Team #44

Civil Appeal No. 13-01234

IN THE
UNITED STATES COURT OF APPEALS FOR
THE TWELFTH CIRCUIT

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 Progress
Nos. 155-CV-2012 & 165-CV-2012

BRIEF OF INTERVENOR-PLAINTIFF-APPELLANT, CROSS-APPELLEE

December 1, 2013

Attorneys for Maleau

Table of Contents

Table of Contents. iii

Table of Authorities . . . . . vi.

Statement of Jurisdiction. 1

Statement of Issues Presented for Review. 1

Statement of the Case. 2

Statement of Facts. 2

Summary of Argument. 4

Standard of Review. 6

Argument. 6

I. Bonhomme is an improper plaintiff because he is not the real party in interest under FRCP 17, as he uses Wildman marsh for primarily business purposes, this action is being financed by PMI, and Bonhomme is a "bought plaintiff" for PMI. 6

A. Bonhomme lacks Rule 17 standing, as he is not entitled to bring suit under Delaware state law. 7

B. The district court afforded Bonhomme a reasonable time and manner to add PMI as a party to the complaint, and the addition of PMI at this late stage in the litigation would be prejudicial to Maleau and would not fall in line with Rule 17's "affirmative purpose". . 11

II. Under CWA § 505, Bonhomme is a foreign national, as opposed to a "citizen,"which forecloses his ability to bring this suit. 13

III. Maleau's overburden piles are not point sources under CWA § 502(12) because they are not confined and discrete conveyances systematically conveying pollutants into "navigable waters/waters of the United States." 15

A. Any pollutants that are emitted by the overburden are not systematically conveyed into navigable waterways through a "confined and discrete" conveyance. 15

B. Absent an allegation that the stormwater is discretely collected and conveyed to a "navigable water", Bonhomme's allegations of generalized stormwater runoff are insufficient to establish the overburden piles as point sources. 17

IV. Ditch C-1 is not a "navigable water/water of the United States" because it constitutes a point source, and alternatively fails both tests under *Rapanos*. 19

A. Ditch C-1 is not a "navigable water/water of the United States" because as a ditch it is considered a point source. 19

B. Ditch C-1 is not a "navigable water/water of the United States" because it does not pass either standard under *Rapanos*. 21

1. Under the plurality test, Ditch C-1 is not a "navigable water/water of the United States." 21

2. Under the concurrence test, Ditch C-1 is not a "navigable water/water of the United States." 22

V. Reedy Creek is not a "navigable water/water of the United States" because it is not a channel of interstate commerce, it is not an "interstate water" under the pertinent federal jurisprudence, and it fails both of the *Rapanos* tests. 23

A. Neither Reedy Creek nor Wildman Marsh are "interstate waters" within the meaning of EPA's definition of "the waters of the United States" because they are not "navigable waters" within the meaning of the pertinent federal jurisprudence. 23

B. Neither Reedy Creek nor Wildman Marsh are "waters of the United States" because they are not channels of interstate commerce. 23

C. Reedy Creek is not a "navigable water" under the CWA because it fails the *Rapanos* plurality test. 25

D. Reedy Creek is not a "navigable water" under the CWA because it fails the *Rapanos* concurrence test. 27

1. Reedy Creek does not have a significant physical nexus with Wildman Marsh. 28

2. Reedy Creek does not have a significant biological or chemical nexus with Wildman Marsh. 29

VI. Bonhomme violates the CWA because the culvert on his property is a recognized point source under the statute and is actually responsible for the "addition" of pollutants into Reedy Creek. 30

A. Bonhomme's culvert does not need to generate pollutants in order to be a point source under the CWA. 30

B. Bonhomme's culvert transfers water from two distinct bodies of water, and therefore he violates the NPDES permit requirement by adding arsenic through his culvert. 31

C. Bonhomme misunderstands the role of causation under the permit requirements of the CWA, as the "proximate source" refers to the place at which the pollutant discharges into the **navigable** waterway. 33

