Team 43

C.A. No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,
Plaintiff-Appellant and Cross-Appellee,

v.

SHIFTY MALEAU,
Defendant-Appellant and Cross-Appellee.

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

and

SHIFTY MALEAU,
Invervenor-Plaintiff-Appellant and Cross-Appellee,

v.

JACQUES BONHOMME,
Defendant-Appellant and Cross-Appellee.

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

Brief for JACQUES BONHOMME
Appellant and Cross-Appellee

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JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for the District of Progress. (R. at 1). The district court had proper subject matter jurisdiction over the case because the issues arise under the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251 *et seq*., (2006), a law of the United States. Federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 28 U.S.C. § 1331 (2006). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of Progress. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether Bonhomme, a property owner and recreational user of the affected area, is the "real party in interest" under Federal Rule of Civil Procedure 17 to bring a CWA citizen suit against Maleau for violating section 301(a) of the CWA.

II. Whether Jacques Bonhomme is a "citizen" within the meaning of section 505(a) of the CWA when the CWA expressly defines citizen as a person, and a person as an individual.

III. Whether Maleau's gold mining waste piles are "point sources" under CWA section 502(12), (14) when they collect and convey contaminated stormwater directly into Ditch C-1 through channels created by their configuration.

IV. Whether Reedy Creek is a "water of the United States" as defined under CWA section 502(7) when it is a permanent waterbody that flows across state lines and interstate waters unambiguously fall under CWA jurisdiction.

V. Whether Ditch C-1 is a "water of the United States" as defined under the CWA section 502(7) when it is a relatively permanent waterbody with a significant nexus to an interstate water.

VI. Whether a culvert on Bonhomme's property adds pollutants to Reedy Creek within the meaning of the CWA when the pollutants enter Ditch C-1 from mining waste piles on Shifty Maleau's property and Ditch C-1 naturally flows into Reedy Creek.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress granting Shifty Maleau's ("Maleau") motion to dismiss and denying Jacques Bonhomme's ("Bonhomme") motion to dismiss. (R. at 10). Bonhomme brought a civil action under the CWA's citizen suit provision, 33 U.S.C. § 1365 (2006), seeking civil penalties and injunctive relief for Maleau's unpermitted discharge of pollutants from mining waste piles into navigable waters (R. at 4).

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

Bonhomme filed a Notice of Appeal challenging the district court holdings that (1) Bonhomme is not a real party in interest contrary to Federal Rule of Civil Procedure ("FRCP") 17 because he is a front for Precious Metals International, Inc. ("PMI"), (2) Bonhomme is not a "citizen" entitled to file a citizen suit under CWA § 505 because he is a foreign national, (3) Maleau's mining waste piles are not "point sources" under CWA § 502(12), (14) because piles are not conveyances, (4) Ditch C-1 is not a navigable water because it is a point source, and (5) Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert because Maleau adds the pollutants to Ditch C-1. (R. at 1–2).

Maleau filed a Notice of Appeal challenging the district court holding that Reedy Creek is a water of the United States under CWA § 502 (7), (12). (R. at 2). Progress takes issue with the decision of the lower court with respect to its holding that Ditch C-1 is not a navigable water. *Id.*

STATEMENT OF THE FACTS

Bonhomme initiated this suit against Maleau under the CWA in order protect his recreational interests. These interests are being adversely affected by Maleau's reckless and illegal actions. Both Maleau and Bonhomme own property abutting Ditch C-1 (the "Ditch") in Progress and this dispute arises from events occurring on and near these properties. (R. at 5).

Maleau has gone to great lengths to evade environmental regulation in order to lower the cost of his mining operations. Maleau trucks overburden and slag from an open pit gold mining operation over 50 miles away, to his property in Jefferson County, Progress. (R. at 5, 7). When the trucks reach Maleau's property, they dump the gold mining waste in piles. (R. at 5). When it rains, rainwater collects on these piles creating channels through which the water, polluted by the mining waste, is conveyed into Ditch C-1, a nearby waterbody. *Id.*

Ditch C-1 is three feet wide and one foot deep on average and maintains a relatively consistent flow except during annual periods of drought. *Id.* The Ditch, while man-made, is a permanent water feature because restrictive covenants in the deeds of the landowners abutting the ditch require the ditch to be maintained. *Id.* The Ditch runs from Maleau's property approximately three miles before running through Bonhomme's property. *Id.* After running through Bonhomme's property, the Ditch drains into Reedy Creek (the "Creek"). *Id.*

Reedy Creek originates in the State of New Union and flows over fifty miles, through the State of Progress. *Id*. The Creek is an integral water supply for Bounty Plaza, a service area on

Interstate 250. *Id.* The Creek is also vital to farmers in both New Union and Progress, who utilize it primarily for irrigation of products sold in interstate commerce. *Id.*

The terminus of Reedy Creek lies in Wildman Marsh. *Id.* Wildman Marsh serves several important functions. First, it is an extensive wetland that is an essential stopover for over a million ducks and waterfowl during their biannual migrations. *Id.* Also, part of the Marsh is a very popular hunting location. (R. at 6). Interstate hunters add over $25 million to the local economy. *Id.* Last, much of the Marsh is contained within the Wildman National Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service. *Id.*

The discharges from Maleau's waste piles have adverse impacts on the Ditch, the Creek and Wildman Marsh because they contain arsenic. Arsenic is commonly associated with gold mining and extraction and is a well-known poison. *Id.* Upstream from Maleau's property, arsenic is undetectable in Ditch C-1. *Id.* However, just below Maleau's property, arsenic is present in Ditch C-1 in high concentrations. *Id.* In Reedy Creek, above the confluence of Ditch C-1, arsenic is undetectable. However, just below the confluence arsenic is present in Reedy Creek in significant concentrations. *Id.* Arsenic is also detectable throughout Wildman Marsh, and has been detected in the Blue-winged Teal in the Marsh. *Id.*

Bonhomme knows the unpermitted discharge of arsenic into Ditch C-1 will adversely impact his recreational use of the area. For this reason, he has curtailed his recreational use. *Id.* Bonhomme has utilized his property and lodge for hunting parties in the past (primarily for duck hunting activities). *Id.* He is joined on these parties by social, as well as business, friends and acquaintances. *Id.* Due to his reasonable fears that the marsh and wildlife residing therein have become contaminated with arsenic, Bonhomme has decreased his hunting parties from eight per

year to two. *Id.* Unrebutted water sampling detecting arsenic in the Ditch, the Creek, Wildman Marsh, and in three Blue-winged Teal substantiates Bonhomme's fears. *Id.*

Because Maleau's unregulated discharges of arsenic cause adverse environmental impacts, and Maleau continues to bring new waste to pile, Bonhomme initiated suit against Maleau under the CWA to protect his interests. (R. at 4–5). Maleau exclusively controls the source of the arsenic and Bonhomme is required to maintain the ditch on his property. *Id.* Bonhomme believes that the only reason Progress filed the suit was for political payback to Maleau, who gave major contributions to the Attorney General's election campaign. (R. at 6).

