piled next to the waterway. *See Sierra Club*, 620 F.2d at 45 (holding that mine tailings piled next to waterways can qualify as a point source). Since Maleau's arsenic-leaching waste piles are not remote and untraceable, they are more similar to the holding in *Abston Construction* than in *Appalachian Power*, and thus, they are a "point source" subject to regulation under the CWA.

B. Failure to find the mine tailings to be a "point source" allows a CWA violator to avoid liability and frustrates the intent of the statute.

The CWA was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to discourage behavior that degrades the Nation's waters by creating liability for polluters. 33 U.S.C. § 1251(a)(1). This goal has been broadly interpreted apply in cases where storm water runoff has carried industrial and mining debris into navigable waters. *See generally Avoyelles Sportsmen's League*, 715 F.2d at 922; *Scrap Metal*, 386 F.3d at 1009. Further, the holding in *Earth Sciences* indicates that non-point source pollutants are typically motor oil, "rubber particles, lead, asbestos and other elements or additives deposited on highways as a result of vehicular traffic" and are then deposited in navigable waters through rainwater. 599 F.2d at 372. Here, Maleau has an identifiable source of pollution that was created as a result of his mining activities, which is subject the Act's jurisdiction. Thus, the district court erred when it held that the overburden was not a point source pollutant because it "contravenes the intent of FWPCA and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point." *Id.*

If Maleau allowed the mine tailings to enter the Buena Vista River near where the waste originated, there is little doubt that the debris would be subject to the CWA. As such, Maleau has transported his waste from his property adjacent to the undisputed, traditionally navigable Buena Vista River to his property adjacent to Ditch C-1. His decision to move the tailings indicates that he knows that when rainwater runoff carries his industrial debris into a navigable water, it is a point source subject to the CWA. This case does not present the regulatory difficulties associated with non-point sources, such as oil and gas runoffs caused by rainfall on the highways, which are "virtually impossible to isolate to one polluter no permit or regulatory

system was established as to them." *Earth Sciences*, 599 F.2d at 371. Rather, the case involves a single, identifiable point source: Maleau's transported mine tailings adjacent to Ditch C-1.

1. The CWA superseded the Refuse Act, which already prohibited discharges from mining waste into the Nation's waters

An early precursor to the Federal Water Pollution Control Act, the Refuse Act, prohibited unpermitted discharges into the Nation's waters, which was understood to apply to mining activities. 33 U.S.C. § 1342(a)(5). Specifically, the Refuse Act has been held to prohibit the "unpermitted discharge of mining wastes." *See Reserve Mining Co. v. EPA*, 514 F.2d 492, 529-32 (8th Cir. 1975). It is clear that the CWA applies to mining activities, such as those undertaken by Maleau, particularly because the predecessor to the Act also regulated unpermitted discharges into navigable waters from mining operations. The goal of the CWA was to reduce water pollution from unpermitted discharges and nothing in the Act indicates that it created with the intention to weaken earlier water pollution abatement regulations. 33 U.S.C. § 1251(a)(1). Maleau allows the mine tailing to leach arsenic into Ditch C-1, which is an unpermitted discharge that has long been subjection to regulation under the CWA.

C. The absences of "mining waste piles" from the list of statutory examples of point sources does not preclude a court from finding that a mining waste is a point source.

Although the point source at issue here is not specifically identified in the definition of "point source," the plain language of § 502(14), 33 U.S.C. § 1362(14), and case law show that the mining overburden is included under the CWA. During the drafting of the 1977 amendments to the CWA, Congress specifically drafted an amendment to cover mining waste as point source pollutants, but declined to include it in the final bill, concluding that it "appeared to be duplicative." *See* Staff of Senate Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the Water Pollution Control Act Amendments of 1972, 530-535 (Comm. Print 1973).