Conclusion 35

Table of Authorities

Cases

Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11 (2d Cir. 1997) 7

American Petroleum Institute v. Johnson, 541 F. Supp. 2d 165 (D.D.C. 2008) 25

Amcast Industrial Corp. v. Detrex Corp., 45 F.3d 155 (7th Cir. 1995) 32

Appalachian Power Company v. Train, 545 F.2d 1351 (4th Cir. 1976) 16

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 31, 33, 34

Consolidated Coal v. Costle, 604 F.2d 239 (4th Cir. 1979) 16

Dague v. Burlington, 935 F.2d 1343 (2d Cir. 1991) 30

Durning v. Citibank, N.A., 950 F.3d 1419 (9th Cir. 1991) 33

Ecological Rights Foundation v. Pacific Gas and Elec. Co., 713 F.3d 502 (9th Cir. 2013) 17, 18

Ensley v. Cody Res., Inc., 171 F.3d 315 (5th Cir. 1999) 7

Friends of Everglades v. S. Florida Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009) 30, 31, 32

Gibbs v. Babbit, 214 F.3d 483 (4th Cir. 2000) 25

Husain v. Olympic Airways, 316 F.3d 829 (9th Cir. 2002) 6

Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc., 271 F.3d 164 (4th Cir. 2001) 11, 12, 13

In re Signal Int'l, LLC, 579 F.3d 478 (5th Cir. 2009). 11

Kramer v. Western Pacific Indus., Inc., 546 A.2d 348 (Del.1988) 8

Labovitz v. Washington Times Corp., Inc., 172 F.3d 897 (D.C. Cir. 1999) 8, 9, 10

Lipton v. News Int'l Plc, 514 A.2d 1075 (Del. 1986) 8

Lim v. City of Long Beach, 217 F.3d 1050 (9th Cir. 2000) 6

Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist., 280 F.3d 1364 (11th Cir. 2002) 33

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 31

N. California River Watch v. City of Healdsburd 496 F.3d 993 (9th Cir. 2007) 21, 28

Rales v. Blasband, 634 A.2d 927 (Del. 1993) 10, 11

Rapanos v. United States, 547 U.S. 715 (2006) . . . . . *passim*

Rawoof v. Texor Petroleum Company, Inc., 521 F.3d 750 (7th Cir. 2008) 7, 8, 10

Rowe v. Education Credit Management Corporation,, 559 F.3d 1028 (9th Cir. 2009) 6

S.D. Warren Co. v. Maine Board of Environmental Protection, 547 U.S. 370 (2006) 14

Secretary of State of Maryland. v. Joseph H. Munson Co., Inc., 467 U.S. 947 (1984) 7

Sierra Club v. Abston Construction, 620 F.2d 41 (5th Cir. 1980) 16, 17

Solid Waste Agency of Northern Cook County. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 14

South Florida Water Management District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) 18, 30, 31, 33

Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber, 407 F.3d 34 (2d Cir. 2005) 6

Trustees for Alaska v. EPA, 749 F.2d 549 (9th Cir. 1984) 15, 16

U.S v. Appalachian Electric Power Company, 311 U.S. 377 (1940) 21, 23

U.S. v. Bailey, 571 F.3d 791 (8th Cir. 2009) 21, 28, 29

U.S. v. Cundiff, 555 F.3d 200, 211 (6th Cir. 2009) 22, 26, 27, 28, 29

U.S. v. Deaton, 332 F.3d 698, 706 (3rd Cir. 2003) 25

U.S. v. Donovan, 661 F.3d 174 (3rd Cir. 2011) 28, 29

U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 17

U.S. v. Gerke Excavating, 464 F.3d 723 (7th Cir. 2006) 21

U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006) 21

U.S. v. Lopez, 514 U.S. 549 (1995) 24, 25

United States v. Plaza Health Laboratories, Inc., 3 F.3d 643 (2nd Cir. 1993) 16, 20

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 21, 23, 25

U.S v. Robison, 505 F.3d 1208 (11th Cir. 2007) 21, 22

U.S. v. Washington, 573 F.3d 701 (9th Cir. 2009) 6

Walden v. Broce Construction Company, 357 F.2d 242 (10th Cir. 1966) 14

Warth v. Seldin, 422 U.S. 490 (1975) 7

Whelan v. Abell, 953 F.2d 663 (D.C.Cir.1992) 11, 12

West Virginia Highlands Conservancy, Inc. v. Huffman, 625 F.3d 159 (4th Cir. 2010) 32