STANDARD OF REVIEW

A well-pleaded complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). At the motion to dismiss stage, the court must assume all facts alleged in a complaint are true and view them in a light most favorable to the nonmoving party. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The only issues on appeal are questions of law, which are reviewed *de novo* by this court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988).

SUMMARY OF THE ARGUMENT

The district court erred in holding that Bonhomme is not entitled to bring suit against Maleau, that mining waste piles are not point sources, and that Ditch C-1 is not a navigable water. The language of FRCP 17 is clear that plaintiffs such as Bonhomme are real parties in interest. The rule contains a non-exclusive list of examples of real parties in interest including "a party authorized by statute." The CWA's citizen suit provision authorizes Bonhomme to bring this suit. The purpose of the FRCP 17 is to protect defendants by subsequent actions for the same

claims. Maleau will not be susceptible to subsequent suits because he will be protected by the affirmative defense of *res judicata*.

The district court erred in holding that Bonhomme could not bring a citizen suit because he is not a citizen of American nationality. The district court held that the traditional meaning of the word citizen did not include foreign nationals. By relying on the traditional meaning of citizen, rather than the statutory definition of citizen, the district court failed to follow the well-recognized principles of statutory interpretation. Where Congress has defined a statutory term, the statutory definition controls. The CWA allows citizens to bring suit against those who violate the Act. The citizen suit provision defines a citizen as a person, and the Act defines a person as an individual. Bonhomme as an individual clearly meets the statutory definition of a citizen.

The district court erred in holding that the mining waste piles on Maleau's property are not point sources under the CWA because they do not resemble the list of examples in the statutory definition. The Act defines a point source as "any discernable, confined and discrete conveyance." Mining waste piles that channelize and convey pollutants into navigable waters meet this statutory definition of point source. By focusing on a non-exclusive list of examples instead of the definition itself, the district court improperly limited what Congress intended to be a broad term.

The district court was correct to hold that Reedy Creek, an interstate water, is a navigable water within the meaning of the Act. The CWA defines navigable waters to mean "waters of the United States" and the Supreme Court has continually held the term navigable waters includes more than those waters which are navigable in fact. Precursor statutes to the CWA clearly regulated all interstate waters and the Congress intended the CWA to increase the scope of federal jurisdiction, not limit it. Even if the term navigable waters does not clearly cover

interstate waters, EPA's regulations have consistently held that all interstate waters are navigable waters. EPA's interpretation merits deference from this court because it is supported by the statutory scheme, the legislative history, and the purpose of the Act. This interpretation of "waters of the United States" does not conflict with Supreme Court precedent, which has never questioned the ability of the federal government to regulate interstate waters.

The district court erred in holding that Ditch C-1 was not a navigable water because it could not both be a point source and a navigable water. The court relied on the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), as definitive precedent that this proposition was true. However, the district court failed to recognize that no circuit court has held the *Rapanos* plurality decision to be definitive precedent. Additionally, the district mischaracterized the plurality opinion. Even under the plurality opinion, Ditch C-1 would be considered a navigable water because Ditch C-1 maintains a relatively permanent flow and merges with a navigable water. Ditch C-1 is a water of the United States under the three opinions in *Rapanos* as well as under EPA's regulations.

Finally, the district court erred by failing to dismiss Progress and Maleau's CWA claims against Bonhomme. In order for a discharge of a pollutant to exist, there must be an addition of a pollutant from a point source to navigable waters. Even if the culvert on Bonhomme's property is correctly characterized as a point source, it did not add pollutants to the Creek. The pollutants were already present in another waterbody, Ditch C-1, and case law is unanimous that when polluted water flows naturally between one waterbody to another there is no addition of a pollutant. Additionally, to hold Bonhomme liable would run contrary to the purpose of the Act, which is to control pollutants at the source. Bonhomme has no control over the source of the pollution and could not stop the flow of water from Ditch C-1 to Reedy Creek.

ARGUMENT

I. BONHOMME IS ENTITLED TO BRING A CLEAN WATER ACT SUIT AGAINST MALEAU.

Bonhomme, a "citizen" as defined by the CWA in § 505(g), has a direct and personal interest in the ecological health of Wildman Marsh, Reedy Creek, and Ditch C-1. This fact satisfies not only the Constitution's Article III limitation on standing, but also the real party in interest requirement of FRCP 17.

Bonhomme has satisfied the requirements of constitutional standing because he has suffered the type of injury expressly laid out by the Supreme Court. While FRCP 17 and Article III constitutional standing can overlap to some degree, they are distinctly different issues. *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992). Courts have described FRCP 17 as essentially a codification of the nonconstitutional, prudential limitation on standing. *See, e.g.*, *Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999). "The standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Because Bonhomme is expressly authorized to bring suit under the CWA citizen suit provision, and suffers direct and personal harm that is distinct from PMI, he meets FRCP 17's real party in interest requirement.

A. Bonhomme satisfies Article III's limitation on standing.

Article III of the United States Constitution limits the power of the federal courts to "cases" and "controversies." U.S. Const. art. III, §2. In order to satisfy Article III's standing requirements, a plaintiff must show (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Bonhomme meets all the elements of constitutional standing. An "injury in fact" is established when a plaintiff has reasonable

concerns about the challenged discharges, and the discharges directly affect the plaintiff's recreational interests. *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000). Due to his fear, Bonhomme has curtailed his use of the adjacent wetlands by reducing his hunting parties from eight per year to two. (R. at 6). Unrebutted water sampling points to Maleau as the cause of the arsenic entering Wildman Marsh. *Id.* The discharges from Maleau's mining waste piles cause Bonhomme's injury, and this court has the power to enjoin Maleau's illegal activities.

B. Bonhomme is the "real party in interest" under FRCP 17.

FRCP 17 states that "[a]n action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). Courts have described Rule 17 as "a prudential rule intended to ensure that the party bringing the action is the party entitled to make the claim," *see e.g.*, *Ensley*, 171 F.3d at 320, and have interpreted the rule to mean that "the action must be brought by the person entitled under the governing substantive law to enforce the asserted right." *Whelan*, 953 F.2d at 672. More importantly, FRCP 17 expressly states that a real party in interest includes "a party authorized by statute." Fed. R. Civ. P. 17(a)(1)(G). Bonhomme is a real party in interest under FRCP 17(a) because Maleau's actions adversely affect Bonhomme's direct personal interests and the CWA authorizes Bonhomme to bring suit to protect these interests.

1. Bonhomme possesses an express right of action under Clean Water Act substantive law.

The Clean Water Act forms the basis of Bonhomme's claim, and he is expressly authorized to enforce the Act in order to protect his distinct property interests. Under the CWA, "any citizen may commence a civil action on his own behalf . . . against any person who is alleged to be in violation of . . . an effluent standard or limitation under this Chapter." 33 U.S.C. § 1365(a). Bonhomme is a "citizen" as defined in § 505(g) of the Act, as discussed fully below. *See infra* Section I.C.

Where an express congressional right of action such as CWA § 505 exists, persons who satisfy the right are not barred by prudential standing rules. *Warth*, 422 U.S. at 501. FRCP 17(a) is such a prudential standing rule, and CWA § 505 is such an express right of action. Therefore, so long as constitutional standing is satisfied, as it is here, affected persons like Bonhomme may bring suit under CWA § 505.