Additionally, case law and legislative history provide a basis for finding that gold mining activities can constitute point source pollutants. In *Earth Sciences*,[3] EPA brought a suit against a gold mining operation under the Federal Water Pollution Control Act, the predecessor to the CWA. 599 F.2d at 370. EPA argued that the gold mining operation was leaking toxic mining chemicals into nearby waters during periods of spring melt that resulted in overflows into the adjacent stream. *Id.* The gold mine responded by arguing that the leak was not a point source as defined under the CWA because it was caused by natural melt water. *Id.* at 370-73. The district court ruled in favor of the mining operation, holding that under § 304, 33 U.S.C. § 1314(f), the EPA classified mining operations as non-point source polluters and intended to develop "guidelines for identifying and evaluating" the "processes, procedures, and methods to control pollution resulting" from "mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines."

On appeal, however, the Tenth Circuit reversed. *Earth Sciences*, 599 F.2d at 372-73. The court focused on the legislative history and the intent of the CWA. *Id.* The court stated, "[w]e are impressed by the rejection of the proposed Hechler amendment on mine water wastes, as being based upon the view mining was already covered by the proposed Act." *Id.* at 372 (citing Staff of Senate Comm. on Public Works, 93d Cong., 1st Sess., A Legislative History of the

[3] The district court erroneously stated that the holding in *Earth Sciences* is no longer good law post-*Rapanos*. Regarding point sources, the Supreme Court held in *Rapano*s that "from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 301(a), 33 U.S.C. § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between." 547 U.S. 715 at 743 (plurality opinion); *see also United States v. Velsicol Chemical Corp.,* 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976). While this holding dictates that a waterway cannot be both a navigable water and a point source, here, Bonhomme argues Ditch C-1 is a navigable water and Maleau's mine tailings are the point source. *See Rapanos*, 547 U.S. at 772 (plurality opinion). Thus, *Earth Sciences* remains good law.

Water Pollution Control Act Amendments of 1972, 530-35 (Comm. Print 1973)). Further, the court held that the concept of "point source pollutants" was created to reduce pollution and therefore should be interpreted with the "broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Earth Sciences*, 599 F.2d at 373.

Here, Maleau does not contest the fact that his mining activity is causing arsenic to seep into Ditch C-1, Reedy Creek, and Wildman Marsh. Thus, he is participating in the very activity Congress acted to prevent and reasonably believed would be prohibited under the Act.

IV. DITCH C-1 IS A "NAVIGABLE WATER"/"WATERS OF THE UNITED STATES" SUBJECT TO THE JURISDICTION OF THE CLEAN WATER ACT.

Ditch C-1 is a navigable water for purposes of jurisdiction under the Clean Water Act. The CWA defines navigable water as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Supreme Court has determined that under § 502(7), 33 U.S.C. § 1362(7), a navigable water must be a somewhat permanent standing or flowing body of water, which may include "seasonal rivers," or waters that possess a "significant nexus" to waters that are or were navigable in fact or could reasonable be made so. *See Rapanos v. United States*, 547 U.S. 715, 732 (2006); *United States v. Robinson*, 505 F.3d 1208, 1222 (11th Cir. 2007). The broad definition provided by Congress, as interpreted by the Supreme Court, is to regulate waters that would not be deemed navigable under the classical understanding of that term. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985*); see also Scrap Metal*, 386 F.3d at 1009 (holding that the term "navigable" has little significance because tributaries to navigable waters, including ditches and canals, are also navigable waters under the CWA). Therefore, a court should study the facts on a case-by-case basis to determine if the body of water in question is "navigable" for purposes of regulation under the CWA. Here, the facts show that Ditch C-1 is

a navigable water because it is a tributary to a navigable water and posses a significant nexus to a navigable water. Thus, the Ditch is subject to jurisdiction under the CWA, and the district court erred in holding otherwise.

A. The meaning of "navigable water" has been long understood to go beyond the plain meaning of "navigable-in-fact" under the CWA.