Regulations

40 C.F.R. § 122.2 . . . . . 23, 24

40 C.F.R. § 122.3 32

29 C.F.R. § 776.29 25

Statutes

28 U.S.C. § 1291 (2012) 1

33 U.S.C. § 1311 (2012) 15, 30

33 U.S.C. § 1362 (2012) 13, 30

33 U.S.C. § 1365 (2012) 1, 13

Rules

Fed. R. Civ. Pro. 17 . . . . . .*passim*

Statement of Jurisdiction

Jurisdiction for this appeal of a Final Motion to Dismiss comes to this court under 28 U.S.C. § 1291 (2012). The United States District Court for the District of Progress exercised jurisdiction for these questions under the citizen suit provision of the Clean Water Act, (CWA) § 505; 33 U.S.C. § 1365 (2012).

Statement of Issues Presented for Review

I. Under FRCP 17, does Bonhomme have standing to sue Maleau when he uses Wildman Marsh primarily for the benefit of the PMI Corporation and when PMI is financing this action?

II. Under CWA § 505, is Bonhomme entitled to bring this suit as a "citizen", when he is a foreign national who does not have United States citizenship?

III. Under CWA § 502(12), do Maleau's overburden piles constitute "point sources" when rainwater merely percolates through them into Ditch C-1?

IV. Under CWA § 502(7) and (12), does Ditch C-1 constitute a "navigable water/water of the United States" when ditches are expressly included in the definition of "point sources" under CWA § 502(14)?

V. Under CWA § 502(7), (12), does Reedy Creek constitute a "navigable water/water of the United States" when Reedy Creek does not affect the flora or fauna of Wildman Marsh?

VI. Under CWA § 502(12), does Bonhomme's culvert add arsenic to Reedy Creek when miniscule levels of arsenic are found upstream from the culvert but found in significant quantities downstream from it?

Statement of the Case

This action came to the United States District Court for the District of Progress when Jacques Bonhomme (Bonhomme) sued Shifty Maleau (Maleau) under CWA § 505. (R. at 4.) Bonhomme averred that Maleau was in violation of the CWA because of gold mining overburden piles that were placed adjacent to Ditch C-1 in Jefferson County, State of Progress. *Id*. After proper notice, State of Progress (Progress) then sued Bonhomme alleging that he violated the CWA by discharging arsenic from his culvert into Reedy Creek. (R. at 5.) Maleau intervened in that action, and both Progress and Maleau moved to consolidate the actions. *Id*. The court granted the motion and both defendants moved to dismiss. *Id*.

The district court granted Maleau's motion to dismiss on July 23, 2012 on the grounds that Bonhomme lacked standing under both FRCP 17 and CWA § 505, as he was neither a proper plaintiff nor was he included in the definition of "citizen." (R. at 8.) The court noted that even if Bonhomme had been a proper plaintiff, it would have found for Maleau on all issues except for the fifth. (R. at 10.) All parties subsequently filed appeals, with Maleau taking issue with the court's holding that Reedy Creek was a "water of the United States" under CWA § 502(7).

Statement of Facts

Maleau owns and operates an open pit gold mining operation in the State of Progress. (R. at 5.) He trucks overburden from his operation in Lincoln County and places it in piles adjacent to Ditch C-1 in Jefferson County. *Id.* On average, Ditch C-1 is three feet wide and one foot deep, except for when it dries up during annual drought periods for up to three months. *Id.* The ditch runs through several properties, including Maleau's, per restrictive covenants established in 1913. *Id.* During the part of the year when water flows through the ditch, rainwater sometimes percolates through the overburden piles into gravity-created channels which leach into the ditch.

After Maleau's property, the ditch runs for several miles through farm fields that subsequently drain into it. *Id.* Eventually, the ditch discharges directly through a culvert on Bonhomme's property into Reedy Creek. *Id.*

It is agreed by all parties that Reedy Creek is not navigable-in-fact. (R. at 9.) Just before reaching Bonhomme's property, Reedy Creek crosses into the State of Progress from the State of New Union. (R. at 5.) The terminus of Reedy Creek is the extensive Wildman Marsh, much of which is contained within the Wildman National Wildlife Refuge. (R. at 5-6.) It is an important stopover for migratory birds and a major destination for duck hunters. (R. at 6.)