Furthermore, the basis for the real party in interest rule further supports Mr. Bonhomme's ability to bring suit. The Advisory Committee in its Note to the 1966 amendment to Rule 17(a) states the purpose as follows: "[T]he modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. R. 17, advisory committee's note. If this court finds Maleau liable under the CWA for the violations alleged in the complaint, principles of *res judicata* would prevent PMI from later bringing suit for the same violations. The purposes of FRCP 17(a) are served by allowing Bonhomme to file his suit against Maleau.

2. The shareholder standing rule does not prohibit Bonhomme from commencing suit because he is enforcing his direct personal interest.

Presumably, in determining PMI (and not Bonhomme) to be the real party in interest, the district court applied the shareholder standing rule, which generally prevents shareholders from initiating actions to enforce the rights of a corporation. *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). However, the district court failed to recognize an explicit exception to this rule. "[A] shareholder with a *direct, personal interest* in a cause of action [may] bring suit even if the corporation's rights are also implicated." *Id.* (emphasis added).

While Maleau alleges, and the district court emphasized, PMI's potential interest in this litigation, certainly the injuries at issue are not suffered solely by the corporation. *See Pagán v.*

Calderón, 448 F.3d 16, 28–30 (1st Cir. 2006) (deciding that no particular shareholder sustained a particularized injury to trigger the exception). Bonhomme, and not PMI, is now afraid to utilize the Wildland Marsh for recreational purposes like he once did. In light of the shareholder standing rule, Bonhomme may only bring this action if he sustains an injury that "is peculiar to him alone, and [that] does not fall alike upon other stockholders." *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 30 (1st Cir. 1987). Bonhomme's diminished use of Wildland Marsh for hunting parties with social friends and acquaintances is such an injury.

C. Bonhomme is a "Citizen" under the Clean Water Act.

The Clean Water Act allows "any citizen" to commence a civil action "against any person . . . who is alleged to be in violation of [an] effluent standard or limitation." 33 U.S.C. § 1365(a). Citizen is defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). A person means "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (2006).

The district court relied on *Solid Waste Agency of Northern Cook County. v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172 (2001), to hold that the definition of Citizen in § 505(g) of the Act could not deprive citizen of its classic meaning, and because Bonhomme is not an American citizen, he could not bring suit. (R. at 8). The district court erred in its judgment because the plain language, legislative history, and purpose of the statute clearly show that Congress intended foreign nationals to be considered citizens under § 505(a) of the Act.

1. The Clean Water Act unambiguously allows foreign nationals to bring citizen suits.

Where Congress's intent is clear, the court must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). The clearest indication of Congress's intent is the language of the statute itself. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). When there is a statutory definition, it controls the meaning of the statutory word. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

By focusing on the ordinary meaning of the term citizen, rather than the statutory definition of citizen, the district court erred in applying the basic principles of statutory construction. The statute defines citizen to mean, *inter alia*, a person, and a person is defined as, *inter alia,* an individual. 33 U.S.C. §§ 1362(5), 1365(g). An individual, undefined in the statute, is "a single human being as contrasted with a social group or institution." Webster's Third New International Dictionary 1152 (3d ed. 2002). Furthermore, the structure of the Act demonstrates that if Congress meant "United States Citizen" it would have been explicit, as it was in other parts of the Act. *See* 33 U.S.C. § 1321(17) (2006) ("otherwise subject to the jurisdiction of the United States' means subject to the jurisdiction of the United States by virtue of *United States citizenship*. . .") (emphasis added)).

The legislative history also supports this reading of citizen. Congress wanted to ensure that the public at large could seek enforcement of the CWA. *See* S. Rep. No. 92-414, at 3730 (1971) ("It should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of section 505"). This legislative history shows that citizen was meant to signify persons or groups of people who did not posses traditional governmental

enforcement powers. Congress in no way meant to limit which affected members of the public can bring suit under the Act.

When the statutory term is unclear, the Supreme Court has relied on the statutory definition rather than the ordinary meaning of the term itself. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the Supreme Court held that a "take" under the Endangered Species Act ("ESA") included habitat modification that actually kills or injures endangered species. *Id.* at 708. "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (2006). In interpreting what could be a "take," the Court looked to the text and structure of the ESA, the legislative history, and the purpose of the act in order to define this term. *Babbitt*, 515 U.S. at 695. By defining the word "take" to mean "harm," Congress "obviate[ed] the need to probe [take's] meaning as [the Court] must probe the meaning of the undefined subsidiary term 'harm.'" *Id.* at 697 n.10. Thus, even though the traditional meaning of "take" did not include habitat destruction, *Id.* at 717–18 (Scalia, J., dissenting), "take" as defined in the statute could include destruction of habitat that killed or injured a species.

The district court erred by failing to analogize to *Babbitt*; instead, relying on *SWANCC*, an inapposite decision. The court cited *SWANCC* for the proposition that a term cannot be deprived of its traditional meaning by its definition. *See* (R. at 8) ("The Supreme Court has held that by defining the narrow phrase 'navigable waters' as the arguably broader concept of 'waters of the United States,' § 502(7), Congress did not deprive the term 'navigable' of all meaning"). Relying on the Supreme Court's reasoning in *SWANCC*, the district court held that the definition of citizen in § 505(g) could not deprive citizen of its traditional meaning. (R. at 8). This reliance is misplaced because the terms navigable waters and citizen are distinct in a critical way. The

definition of navigable waters at issue in *SWANCC* was ambiguous. *See generally SWANCC,* 531 U.S. 159 (2001) (implicitly holding "waters of the United States" to be an ambiguous term by deferring to the Corps' regulatory definition of "waters of the United States" under a Chevron Step II analysis). Conversely, the definition of citizen is unambiguous on its face. Because the definition of navigable waters in the statute is itself ambiguous, it made sense for the Court to rely on the ordinary meaning of the word navigable to aid in its analysis. However, the definition of citizen in § 505(g) is unambiguous. A citizen is a person and a person is an individual. Because Congress clearly defined the term citizen to include individuals without qualification, this court should give effect to the clear intent of Congress.

2. A broad reading of the term citizen furthers the purpose of the Act.

The purpose of the citizen suit provision is to enable persons to perform a public service. *See* S. Rep. No. 92-414, at 3747 (1971) (recognizing that "in bringing legitimate actions under [§ 505] citizens would be performing a public service"). Whether a foreign national, an American citizen, a corporation, or a non-governmental organization brings an action to enforce the provisions of the Act, the end result is the same—improving the quality of the Nation's waters. If this court holds that foreign nationals are not citizens within the meaning of CWA § 505(a), there will be equitable consequences for the public and those individuals harmed by illegal activity. If Bonhomme could not bring suit to enjoin discharges that affected his interests, he would have no other legal recourse to enjoin this illegal activity. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317–18, 332 (1981) (holding the CWA's comprehensive scheme of regulating water pollution precludes common law claims such as nuisance against those who violate the Act). At bottom, the laws of the United States protect the rights of all people within the jurisdiction of the United States and those injured can seek redress when their rights are violated, even if they are not

American citizens. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (recognizing the Fourteenth Amendment applied equally to American citizens and foreign nationals).