Congress broadly defined "navigable water" in order to subject nearly all of the nations waters to jurisdiction under the CWA. 33 U.S.C. § 1362(7). Consistently, courts have held that the traditional definition of "navigable" does not apply in the context of the CWA because Congress chose to regulate waters that would not be deemed navigable under the classical understanding of that term. *See Riverside Bayview*, 474 U.S. at 133. Additionally, there is no distinction between naturally occurring and manmade waters, specifically including ditches. *See Scrap Metal*, 386 F.3d at 1009. Pollutants are equally harmful to this country's water quality whether they travel along manmade or natural routes, thus, a tributary is a navigable water for purposes of the CWA even if it is an artificial drainage ditch. *See United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974); *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990) (noting that protection of the CWA "does not depend on how the property at issue became a water of the United States"), *cert. denied*, 498 U.S. 1126 (1991). In the present case, Ditch C-1 is a manmade drainage waterway that flows into Reedy Creek and Wildman marsh. Thus, Ditch C-1 is not navigable-in-fact, but it is still considered navigable for the purposes of jurisdiction under the CWA.

B. Ditch C-1 maintains a significant nexus between a navigable water subject to regulation under the CWA.

"Navigable water," for purposes of the CWA, should also be interpreted broadly to include Justice Kennedy's "significant nexus" test from *Rapanos*. In *Rapanos*, Justice Kennedy

defined navigable water as any water that has a significant nexus between a navigable-in-fact water and a wetland. 547 U.S. at 759 (Kennedy, J., concurring). Using the intent of the CWA as a guideline, "a wetland meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Robinson*, 505 F.3d at 1219 (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring)). Here, Ditch C-1 flows directly into Reedy Creek, a navigable water, and then into a wetland, Wildman Marsh. Because arsenic is flowing into the Ditch to the Creek and finally into the wetland, the significant nexus test provides a basis for finding Ditch C-1 to be a navigable water. Given that Justice Kennedy's test requires the "nexus must be assessed in terms of the statute's goals and purposes," which are to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* at 780, the district court erred when it determined that Ditch C-1 was not a navigable water under the jurisdiction of the CWA.

V. REEDY CREEK IS A "NAVIGABLE WATER"/"WATER OF THE UNITED STATES" SUBJECT TO THE JURISDICTION OF THE CLEAN WATER ACT.

Section 301(a) of the Clean Water Act provides that the "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). The term "navigable waters" means the "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). As the Supreme Court has noted, "Congress chose to define waters covered by the Act broadly in that definition." *Riverside Bayview,* 474 U.S. at 133; *see also Scrap Metal*, 368 F.3d at 1009. Accordingly, EPA regulations define "waters of the United States" to include (i) traditional navigable waters, that is, waters which are currently used, or were used, or may be susceptible to use in interstate or foreign commerce," 40 C.F.R. §

230.3(s)(1), and (ii) wetlands adjacent to covered waters, including tributaries, *id.* § 230.3(s)(7). Here, the district court correctly held that Reedy Creek is a navigable water.

A. Reedy Creek is a "navigable water" because it is within the traditional definition of "waters of the United States" in that its water is used in interstate commerce.

It is well established that in enacting the Clean Water Act, Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce. In adopting the present definition of "navigable waters," Congress recognized that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." S. Rep. No. 92-414, at 77. In accordance with this intent, EPA define "waters of the united States" to include tributaries to waters that "may be susceptible to use in interstate or foreign commerce," *see* 40 C.F.R. § 230.3(s), and courts repeatedly have recognized that tributaries to bodies of water that affect interstate commerce are "waters of the United States" protected by the Act. *See, e.g.*, *United States v. Texas Pipe Line Co.,* 611 F.2d 345, 347 (10th Cir. 1979) (tributary of navigable water); *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324 (6th Cir. 1974) (tributary that eventually flowed into river that was navigable-in-fact); *Georgia v. East Ridge*, 949 F. Supp. 1571, 1578 (N.D. Ga. 1996) (unnamed tributary of interstate creek); *United States v. Saint Bernard Parish*, 589 F. Supp. 617, 620 (E.D. La. 1984) (canal flowing into wetland).

With these principles in mind, the evidence concerning Reedy Creek is sufficient to establish that the Creek is a "navigable waters" protected by the CWA. The Creek is fifty miles long, maintains water flow throughout the year, and expands from New Union to Progress. In New Union, Bounty Plaza, a service area on I-250 selling gasoline and food, uses the Creek as a water source. Bounty Plaza receives customers traveling on I-250, which is a federally funded,

east-west interstate highway. Farmers in both states, whose land adjoins the Creek, divert the Creek's water for agricultural purposes, primarily irrigation. In turn, the farmers sell their agricultural products in interstate commerce. Consequently, Reedy Creek is navigable waters since its water is used in interstate commerce for businesses on a federally funded highway and for farmers as part of their agricultural enterprises.