Bonhomme is a French national and the largest shareholder of Precious Metals International (PMI). (R. at 7.) He also sits on the Board of Directors of PMI. *Id.* PMI owns five gold mines around the world and is in direct competition with Maleau's business. *Id.* The district court took judicial notice of the fact that the Attorney General of Progress held a press conference and stated that Bonhomme filed this suit to injure Maleau's ability to compete with PMI. (R. at 6.)

Before suing Maleau, PMI paid for or conducted testing to support Bonhomme's contention that arsenic, a well-known pollutant, present in Reedy Creek and Wildman Marsh comes from Maleau's overburden. (R. at 7.) The tests indicated that above Maleau's property arsenic is undetectable. (R. at 6.) It is detectable downstream from Maleau's property, but the concentration decreases the closer it gets to Bonhomme's culvert. *Id.* Immediately after Bonhomme's culvert discharges the ditch water into Reedy Creek, arsenic is found in significant concentrations. *Id.* Arsenic is then detectable in lower concentrations in the terminus of Reedy Creek, Wildman Marsh. *Id.* However, no tests have indicated a significant change in the flora or

fauna in the marsh adjacent to Bonhomme's lodge. *Id.* The only change detected was the presence of arsenic found in three migratory birds. *Id.*

Bonhomme owns property and a hunting lodge at the edge of the marsh. *Id.* He does not live at this property; he only uses it to take business clients and associates of PMI hunting. (R. at 7-8.) Although the environmental impact of arsenic in the waters of Wildman Marsh have been unnoticeable, Bonhomme claims he is now afraid to host business associates on hunting trips at his lodge. (R. at 6.) Bonhomme has decreased his hunting parties from eight-per-year down to two-per-year. *Id.* Although PMI has shown a decline in profits the last couple of years, it still covered the cost of the arsenic testing. *Id.* PMI is also paying Bonhomme's attorney's fees and expert witness fees. (R. at 7.)

Summary of Argument

Under Rule 17, Bonhomme is not the real party in interest. Fed. Civ. P. 17(a). Under the shareholder-standing doctrine, Bonhomme cannot sue without joining PMI. He cannot bring a direct suit because he has not alleged any injuries independent of those possibly suffered by PMI. He cannot bring a derivative suit, because the record is absent to a demand made to the PMI Board of Directors or wrongful refusal by the PMI Board. Under Rule 17, this case should be dismissed because there was ample time to add PMI as a party as Maleau raised this issue in his original answer to Bonhomme's complaint. *Id.* Maleau should not be faced with the specter of ongoing and costly litigation. This court should affirm the district court's finding on issue one.

Bonhomme lacks standing to bring this "citizen suit" under CWA § 505(a), because he is a foreign national. Section 505 is the "citizen suit" provision, not the "person suit" provision. The plain meaning of "citizen" in § 505 means citizen of the United States. Congress chose the term "citizen," not "person," and the statute should be read in terms of the common vernacular of

"citizen." This lends more credence to the fact that PMI is the real party in interest here and this case should be dismissed. This court should affirm the district court's finding on issue two.

Maleau's overburden piles are not point sources under § 502(14) because they are not confined, discrete conveyances that systematically convey pollutants into navigable waters. The CWA does not specifically define overburden piles, or anything similar, as point sources. *Id*. Maleau has not altered his land and he has made no effort to channel or collect surface waters. The piles were not created for the express purpose of storing or transferring pollutants from one place to another. This court should affirm the district court's finding on issue three.

Ditch C-1 is not a "navigable water/water of the United States" because ditches are point sources under the CWA, and alternatively Ditch C-1 fails both tests under *Rapanos*. Section 502(14) specifically defines ditches within its definition of point source. Categorizing the narrow, shallow, sometimes dry Ditch C-1 would lead to untenable results. Further, Ditch C-1 fails both tests under *Rapanos* because it does not have a connection to "navigable waters/waters of the United States." This court should affirm the district court's finding on issue four.