II. MINING WASTE PILES ARE POINT SOURCES UNDER THE CWA.

A point source is "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2006); *see also* 40 C.F.R. § 122.2 (2013). This definition is interpreted "to embrace the broadest possible definition of any identifiable conveyance from which pollutants may enter waters of the United States." *Dague v. City of Burlington*, 935 F.2d 1343, 1354–55 (2d Cir. 1991), *rev'd on other grounds,* 505 U.S. 557 (1992). This case presents the specific kind of pollution Congress intended to regulate under the CWA—industrial pollution. *See United States v. Plaza Health Labs.*, 3 F.3d 643, 650 (2d Cir. 1993) (emphasizing the term point source was intended to target industrial sources of pollution).

A. Maleau's waste piles meet the statutory definition of "Point Source."

Guided by the broad statutory definition, courts have held waste piles to be point sources. In *Sierra Club v. Abston Construction*, 620 F.2d 41 (5th Cir. 1980), defendants were engaged in mining operations and placed their overburden in highly erodible piles, which were then carried away by rain water through naturally created ditches. *Id.* at 43. The current facts are indistinguishable. Maleau configures his overburden piles such that channels are eroded, which convey arsenic into Ditch C-1. The court in *Abston Construction* reasoned that a point source may "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 . . . even if the miners have done nothing beyond the mere collection of rock and other materials." *Id.* at 45. Similarly, the Eleventh Circuit in *Parker v. Scrap Metal Processors*, 386 F.3d 993, 1009 (11th Cir. 2004), held that "piles of debris . . . collected water,

which then flowed into the stream. [The piles] are, therefore, point sources within the meaning of the CWA." This reasoning can also be applied to the current case, where the waste piles are collecting water and conveying pollutants.

Due to the precise design of Maleau's waste piles, surface runoff is collected, percolated, directed, channeled, and discharged into Ditch C-1. (R. at 5). These elements combine to create a "discrete conveyance" as required by the Act's broad definition. 33 U.S.C. § 1362(14) (2006). Therefore, the mining waste piles are point sources under the Act.

B. Stormwater that is collected and conveyed from an identifiable point is point source pollution.

The fact that Maleau did not himself create the channels through which the arsenic flowed is immaterial as the definition of discharge of a pollutant does not require an affirmative act. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142 (10th Cir. 2005). Where as general rainfall or snowmelt can be considered "nonpoint" source pollution, when such water is collected and subsequently conveyed, it becomes point source pollution even if the conveyance is "from a fissure in the dirt." *United States v. Earth Scis., Inc*., 599 F.2d 368, 374 (10th Cir. 1979) (holding that polluted stormwater which escaped from plastic lined heaps of gold was discharged from a point source). Therefore, when precipitation causes discharge to escape Maleau's mining waste piles through fissures created by the piles' configuration, the resulting discharge is from a point source and cannot be considered general "nonpoint" source pollution.

When stormwater collects in piles of industrial debris, and eventually enters navigable waters, it is point source pollution. *Parker*, 386 F.3d at 1009. EPA has recognized the nature of these industrial point sources, requiring a permit for the "discharge from any conveyance that is used for collecting and conveying stormwater." 40 C.F.R. § 122.26(b)(14) (2013). For example, in *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 119 (2d Cir.

1994), the court found contaminated surface runoff, once channeled or collected, constitutes a point source discharge even where naturally induced, random runoff is not. That the arsenic pollution may have migrated via rainwater run-off has no bearing on the discharges' point source origin—Maleau's waste piles. While Maleau's waste piles may not have been intended to collect and convey stormwater, that is exactly what they do. They collect stormwater, the stormwater percolates through the piles becoming contaminated with arsenic, and that discharge is directed through channels eroded by gravity due to the configuration of the piles themselves. (R. at 5).

C. The district court misapplied the statutory definition and cases defining this definition.

The district court erred by focusing on the examples of point sources in the statutory definition instead of the definition itself. Additionally, the cases the district court relied upon from the Fourth Circuit do not speak to the issue at hand.

1. Point Source is not limited to the conveyances listed in the Act.

The district court declared the definition of point source contained in the statute "lists a dozen examples of point sources and none of them remotely resemble a pile of dirt and stone." (R. at 9). However the district court erred in narrowing its conception of "any discernible, confined and discrete conveyance" to a list that Congress itself made clear is "not limited to" those conveyances included. 33 U.S.C. § 1362(14). By writing "including but not limited to," Congress emphasized the list it provided is not exclusive, and even items not resembling those listed are included if they meet the statutory definition. Obviously a dump truck emptying its load is a discernable, confined, discrete conveyance, even if it is not a listed item and does not resemble the examples. *See e.g., Nat'l Ass'n of Home Builders v. United States Army Corps of Engineers*, 311 F. Supp. 2d 91, 93 (D.D.C. 2004), *rev'd on other grounds*, 440 F.3d 459 (D.C. Cir. 2006). By focusing on the examples of point source, rather than the definition itself, the

district court failed to consider the characteristics that differentiate a point source from a nonpoint source.

2. The Fourth Circuit cases relied on by the district court did not involve channelized and collected waters.

Maleau and Progress attempt to rebut the persuasive Fifth Circuit analysis in *Sierra Club v. Abston Construction* by citing two Fourth Circuit cases, both of which did not address the current issue. In *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979), quoting *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976), the Fourth Circuit noted only that the definition of point source "excludes unchanneled and uncollected surface waters," and went on to note that EPA's regulations expressly included coal refuse piles as point sources. *Id.* Holding Maleau's waste piles to be "point sources" under the Act would be entirely consistent with this position. The record is clear the configuration of the wastes piles is creating "channels," which leach and carry arsenic from the piles into the Ditch. (R. at 5). Because the waste piles are designed in a way as to collect and channel polluted discharge into navigable waters, this case falls in line with the facts and reasoning in *Abston Construction Co.*, and the Fourth Circuit cases cited by Maleau and Progress are not of use.

III. REEDY CREEK AND DITCH C-1 ARE NAVIGABLE WATERS.

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). EPA has defined this broad term in its regulations to include all interstate waters as well as tributaries. *See* 40 C.F.R. § 122.2 (2013).[1] Maleau is liable under the CWA for discharging pollutants into "waters of the United States" because runoff from the mining piles flows into the Ditch, which ultimately flows into Reedy Creek.

[1] EPA and the Army Corps define "waters of the United States" identically. *See* 40 C.F.R. § 122.2 (2013) and 33 C.F.R. § 328.3 (2013). Both agencies administer different sections of the CWA and thus have jurisdiction.

Reedy Creek is a jurisdictional "water of the United States" because it is an interstate water. Furthermore, because the Ditch flows into Reedy Creek, it is a tributary of Reedy Creek. Therefore, this Court should affirm the district court's decision regarding Reedy Creek, reverse the district court's decision regarding the Ditch, and hold both waters are navigable waters under the Act.