B. Reedy Creek is a "navigable water" because it is connected to Wildman Marsh, a wetland that is a "water of the United States."

As used in the CWA, the terms "navigable waters" and "waters of the United States" are not limited to the traditional definition of navigable waters. *Rapanos*, 547 U.S. at 730-31 (plurality opinion). For waters outside this definition, the Supreme Court in *Rapanos* articulated two standards for when the CWA has jurisdiction: the plurality opinion and Justice Kennedy's concurrence. Given that Justice Kennedy's standard is narrower, it is the controlling grounds. It is a well-established rule that when interpreting the precedential value of a plurality opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976).

Justice Kennedy characterized *Riverside Bayview* as standing for the proposition that the connection between non-navigable water or wetland and navigable water may be so close, or potentially so close, that the water or wetland is "navigable water." *Id.* at 767 (Kennedy, J., concurring). For other instances, however, under *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 US. 159 (2001), there may be little or no connection, and absent a significant nexus, jurisdiction under the Act is lacking. *Id.* Thus, Justice Kennedy's standard provides that "waters of the United States" includes wetlands that possess a "significant nexus" to waters that are or were navigable-in-fact or that could reasonably be so made. *See id.* at 759.

Wildman Marsh is a wetland covered by the Act because it possesses a significant nexus to waters that could reasonably be made navigable. The Marsh is the final part of Reedy Creek, a fifty-mile-long water body that maintains water throughout the year. Even after supplying water to businesses and farmers on I-250, Reedy Creek maintains flow upon connection with the Marsh. Accordingly, if use of Reedy Creek waters was restricted, it could be made a navigable water. Also, the Marsh does not have an intermittent, physically remote hydrological connection to the Creek. Instead, it has a continuous connection, and it is difficult to determine where the water ends and the wetland begins. Consequently, Wildman Marsh has a sufficient nexus to a water that may reasonable be made navigable and is covered by the Act.

Additionally, courts have recognized that wetlands that have actual or potential effect on interstate commerce are "navigable waters" under the CWA. In 40 C.F.R. § 230.3(s), EPA regulations specify protection for wetlands that affect interstate commerce that are, or could be, used by interstate or foreign travelers for recreational or other purposes, from which fish or shellfish are, or could be, taken and sold in interstate commerce, and which are, or could be, used for industrial purposes by industries in interstate commerce. Here, Wildman Marsh is an extensive wetland that affects interstate commerce and is used by interstate and foreign travelers for recreational purposes. The Marsh is an essential stopover to over a million ducks and other waterfowl during their twice-annual migration. Fittingly, the area is a major destination for duck hunters not only from Progress, New Union, and five neighboring states, but also from foreign countries. As the district court found, hunting from interstate hunters supports the local economy by adding over $25 million per year. Wildman Marsh is a wetland that affects interstate commerce and that is used by interstate and foreign travellers for recreational purposes.

Finally, the waters of Wildman Marsh National Wildlife Refuge are "waters of the United States" because the refuge is federal property. As the lower court stated, "[t]he interstate nature of water pollution is the reason why Congress enacted water pollution control legislation in the first place." (R. 10.) The Supreme Court in *Rapanos* did not consider or reject these arguments. (R. 10.) Here, much of Wildman Marsh is within the Wildman National Wildlife Refuge, which is owned and maintained by the U.S. Fish and Wildlife Service. Water on federal wildlife preserve as "waters of the United States" is true to the plain meaning of the term. Both EPA regulations, 40 C.F.R. § 122.2, and Army Corps of Engineers regulations, 33 C.F.R. § 328.3, define "waters of the United States" as interstate waters, including interstate wetlands, and "tributaries" of covered waters. To keep waters clean from pollutants that travel in interstate commerce, the CWA cannot purport to police only wetlands adjacent to "waters of the United States." A pollutant can contaminate non-navigable waters and wetlands and thus pollute navigable water-in-fact waters downstream. Congress acknowledged this reality when it enacted the CWA, stating: "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77. Bringing Reedy Creek and Wildman Marsh under the CWA's jurisdiction will satisfy the intent of Congress to keep waters clean from pollutants.