Under § 502(7), Reedy Creek is not a "navigable water/water of the United States." It has no effect on interstate commerce because neither it nor Wildman Marsh are channels of interstate commerce. It is not an "interstate water" within the meaning of the pertinent federal jurisprudence. It also fails both tests under *Rapanos*. It fails the plurality test, because it does not have a continuous surface connection to a "water of the United States" in its own right. It fails the concurrence test, because Wildman Marsh is not a "water of the United States." Even if Wildman Marsh was a "water of the United States," Reedy Creek does not significantly affect the physical, chemical, or biological integrity of the extensive wetland. This court should reverse the district court's finding on issue five.

If anybody violates the CWA it is Bonhomme because culverts are recognized point sources, and his is responsible for the addition of arsenic into Reedy Creek. The water transfer rule does not apply to Bonhomme's culvert because neither Ditch C-1 nor Reedy Creek are navigable waters, and the rule covers only transfers between two navigable waters. Section 502(12) does not define "addition of a pollutant" in terms of creation of a pollutant, but rather the place where the pollutant is added to navigable waters. It is irrelevant whether the arsenic originates from Maleau's overburden, because Bonhomme's point source conveys the arsenic and he is liable. This court should affirm the district court's finding on issue six.

Standard of Review

The proper standard of review for dismissal under Rule 17 standing is *de novo. Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 43 (2d Cir. 2005). "The Court may affirm the dismissal on any ground supported by the record." *United States v. Washington*, 573 F.3d 701, 706 (9th Cir. 2009). "The court must accept all factual allegations in the complaint as true the pleadings in the light most favorable to the nonmoving party. *Rowe v. Educ. Credit Mgmt. Corp,*, 559 F.3d 1028, 1029-30 (9th Cir. 2009). Conclusions of law are reviewed de novo. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002). Mixed questions of law and fact are reviewed de novo. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000).

I. Bonhomme is an improper plaintiff because he is not the real party in interest under FRCP 17, as he uses Wildman marsh for primarily business purposes, this action is being financed by PMI, and Bonhomme is a "bought plaintiff" for PMI.

Civil actions must be prosecuted under the name of the real party in interest. Fed. R. Civ. Pro. 17(a). FRCP 17 provides examples of those who may sue in their own name without joining the person for whose benefit the action is focused. These include an executor, an

administrator, a guardian, a bailee, a trustee of an express trust, a party with whom or in whose name a contract has been made for another's benefit, and a party authorized by statute. *Id*. Bonhomme does not fall into any of these categories in regards to the action at bar. As he is a shareholder of the corporation, he is not entitled under the law of the state of incorporation to bring suit. (R. at 7.) The corporation alone stands to benefit from a favorable ruling in this case, raising *res* judicata concerns for Maleau, and this litigation is being financed by the corporation. Bonhomme is therefore not a real party in interest for the purposes of the Rule.

A. Bonhomme lacks Rule 17 standing, as he is not entitled to bring suit under Delaware state law.

Although Article III jurisdictional standing is not an explicit issue before this court, some courts have formulated Rule 17 as a codification of generalized, non-constitutional prudential standing limitations. *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008). In Rule 17 contexts, this is not a question of whether or not a court has jurisdiction to hear a complaint, but rather how that court decides to exercise its jurisdiction in light of prudential concerns. *Ensley v. Cody Res., Inc.*, 171 F.3d 315, 320 (5th Cir. 1999). Although they provide distinct requirements, the nexus of Article III and Rule 17 come together at the point that they both prohibit third parties from suing in court to enforce the rights of third parties. *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955 (1984) ("The plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" (*citations omitted*)). These matters are "closely related to Article III concerns but essentially matters of judicial self-governance" and are applicable where judicial intervention is not necessary for a party to assert its rights. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

An extension of the principle that third parties cannot sue to enforce the rights of others is a doctrine known as the shareholder-standing rule. The rule provides that an individual cannot bring suit in his own name for indirect injuries she might suffer as a result of an injury to the corporation. *Rawoof*, 521 F.3d at 757. There are three recognized exceptions to this rule: firstly, this rule does not apply if the corporation's management has failed to prosecute a claim for reasons unrelated to business judgment; secondly, a shareholder can bring suit if she has suffered a **direct personal injury** independent of the injuries suffered by all of the shareholders of a company; and thirdly, a shareholder may prosecute a claim if a special contractual relationship exists between the shareholder and the wrongdoer. *Id*. (*emphasis added).*