A. Reedy Creek qualifies as a "water of the United States" under § 502(7) of the CWA because it is an interstate water.

The district court properly held Reedy Creek is a "water of the United States." (R. at 10). EPA's regulations define "waters of the United States" to include "all interstate waters" regardless of navigability. 40 C.F.R. § 122.2. In its interpretation of its regulations, EPA clarifies interstate waters means "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." EPA, Draft Guidance on Identifying Waters Protected by the Clean Water Act 7 (April 17, 2011) (citing Water Pollution Control Act of 1948, § 10(e), Pub. L. 80-845, 62 Stat. 1155, 1161). Reedy Creek plainly qualifies as a "water of the United States" under EPA's regulatory definition because it flows across the border of State of New Union into the State of Progress. (R at 5).

1. Congress intended all interstate waters to be regulated under the Clean Water Act.

In order to resolve questions of statutory interpretation, courts first examine the underlying statute to see "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). A court should not confine itself to the language in isolation, rather "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which

that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The plain language, context and statutory scheme of the CWA unambiguously demonstrate Congress intended for "waters of the United States" to cover interstate waters, regardless of whether they are navigable.[2] As the Supreme Court explained in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the meaning of a term must be gleaned from the statutory definition of the term, not the plain meaning. *Id.* at 697–98 n.10. Interstate waters, as waters of the several states, are "waters of the United States" and thus, are "navigable waters" under CWA § 502(7). 33 U.S.C. § 1362(7).

Moreover, Congress' intention to assert jurisdiction over interstate waters is ever more apparent when the CWA is viewed in context of its statutory history. All precursor statutes to the current CWA subjected interstate waters to Federal jurisdiction. *See e.g.*, Federal Water Pollution Control Act of 1948, Pub. L. 80-845, 62 Stat. 1155; 33 U.S.C. § 466 (1952); 33 U.S.C. § 466 (1958), 33 U.S.C. § 466 (1964); 33 U.S.C. § 1151 (1970). When the Federal Water Pollution Control Act and the Rivers and Harbors Act of 1899 ("RHA") were combined, Congress utilized the RHA jurisdictional trigger, "navigable waters." By adopting this term, Congress did not intend to preclude interstate waters from the statute's jurisdictional reach. Rather, in its effort to harmonize the two statutes, Congress intended to expand the jurisdiction of the Act. S. Rep. No. 92-1236, at 144 (1972) (explaining Congress intended to give the term navigable waters "the broadest possible constitutional interpretation.")

[2] "Waters of the United States" is an ambiguous term in some contexts. *See Rapanos v. United States*, 547 U.S. 715, 752, 804 (2006). Yet, it is unambiguous in other contexts. *See SWANCC*, 531 U.S. 159, 172 (2001).

The statutory text also unambiguously demonstrates Congress' intention to cover non-navigable interstate waters as part of the broadly defined "waters of the United States." Under the 1965 Version of CWA, states were required to promulgated water quality standards for interstate waters. Pub. L. No. 89-234, 79 Stat. 908 (1965). When the 1972 amendments to the CWA were passed, Congress made clear these water quality standards should remain in effect "to carry out the purpose of the Act." 33 U.S.C. § 1313(a)(1) (2006) ("[i]n order to carry out the purpose of this Act, any water quality standard applicable to interstate waters . . . shall remain in effect . . ."). CWA § 303(a)(1) evinces Congress's intention for all interstate waters to be covered by the Act because it carries out the purpose of the CWA. 33 U.S.C. § 1251(a) (2006).

2. CWA § 509(b) bars Maleau from challenging the regulatory definition of "Navigable Waters."

If the court finds the term "waters of the United States" is ambiguous as applied to interstate waters, this court must defer to EPA's regulation. In this litigation Maleau has asserted that Reedy Creek is not a "water of the United States" even though EPA's regulations clearly include interstate waters that are not navigable in fact. 40 C.F.R. § 122.2. In effect, Maleau is challenging EPA's regulation itself. However, CWA § 509(b) prohibits Maleau from challenging this regulation in this enforcement action.

Section 509(b) of the Act contains a list of actions by the administrator that may only be challenged in the Circuit Court of Appeals within 120 days of being promulgated. 33 U.S.C. § 1369(b)(1) 2006). Any action within this list shall not be subject to judicial review in any civil proceeding for enforcement. *Id.* § 1369(b)(2). One such action is "issuing or denying any permit under section 1342 of this title." *Id.* § 1369(b)(1)(F). Courts have taken a functional approach to interpreting the meaning of § 509(b)(1)(F) by holding this category includes regulations that govern issuance of permits under § 402 of the Act. *See American Mining Cong. v. U.S. Envtl.*

Prot. Agency, 965 F.2d 759, 763 (9th Cir. 1992) (EPA's stormwater rule which required discharge permits for inactive mining operations fell under 509(b)(1)(F)); *Nat'l Cotton Council of America v. U.S. Envtl. Prot. Agency*, 553 F.3d 927, 933 (6th Cir. 2009) (EPA's rule exempting pesticide application from NPDES permits was properly challenged under 509(b)(1)(F)).[3] EPA's regulations defining "waters of the United States" clearly affects the issuance of permits because whether a permit is necessary depends on whether the water is covered by EPA's regulation.

This court should adopt the functional approach utilized by the Sixth and Ninth Circuits because it promotes certainty for regulated entities and uniformity throughout the country. A contrary result would "produce the truly perverse situation in which the court of appeals would review numerous individual actions issuing or denying permits pursuant to [§] 402 but would have no power of direct review of the basic regulations governing those individual actions." *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136 (1977). By failing to challenge EPA's regulations defining "waters of the United States" within the statutory timeframe, Maleau forever lost the right to do so.

3. EPA's longstanding regulatory interpretation of navigable waters to include interstate waters is entitled to *Chevron* deference.

If the court finds that Maleau can challenge EPA's regulations in this action, it should defer to EPA's regulatory definition of "waters of the United States." Where Congress has not directly spoken to the precise question at issue, a court will defer to an agency's construction of the statute so long as "the agency's answer is based on a permissible construction of the statute."

[3] The Supreme Court's decisions in *Riverside Bayview*, *SWANCC*, and *Rapanos* do not change the 509(b) issue in the present case because those cases involved rules promulgated by the Army Corps of Engineers, not the Administrator. Section 509(b) only applies to actions of the Administrator, not those of the Secretary. *Compare* 33 U.S.C. § 1251(d) (2006) (the administrator of the EPA shall be referred to as "Administrator" throughout the Act) with 33 U.S.C. § 1344(d) (2006) ("the term 'Secretary' as used in this section means the Secretary of the Army, acting through the Chief of Engineers").