VI. BONHOMME DID NOT VIOLATE THE CLEAN WATER ACT BECAUSE HIS CULVERT IS NOT A POINT SOURCE, AND IN THE ALTERNATIVE, BECAUSE HE DID NOT "ADD" A POLLUTANT INTO REEDY CREEK.

The CWA prohibits the addition of pollutants from a point source into a navigable water without a permit. 33 U.S.C. §§ 1311(a), 1342. Without a point source or an addition, the Act does not apply. The district court erred when it held that the culvert was a point source.

A. The culvert under Bonhomme's property is a conveyance that the arsenic travelled through to reach Reedy Creek, and thus, it is not a "point source."

The Clean Water Act does not forbid the "addition of pollutant *directly* to navigable waters from any point source," but rather, it forbids the "addition of any pollutant *to* navigable waters." *Rapanos*, 547 U.S. at 743 (plurality opinion) (citing 33 U.S.C. § 1362(12)(A) (emphasis added); 33 U.S.C. § 1311(a)). Thus, discharge into intermittent channels of any pollutant that naturally washes downstream likely violates § 301, 33 U.S.C. § 1311(a), even if the pollutants discharged from a point source do not emit "directly into" covered waters, but pass "through conveyances" in between the point source and the navigable waters.[4] *Id.* (emphasis and internal citations omitted).

In *Rapanos*, the plurality cited, seemingly with approval, two cases holding that a discharge violated § 301, 33 U.S.C. § 1311(a), where the pollutant was washed downstream into covered water, though not directly emitted into covered waters. *Id.* (citing *Velsicol*, 438 F. Supp. at 946-47; *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005)). In *Velsicol*, the district court found that the fact that the discharge flowed through a conveyance before reaching covered water did not remove the discharge from the CWA's jurisdiction. *See* 438 F.3d at 946-47. The defendant argued that the discharge at issue was not within the Act's

[4] Although the *Rapanos* plurality proceeded to state that *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), held that a point source need not be the original source, and it need only convey the pollutant to "navigable waters," that case is readily distinguishable. First, the interpretation in *South Florida* was in light of furthering the CWA's primary goals to impose NPDES permitting requirements on municipal wastewater treatment plants. *See, e.g.*, 33 U.S.C. § 1311(b)(1)(B). Second, the issue in *South Florida* was whether a pump between a canal and an impoundment produced a "discharge of a pollutant" within the meaning of 33 U.S.C. § 1342. That court accepted that if two volumes of water are "simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants." Thus, *South Florida* was concerned only with whether an "addition" had been made as required by the definition of the phrase "discharge of a pollutant"; it did not matter under § 1342 whether pumping the water produced a discharge without any addition.

jurisdiction because it discharged into a sewer system, rather than directly into a "waters of the United States." *See id.* at 947. The district court, however, disagreed and stated that defendant knew or should have known that the sewers lead directly to navigable waters, and this was sufficient to satisfy the requirements of discharging into "water of the United States." *Id.* at 947 (citing 33 U.S.C. §§ 1311(a), 1362(7)).

Similarly, in *Sierra Club*, the pollutant was discharged into a shaft that emptied into a tunnel, traveling 2.5 miles before discharging into navigable waters. *See* 421 F.3d at 1136-37. The Tenth Circuit concluded that the Act's jurisdiction was established, in part, because the discharge was from a point source, the shaft, and it merely flowed through "other conveyances" before reaching navigable water. *Id.* at 1141. Consequently, even after *Rapanos*, it appears as if the discharge of a pollutant from a point source that is indirectly discharged into covered water because it flows through intermittent conveyances is subject to the Act's jurisdiction.