"Although federal law generally controls the question of standing, whether the shareholder's claims are derivative or direct for purposes of the shareholder standing rule is controlled by the law of the state of incorporation." *Rawoof*, 521 at 762. In this case, the state law that governs is Delaware. (R. at 6.) Under Delaware law, a shareholder can only bring an individual suit if she's suffered injuries "directly or independently of the corporation." *Kramer v. Western Pacific Indus., Inc.,* 546 A.2d 348, 351 (Del.1988). This can be contrasted with claims that are derivative in nature, where the party damaged is the corporation itself, and where any damages owed are owed to the corporation. *Id*.

There are two common ways that individual injury can arise in these contexts: (1) "where the allegedly wrongful conduct violates a duty to the complaining shareholder independent of the fiduciary duties owed that party along with all other shareholders" or (2) "where the conduct causes an injury to the shareholders distinct from any injury to the corporation itself." *Labovitz v. Washington Times Corp., Inc.*, 172 F.3d 897, 901(D.C. Cir. 1999) (quoting *Lipton v. News Int'l Plc*, 514 A.2d 1075, 1078 (Del. 1986)).

In *Labovitz,* the court applied the substantive Delaware state law in an appeal by two shareholders of a publishing company against another major shareholder. *Labovitz*, 172 F.3d 897. The plaintiffs were two shareholders and board members of a Delaware newspaper corporation (DCI). They alleged that the Washington Times (Times) had breached a fiduciary duty owed to them by trying to buy the company at a "distressed" price after it had bought a fifty-percent ownership interest in the company and commenced "secret negotiations" with another member of the Board. *Id*. at 899. The Times refused to pay plaintiff his $20,000 monthly salary and demanded that he and his wife divest their interests and investments in the corporation. *Id*. When the plaintiffs refused to do so, the Times withdrew its financial support of the company and demanded that DCI pay it $2 million in deferred costs. *Id*. The corporation filed for bankruptcy and the plaintiffs sued on seven counts, including breach of fiduciary duty, fraud, negligent misrepresentation, and breach of contract. *Id*. at 897-899.

The plaintiffs proceeded on a direct injury theory, arguing that the Times owed them individual duties because of its "de facto control" over DCI. *Id*. at 899. The district court dismissed all of their claims except for the breach of contract, noting "that the injuries alleged by the [plaintiffs], such as loss in stock value and losses associated with the status as guarantors, were derivative in nature." *Id*. In holding that the corporation was the real party in interest, the court of appeals noted that the following injuries alleged by the plaintiffs were derivative in nature and belonged to the corporation: (1) the injuries inflicted upon them as guarantors on debts owed by the parties to other creditors; (2) guarantees made on loans owed directly to the Times; and (3) the breach of contract claim. *Id*. at 903. The court did not attempt to proceed on a derivative liability theory. *See Id*. at 906.

In order for a stockholder to bring a derivative suit under the corporate law of Delaware, the state Supreme Court has recognized stricter limitations:

> [T]he right of a stockholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation.

Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993).

Bonhomme does not allege sufficient injuries to advance as a party at this stage in the litigation under either a direct or a derivative capacity. As borne out by the factual record, Bonhomme has not suffered any injuries independent of those injuries that could possibly be suffered by the corporation. Like the plaintiffs in *Labovitz*, Bonhomme is a board member, and in fact president of, the corporation that is financing this litigation. (R. at 7.) Although Bonhomme owns a lodge adjacent to Wildman marsh, he does not live at the lodge. (R. at 7.) He uses the lodge only for hunting parties, the majority of which are comprised of associates and clients of PMI. (R. at 8.) Although he owns the lodge in his personal capacity, he does not use the lodge for personal reasons and the lodge is therefore the "de facto" property of the corporation. He has thus failed the second prong of the test outlined in *Rawoof*, because he has failed to show how any of the potential injuries he may or may not suffer are "direct and personal injuries." *Rawoof*, 521 F.3d at 757.