Chevron, 467 U.S. at 842–43. In such a case an agency's interpretation of a statute will be permissible, unless "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

EPA's interpretation of "waters of the United States" to include non-navigable interstate waters is reasonable and therefore, deserving of *Chevron* deference. EPA was given authority by Congress to "prescribe such regulations as are necessary to carry out [the] functions" of the CWA. 33 U.S.C. § 1361 (2006). This authority includes the power to define key terms including "waters of the United States." *See Natural Res. Def. Council*, *Inc. v. Costle*, 568 F.2d 1369, 1382 (D.C. Cir. 1977) (explaining the power to define CWA jurisdictional terms is vested in EPA). It is reasonable for EPA to interpret the legislative history of the Act, as described *supra* Section III.A.1, to demonstrate Congress' intent to include interstate waters in the definition of "waters of the United States." Also, EPA has always interpreted the term "waters of the United States" under the CWA to include non-navigable interstate waters. *See* 38 Fed. Reg. 13528 (May 22, 1973).[4]

4. Finding that interstate waters qualify as navigable waters is consistent with Supreme Court precedent.

Supreme Court precedent establishes the CWA is a sweeping regulatory scheme intended to resolve interstate disputes regarding interstate water pollution. *Illinois v. Milwaukee*, 406 U.S. 91, 99 (1972); *Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) (the "Milwaukee cases") (together holding federal law applied to the disputes regarding interstate waters and that CWA "occup[ied] the field" of interstate water pollution control.) Maleau's reliance on

[4] Though the Army Corps of Engineers ("the Corps") initially construed its jurisdiction under the CWA as analogous to its jurisdiction under the 1899 Rivers and Harbors Act. However, federal courts and Congress weighed in on the issue. *See e.g. Natural Res. Def. Council, Inc. v. Callaway,* 392 F. Supp 685, 686 (D.C. Cir. 1975); H.R. Rep. No. 93-1396, at 23–27 (1974). Thus, from 1977 on, the Corps similarly asserted jurisdiction over non-navigable interstate waters. *See* 33 C.F.R. § 328.3(a)(3) (1977).

SWANCC, 531 U.S. 159 (2001), to assert that Reedy Creek cannot be a "water of the United States" is misplaced because *SWANCC* only addressed intrastate waters. In *SWANNC,* the Court held that a wholly intrastate water that had no connection to traditionally navigable waters was not a "water of the United States." *Id.* at 174. The Court reasoned that even though "navigable" was of limited imported, it could not be read entirely out of the statute. *Id.* at 172. Finding interstate waters that are not navigable in fact to be "waters of the United States" does not read navigability out of the statute; rather, it embraces the very origin of the term navigable as historically used by Congress.

At bottom, *SWANCC* was a case about federalism. The Court, concerned with the federal-state balance the CWA strikes, did not believe the Agency deserved deference for an interpretation which invoked "the outer limits of Congress' power." *Id.* The Court's repeated emphasis the intrastate nature of the waterbody at issue further demonstrates the Court's analysis in *SWANCC* is limited to intrastate waters. *Id.* at 171. ("We, thus, decline to . . . hold that isolated ponds, some only seasonal, *wholly located within two Illinois counties* fall under § 404(a) definition of navigable waters") (emphases added). The federalism concerns in *SWANCC* that prevented the Supreme Court from deferring to the Corps' interpretation of "waters of the United States" are not present here. Asserting jurisdiction over interstate waters does not, in any way, disrupt the federal-state framework.

5. It is squarely within Congress' authority under the Commerce Clause to regulate the discharge of pollutants into Reedy Creek.

Congress' power to regulate "waters of the United States" expands beyond the ability to regulate these waters as channels of interstate commerce.[5] *See United States v. Deaton*, 332 F.3d

[5] Article I, § 8 of the United States Constitution provides Congress with the authority "to regulate commerce with foreign Nations, and among the several States...." U.S. Const. art. I, § 8.

698, 707 (4th Cir. 2003) ("[T]here is no reason to believe Congress has less power over navigable waters than over other interstate channels such as highways, which may be regulated to prevent their "immoral and injurious use[ ]") (citing *Caminetti v. United States*, 242 U.S. 470, 491 (1917)). Maleau's pollution, which ultimately ends up in Reedy Creeks, substantially affects interstate commerce. In *State of Utah By & Through Div. of Parks & Recreation v. Marsh,* 740 F.2d 799, 803 (10th Cir. 1984), the 10th Circuit held the discharge of dredge and fill material has a substantial effect on interstate commerce where waterbody there was documented non-resident visitation. Similarly here, Reedy Creek has a robust out-of-state tourism business. *See* (R. at 6) (hunting at the terminus of Reedy Creek in Wildman Marsh is acknowledged to add over $25 million to the local economy from interstate hunters). Maleau's pollution enters Reedy Creek upriver of Wildman Marsh. *Id.* Therefore, Maleau's discharges directly affect interstate commerce.

B. Ditch C-1 qualifies as a "water of the United States" under § 507(7) of the CWA because it is a tributary of Reedy Creek.

Contrary to the district court's holding, a ditch can be a "water of the United States" even though it is listed as a point source under CWA § 507(12). Moreover, the Ditch falls under EPA's regulatory definition of "tributary" and therefore is a "water of the United States." Therefore, this court should overturn the district court's decision and hold the Ditch to be a navigable water.

1. Ditches can qualify as navigable waters under the CWA.

In holding "ditches are listed as point sources in CWA § 502(14) and a ditch cannot be simultaneously two elements in the water pollution offense," the district court relied on an

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Under the Commerce Clause, Congress has the authority to regulate (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) economic activities having a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

improper reading of *Rapanos.* (R. at 9) ("Maleau has definitive precedent on his side," citing *Rapanos v. United States,* 547 U.S. 715, 735–36 (2006)). This reliance is misplaced for two reasons. First, the statutory text does not support this conclusion. Second, *Rapanos* does not impose a limitation that ditches cannot be "waters of the United States."

The statutory text of the CWA does not support the conclusion that particular ditches cannot be "waters of the United States." The CWA broadly defines point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch . . ." 33 U.S.C. § 1362(14) (2006). The Act does not state that *every* ditch is a point source. Rather, the Act defines point source to include some ditches, if they discharge pollutants into navigable waters. Furthermore, the definition of "navigable waters" does not exclude particular ditches from being considered "waters of the United States." Simply because some ditches are point sources, does not mean that particular ditches are not "waters of the United States."

Rapanos does not impose a limitation that ditches cannot be "waters of the United States." The district court erred in relying on the *Rapanos* plurality opinion as "definitive precedent." (R. at 9). In *Rapanos,* 547 U.S. at 735, a majority did not agree upon whether a ditch could be a navigable water. The plurality suggested the categories of point source and navigable water do not overlap. Yet, Justice Kennedy's concurrence expressly rejected the idea that the categories of point source and "waters of the United States" may not overlap. *Id.* at 772 (Kennedy, J., concurring) ("[C]ertain water bodies could conceivably constitution both a point source and a water"). The dissent also rejected this distinction. *Id.* at 804 (Stevens, J., dissenting). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." *Marks*

v. United States, 430 U.S. 188, 193 (1977). While there is a split among the circuits as to how to apply *Marks* to the Supreme Court's decision in *Rapanos,* no circuit has relied solely on the plurality opinion as "definitive precedent."[6]

Even if one were to rely on the plurality opinion in *Rapanos*, the plurality did not state ditches can never be "waters of the United States." Rather, the plurality explained that ditches that contain *only intermittent flow* do not qualify as "waters of the United States." *Rapanos*, 547 U.S. at 735. In order for a waterbody to qualify as a "water of the United States" under the plurality test in *Rapanos*, a water must be a relatively permanent, standing or continuously flowing bod[y] of water" and not contain only intermittent flow. *Id.* at 739. In explaining the rationale behind a jurisdictional test premised on flow, the plurality relied heavily on the fact water bodies that contain only intermittent flow are considered to be point sources under the Act─ not "waters of the United States." *Id.* at 735 ("Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source.'"). Therefore, while the plurality did state "the [CWA] definitions . . . conceive of 'point sources' and 'navigable waters' as separate and distinct categories," this statement is premised on the assumption that the conveyances listed under the point source definition contain only intermittent flows. *Id.* Throughout its opinion, the plurality is clear that it characterizes ditches as a type of waterbody that contains only intermittent flow: "ditch[es], channel[s], and conduit[s]' . . . are

[6] *See United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v. Lucas*, 516 F.3d 316, 324 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007).

terms ordinarily used to describe the watercourses through which intermittent waters typically flow." *Id.* at 735–36.