Here, the evidence clearly shows Maleau's waste piles are the point sources and Bonhomme's culvert is merely a "through conveyance" upon which the pollutant traveled to reach navigable waters. In the course of business, Maleau trucks overburden and slag from his operations and places it in piles adjacent to Ditch C-1. As the district court found, when it rains, "rainwater runoff flows down the piles and percolate through them, eventually discharging . . . into Ditch C-1, *leaching and carrying arsenic from the piles* into the water in the Ditch." (R. 5.) (emphasis added). From Maleau's property, Ditch C-1 travels for three miles before it crosses into Bonhomme's property and passes through a culvert into Reedy Creek. Consequently, the culvert is merely a "through conveyance" between the point sources (the waste piles) and Reedy Creek, a navigable water. Thus, although the arsenic moved through another conveyance before

reaching navigable waters, the jurisdiction of the CWA is not removed simply because it did not discharge directly into "waters of the United States."

B. In the alternative, if this Court finds that the culvert is a point source, Bonhomme did not discharge into the Creek because there was no "addition" of any pollutant.

Unless authorized by an NPDES permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "Discharge of a pollutant" means the "additional of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The Clean Water Act does not otherwise define the term "addition," and the legislative history is silent on the matter. *Sierra Club*, 421 F.3d at 1142 (citing *Catskill Mountains Chapter of Trout Unlimited v. New York*, 273 F.3d 481, 493 (2d Cir. 2001)). EPA, however, has previously defined "addition" as occurring "only if the point source itself physically introduces a pollutant into water from the outside world." *Nat'l Wildlife Fed. v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *see also Nat'l Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 584-87 (6th Cir. 1988) (agreeing with *Gorsuch* that "the NPDES system was limited to 'addition' of 'pollutant' 'from' a point source"). In EPA's view, the point or nonpoint character of pollution is established when the pollutant first enters navigable waters, and it does not change when the polluted water later passes through one body of navigable water to another.[5] *Id.* "Addition" is the "action or process of *adding* something to something else." *Addition Definition*, Oxford Dictionaries.[6] Thus, EPA's definition of "addition" as accepted by *Gorsuch* and *Consumers Power* comport with the plain

[5] Although Congress did not expressly address whether EPA should have discretion to define the term "addition," the D.C. Court of Appeals noted that Congress did give the agency reasonable discretion to define two other necessary components of the NPDES permit program—point source and pollutant. *Gorsuch*, 693 F.2d at 175. Thus, the court considered it was likely that Congress would have given EPA similar discretion to define "addition" had it expected that the meaning of the term would be disputed. *Id.*

[6] *Available at* http://www.oxforddictionaries.com/us/definition/american_english/addition.

meaning of the term, but assuming that the water from which the discharges came is the *same* as that to which they go. *See Catskill*, 273 F.3d at 492 (emphasis added).

In the alternative, if this Court finds that Bonhomme's culvert is a point source, then the culvert did not discharge into the Creek because there was no "addition" of any pollutants. It is undisputed that arsenic originates from Maleau's waste piles. As the district court found, when it rains, the runoff flows from Maleau's waste piles "down the piles and percolates through them." (R. 5.) Eventually, the runoff discharges into Ditch C-1, "leaching and carrying arsenic from the piles into the waters in the Ditch." Thus, before reaching the culvert, the rainwater already had arsenic, and there can be no additional discharge where the discharge is the same where it originates as which it ends up. As Chief Judge Walker of the Second Circuit described: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot (beyond, perhaps, a *de minimis* quantity of airborne dust that fell into the ladle)." *Id.* This analogy precisely explains the situation here: the culvert is merely a ladle lifting portions of the arsenic-ridden rainwater runoff from Ditch C-1, which discharges into Reedy Creek.

CONCLUSION

This Court should hold that Bonhomme is a private citizen who has suffered an actionable harm under the CWA, that he is a proper plaintiff under Rule 17, and that he has standing to bring suit. Maleau's waste piles are point sources because they clearly are identifiable sources of arsenic in Ditch C-1 and Reedy Creek, both navigable waters and waters of the United States. Bonhomme did not violate the Act because his culvert is not a point source and he did not add pollutants into Reedy Creek. Thus, this Court should reverse the district court's decision to deny Bonhomme's motion to dismiss because Progress adequately stated a cause of action.

Respectfully Submitted,

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Counsel for Jacques Bonhomme