If Bonhomme cannot succeed on a theory of direct injury, he certainly cannot proceed by labeling this action as a derivative suit. The factual record is silent as to whether or not Bonhomme has "demanded that the directors pursue the corporate claim and they have wrongfully refused to do so" or "where demand is excused because the directors are incapable of making an impartial decision regarding such litigation." *Rales*, 634 A.2d at 932. The record

does bear out, however, that PMI is financing the attorney and expert witness fees for this action in addition to Bonhomme being president of the company. (R. at 7.) We ask this court to reason that Bonhomme, as president of the company, is the party who has "wrongly refused" to prosecute this claim. *Rales*, 634 A.2d at 932.

B. The district court afforded Bonhomme a reasonable time and manner to add PMI as a party to the complaint, and the addition of PMI at this late stage in the litigation would be prejudicial to Maleau and would not fall in line with Rule 17's "affirmative purpose".

A court may not dismiss an action for failure to prosecute under the real party in interest until a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. *In re Signal Int'l, LLC*, 579 F.3d 478, 487 (5th Cir. 2009).

"Reasonable time" is a case-by-case inquiry, and will depend on the facts of each case before a court. *See generally* § 1555 Dismissal and Relation Back, 6A Fed. Prac. & Proc. Civ. § 1555 (3d ed.). Courts liberally allow the substitution of plaintiffs to comply with Rule 17(a) when the substitution of parties does not change the original complaint or the factual allegations contained therein. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997). Rule 17 provides that courts should be generous, rather than punitive, in allowing for the addition of parties, even at late stages in litigation. *Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001). This is especially true in cases in which injustice or forfeiture could be avoided by allowing the inclusion of new parties when naming the determination of the real party in interest was difficult and the mistake was understandable. *Id*. This has been called the "affirmative purpose" of the Rule. *Id*.

Although it provides a liberal standard, Rule 17 does not allow the addition of a party if the opposing party would suffer undue prejudice. *See Whelan v. Abell,* 953 F.2d 663, 671–73 (D.C.Cir.1992) (dismissing motion to amend under Rule 15 to add a real party in interest under

Rule 17 came too late in the proceedings and unfairly prejudiced the plaintiffs). The *Intown* case is instructive in this regard. In that case, the Fourth Circuit heard the appeal of a hotel and restaurant owner (Intown) whose business had been crashed into by a driver employed by a trucking company (Wheaton) on July 18, 1996. *Intown*, 271 F.3d at 167. The insurance company (Transcontinental) reimbursed Intown for the damages its properties had sustained in the accident and sued Transcontinental for damages on February 9, 1999. *Id*. Intown brought a separate suit on July 9, 1999 for the damages sustained in the accident three years prior. *Id*. The court consolidated the Transcontinental and Intown actions against Wheaton, and Wheaton moved for summary judgment against Intown on the basis that the three-year statute of limitations had run. *Id*. After responding to Wheaton's motion for summary judgment, Intown sought to amend the complaint in the original Transcontinental action under FRCP 15 on the grounds that Intown was the real party in interest under FRCP 17. *Id*. Transcontinental and Wheaton ultimately settled, and Intown's original complaint was dismissed because of statute of limitations issues. *Id*.

The court denied Intown's motion to join the original Transcontinental action on state law grounds, and also noted that Rule 17 did not support Intown's notion that it could join the original Transcontinental action, as the Rule 17 motion was untimely. *Id*. at 170. On appeal, the court affirmed the district court's ruling. In regards to the timeliness of the appeal, the court found it determinative that Intown had been "represented by counsel and had notice of the original Transcontinental action from an early date, and yet failed to seek to join the Transcontinental action until after the limitations problem with its own action became apparent." *Id*.

In applying the facts of the *Intown* case to the present action, we ask the court to dismiss this claim with prejudice in lieu of remanding the case and adding PMI as a party. PMI had ample time to join the action, as Maleau raised this issue in his original answer to Bonhomme's complaint. (R. at 7.) Maleau should not be faced with the specter of ongoing costly litigation on remand because of Bonhomme's failure to add PMI as a real party in interest at the appropriate time, especially given the presumption that PMI has been "represented by counsel" and "had notice of the original action from an early date". *Intown*, 271 F.3d at 167. *See* (R. at 7) ("PMI pays the attorney and expert witness fees for Bonhomme in this case").

II. Under CWA § 505, Bonhomme is a foreign national, as opposed to a "citizen," which forecloses his ability to bring this suit.