Under the plurality reasoning, a ditch, and any other conveyance listed under the definition of point source that conveys water, can be a "water of the United States" if it contains relatively permanent flow. The plurality indicates in some circumstances these categories overlap: "It would make little sense if the two categories were *significantly* overlapping." *Id.* at 735. (emphasis added). Specifically, in regards to ditches, the plurality states ditches can be point sources and "waters of the United States." *Id.* at 735–36 ("The separate classification of 'ditch[es] . . . shows that these are, *by and large*, not "waters of the United States"). Therefore, the district court erred in stating *Rapanos* stood for the proposition ditches cannot be "waters of the United States." Rather, under the plurality test, a ditch can only qualify as a "water of the United States" if it contains relatively permanent flow. Ditch C-1 is a relatively permanent waterbody because it contains running water at all times except during annual periods of drought. (R. at 5). Its seasonal nature does not negate its relative permanence under the plurality test. *See Rapanos*, 547 U.S. at 732 n.5 (seasonal rivers "which contain continuous flow during some months of the year but no flow during dry months" are not excluded under the "relatively permanent" standard).

Furthermore, numerous courts have held ditches to be jurisdictional waters under the CWA both before and after the Supreme Court's decision in *Rapanos*. In *United States v. Gerke Excavating*, 412 F.3d 804 (7th Cir. 2005), Judges Posner and Easterbrook, along with Judge Evans, held a ditch to be a water of the United States explaining, "[a] stream can be a tributary; why not a ditch? A ditch can carry as much water as stream, or more; many streams are tiny. It wouldn't make much sense to . . . distinguish[] between a stream and its manmade counterpart."

Id. at 805–06; *see also United States v. Eidson,* 108 F.3d 1336, 1342-43 (11th Cir. 1997) (holding manmade ditches and canals that flow intermittently into a creek are "waters of the United States"); *accord United States v. Deaton,* 332 F.3d 698, 712 (4th Cir. 2003). Courts have continued to find ditches to be navigable waters post-*Rapanos. See e.g. Precon Dev. Corp. v. U.S. Army Corps of Eng'rs,* 633 F.3d 278, 292 (4th Cir. 2011) (holding a ditch which flowed seasonally and contained a significant nexus to a navigable water to be a tributary).

2. Ditch C-1 qualifies as a water of the United States as a tributary of Reedy Creek because it is a relatively permanent waterbody and it has a significant nexus with the Creek.

Maleau argues that, even if a ditch can be a navigable water, Ditch C-1 is not a "water of the United States" because "it has never floated a boat and is too small to do so in the future." (R. at 9). This argument must fail because it has been repeatedly rejected by the Supreme Court. *See Rapanos*, 547 U.S. at 767 ("[I]n enacting the CWA Congress intended to regulate at least some waters that are not navigable in the traditional sense") *accord SWANCC*, 531 U.S. at 167.

Ditch C-1 is a jurisdictional tributary under the tests set forth by the Supreme Court. In *Rapanos,* a fractured Supreme Court proffered two separate tests to determine jurisdiction of non-navigable waters under the CWA. Under the plurality test, a waterbody must be relatively permanent in order to qualify as a "water of the United States." *Id.* at 739. Justice Kennedy, however, requires a waterbody to have a significant nexus with a navigable water. *Id.* at 759 (Kennedy, J., concurring). Ditch C-1 is a "water of the United States" by either standard.

As established, Ditch C-1 is a jurisdictional tributary under the plurality's "permanent flow" standard and therefore is a "water of the United States." *See supra* Section III.B.1 Furthermore, Ditch C-1 is a "water of the United States" because it has a significant nexus with Reedy Creek. In *Rapanos,* Justice Kennedy explained a tributary meets the "significant nexus"

test if it affects the chemical, physical or biological integrity" of a navigable water. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). The significant nexus between Ditch C-1 and Reedy Creek is manifestly demonstrated by the effects of the arsenic from Ditch C-1 on Reedy Creek. Above the area where Ditch C-1 discharges into Reedy Creek, arsenic is undetectable. (R. at 6). Below Ditch C-1, arsenic is present in "significant concentrations" which have impacted wildlife dependent on Wildman Marsh, the terminus of Reedy Creek. *Id.*

IV. BONHOMME DOES NOT VIOLATE THE CWA BECAUSE HE DOES NOT ADD POLLUTANTS TO REEDY CREEK.

The CWA states the discharge of any pollutant by any person without a permit is unlawful. 33 U.S.C. § 1311(a) (2006). The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2006). The district court erred in denying Bonhomme's motion to dismiss because the culvert does not add pollutants to the Creek for two reasons. First, Ditch C-1 and Reedy Creek are not meaningfully distinct water bodies. Second, Maleau owns and controls the source of the pollution.

A. Ditch C-1 and Reedy Creek are not meaningfully distinct water bodies; therefore, Bonhomme's culvert does not add pollutants to navigable waters.

In refusing to dismiss the cause of action against Bonhomme, the district court stated that the CWA prohibits the addition of arsenic from a culvert to Reedy Creek. (R. at 9). Although a culvert can meet the definition of point source under the CWA without itself being the source of the pollutants in the water it conveys, in order to be held liable under the Act there must not only be a point source, but also an "addition" of pollutants. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). The relevant question in the present case is whether there is an addition of pollutants from the culvert to the Reedy River. Because the water

from Ditch C-1 naturally flows into Reedy Creek, and arsenic is already present in Ditch C-1, there is no addition of a pollutant within the meaning of the Act.

If the pollutant would enter a navigable water absent the existence of an improved portion of a waterway, there is no addition. In *Los Angeles County Flood Control District v. Natural Resource Defense Council, Inc.*, 133 S. Ct. 710 (2013), the Supreme Court held no addition occurred when water flowed out of concrete channels and entered downstream, unimproved portions of the same waterway. *Id.* at 713. Even though the county owned the improved portion of the river, a transfer of water is not a discharge of pollutants if the transfer is not between "meaningfully distinct water bodies." *Id.* Just as Los Angeles County Flood Control District was not liable because it owned the improved portion of the river, Bonhomme cannot be liable solely because he owns the improved portion of the Ditch.

The fact that the culvert is at the confluence of two water bodies does not change the analysis because the Ditch and Reedy Creek are not meaningfully distinct water bodies. In *South Florida Management District v. Miccosukee Tribe of Indians* the Supreme Court addressed whether a pumping system that moved water from a canal to a reservoir constituted a discharge of a pollutant under the CWA. 541 U.S. at 98. The Court noted that the pumping station could be a point source even though it did not generate the pollutants contained in the water it transferred. *Id.* at 105. However, just because the pumping station was a point source did not mean that an addition occurred. The Supreme Court remanded the case back to the district court to make factual findings about whether the water bodies were meaningfully distinct. *Id.* at 112. If they were not meaningfully distinct waters, there would be no addition of a pollutant. *Id.*

While the Supreme Court has never directly stated a test to determine whether two water bodies are "meaningfully distinct," the circuit courts are unanimous that water bodies are not

"meaningfully distinct" when water would naturally flow from one waterbody to another waterbody absent the point source. In *Dubois v. United States Department of Agriculture*, 102 F.3d 1273 (1st Cir. 1996), the U.S. Department of Agriculture wanted to transfer water from a polluted river into an upstream pond. *Id.* at 1296–97. Although the pond flowed naturally into the river, the court noted that the water in the river would never flow naturally back into the pond absent an intervening action. *Id.* Pumping polluted water from the river into the pond was an addition of a pollutant because it would never reach the pond naturally. *Id.* Conversely, pollutants flowing from the pond to the river would not be an addition, because there was no alteration of the natural flow.

Similarly, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), the Second Circuit held that the City of New York violated the CWA when it transferred water from a reservoir through a tunnel to a creek. *Id.* at 494. Under natural conditions, the water from the reservoir would never reach the creek because it would instead flow north, eventually entering into the Hudson River. *Id.* at 484. Therefore, the water entering the creek from the reservoir was an addition within the meaning of the Act. *Id.* at 492.

These decisions stand for the proposition that the term "meaningfully distinct" is defined by the natural flow of the water bodies. *Id.* at 493 (citing *Dubois* 102 F.3d at 1296–97). The district court relied on *Dague v. City of Burlington*, 935 F.2d 1343, 1354–55 (2d Cir. 1991) *rev'd on other grounds,* 505 U.S. 557 (1992), in denying Bonhomme's motion to dismiss. (R. at 9). However, *Dague* involved a transfer of water between two meaningfully distinct water bodies, *see Catskill*, 273 F.3d at 492 (citing *Dague*, 935 F.2d 1343), and therefore its holding does not implicate the case at hand. If the point source does not alter the natural flow between water bodies, there is no addition of a pollutant.

Ditch C-1 and Reedy Creek are not meaningfully distinct bodies of water because the water from Ditch C-1 flows naturally into Reedy Creek. Unlike the point sources in *Dubois* and *Cakstill*, Bonhomme's culvert does not alter the natural flow of water from Ditch C-1. Ditch C-1 is three feet across and one foot deep on average, and contains running water for the vast majority of the year. (R. at 5). From Maleau's property, the Ditch flows downwards three miles across multiple properties before emptying into Reedy Creek through the culvert on Bonhomme's property. *Id.* Therefore, even if the culvert were to be removed, Ditch C-1 would naturally flow into Reedy Creek. Because one of the statutory elements of a discharge of a pollutant is missing—an addition— Bonhomme does not violate the CWA.

B. Because Maleau has exclusive control over the source of the pollution, Bonhomme cannot be held liable under the Clean Water Act.

Finding Bonhomme to be a liable party under the Act would shield Maleau from liability which would be contrary to the Congressional intent of controlling pollution at the source. *See* S. Rep. No. 92-414, at 3743 (1971) ("it is essential that discharge of pollutants be controlled at the source"). Holding a person liable for the addition of pollutants for which he has no control over would lead to the perverse result where "any point at which one waterway empties into another could be construed as a 'point source,' subjecting unsuspecting owners of these confluences to liability when pollutants flow downstream." *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000).

The reasoning in *Dague* supports dismissing the State of Progress's cause of action under the CWA. In *Dague,* the City of Burlington owned a landfill that caused pollutants to enter into a pond which were conveyed into a marsh through a railroad culvert. 935 F.2d at 1347–49. The City was held liable for the discharge of a pollutant through the culvert, even though it was the railroad, not the defendant, who owned the culvert. The court did not focus its attention on who

owned the point source; rather, the court reasoned that one who discharges pollutants into a conveyance owned by another can still be liable under the Act. *Id.* at 1355 (citing *United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945, 947 (W.D. Tenn. 1976) (holding "[t]he fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions form the scope of [the CWA]")). Thus, the reasoning in *Dague* actually supports holding Maleau, not Bonhomme, liable because it is the person who possesses original control over the source of pollution that is liable under the CWA.

Other courts have similarly held that it is the one who has control over the pollutant is the liable party under the Act. *See e.g.*, *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005) (holding the owner of an abandoned mine liable for discharges from its mine shaft that traveled 2.5 miles before discharging into a navigable water); *San Francisco Baykeeper v. West Bay Sanitary Dist*., 791 F.Supp.2d 719, 771 (N.D. Cal. 2011) ("dischargers are not insulated from liability merely because they make illegal discharges via a system owned and operated by other entities"). Indeed, the plurality opinion in *Rapanos* found that a party can be liable for "pollutants discharged from a point source [that] do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Rapanos v. United States*, 547 U.S. 715, 743 (2006). This court should follow this reasoning and find that a person who has no control over the source of pollution cannot be liable under § 301(a) of the CWA because a contrary finding would defeat the congressional intent to control pollution at its source.

Practical considerations also militate against finding Bonhomme to be potentially liable. A court could easily enjoin Maleau from dumping the waste piles in a way that will lead to arsenic entering a "water of the United States." However, if this court finds Bonhomme liable there are no easy remedies to abate the pollution. Bonhomme cannot force Maleau to place the

mining waste in areas that would prevent the arsenic from entering Reedy Creek. Additionally, Bonhomme cannot stop the discharge of the water from the ditch to Reedy Creek due to a restrictive covenant in his deed. (R. at 5). Thus, the only solution would be for Bonhomme to seek a permit from EPA, which EPA is not obligated to bestow to Bonhomme. If EPA did not give Bonhomme a permit, Bonhomme would be unable to take any action in order to ensure that he was in compliance with the Act.

CONCLUSION

Bonhomme is entitled to bring suit under the Clean Water Act against Maleau because he has Article III standing, is a real party in interest under FRCP 17 and is a "citizen" as defined by the CWA. Furthermore, Maleau is in violation of the CWA § 301 for the unpermitted discharges of arsenic into Ditch C-1 because his mining piles are a point source, and Ditch C-1 and Reedy Creek are navigable waters. Last, Bonhomme is not in violation of the CWA because he does not add pollutants to Reedy Creek. For the foregoing reasons, Bonhomme respectfully requests this Court (1) reverse the district court's decision to dismiss Bonhomme's suit against Maleau and (2) reverse the district court's denial of Bonhomme's motion to dismiss Progress's suit against Bonhomme.

DATED this 2nd day of December, 2013.

Respectfully Submitted,

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Counsel for Jacques Bonhomme