Section 505(a) prescribes that "any **citizen** may commence a civil action on his own behalf" under the CWA. 33 U.S.C.A. § 1365(a) (*emphasis added*). The statute defines "citizen" as "a **person** or **persons** having an interest which is or may be adversely affected." § 1365(g) (*emphasis added*). The general definitions section 502(5) provides that "the term **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) (2008) (*emphasis added*).

Bonhomme argues that he is entitled to bring this cause of action because he might be included in the broader definition of "person" contained in § 502(5). However, Bonhomme's argument obliterates any plain meaning of the word "citizen" to the point that it is rendered meaningless for the purposes of the law. Citizenship is well and widely decided to be much more narrow than Bonhomme's formulation. Black's Law Dictionary defines a citizen as, "[a] person who, by either **birth** or **naturalization**, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges." CITIZEN, Black's Law Dictionary (9th

ed. 2009), citizen (*emphasis added*). Vernacular dictionaries similarly define the term narrowly, as "a person who **legally belongs to a country** and has the rights and protection of that country." "citizen." Merriam-Webster Online Dictionary. 2004. http://www.merriam-webster.com (15 Nov. 2013). Additionally, undefined statutory terms should be read "in accordance with [their] ordinary and natural meaning." *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006). Additionally, residency alone is not enough to confer citizenship even for diversity jurisdiction purposes. *Walden v. Broce Const. Co.*, 357 F.2d 242, 245 (10th Cir. 1966).

The Supreme Court has held that statutory phrases that define narrow terms more broadly do not deprive the narrower interpretations of their meaning. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corpos of Eng'rs*, 531 U.S. 159, 172 (2001) (holding that by defining the narrow phrase "navigable waters" as the broader phrase "waters of the United States" did not deprive the narrower phrase "navigable waters" of all of its meaning). Accordingly, the Court has held that when Congress creates causes of actions, courts should not presume a kind of "acquiescence" as to the terminology used in the statute, and must not "replace the plain text and meaning" of a statute if it would render the statute overbroad or run contrary to Congressional intent. *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion) (holding in regards to agency interpretations of the Clean Water Act).

Accordingly, Bonhomme's contention that he is entitled to bring this citizen suit is patently untenable. Just because Bonhomme is included as a "person" under the definition of the statute does not mean that this court should amend the interpretation of a "citizen" to include any human being regardless of other requirements. Bonhomme would have this court, in allowing him to proceed as a "citizen" for the purposes of the statute, redefine "citizen suit" as a "person suit", which Congress notably did not entitle it. As the district court correctly noted, the Clean

Water Act does not explicitly allow foreign nationals to commence suits under this provision. (R. at 8.) This fact, taken in conjunction with the previous arguments contained herein, give further purchase to proposition that PMI, not Bonhomme, is the proper plaintiff in this case because as domestic entity, it is certainly entitled to bring suit under this provision. (R. at 8.) Bonhomme was neither born in the United States, nor is he a naturalized citizen of the United States. (R. at 8.) Including him in the class of persons that "legally belongs" to this country is equally untenable, as Bonhomme's novel theory that the citizen suit provision extends to foreign nationals does not confer standing upon him, and this court must dismiss this action accordingly.

III. Maleau's overburden piles are not point sources under CWA § 502(12) because they are not confined and discrete conveyances systematically conveying pollutants into "navigable waters/waters of the United States."

The CWA prohibits the discharge of any pollutant except as in compliance with the enumerated sections of the act. CWA § 301(a), 33 U.S.C. § 1311(a) (2012). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12). The term "point source" is defined as:

> [A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture."

CWA §502(14).

A. Any pollutants that are emitted by the overburden are not systematically conveyed into navigable waterways through a "confined and discrete" conveyance.

The Parties do not dispute that arsenic is a pollutant under the CWA. (R. at 6.) However, "point sources and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance." *Trustees for Alaska v. EPA*, 749 F.2d 549, 558

(9th Cir. 1984). Bonhomme alleges that Maleau's overburden piles are point sources. (R. at 8.) However, the CWA gives numerous examples of point sources in its definition and none of those examples resemble Maleau's piles of dirt and rock. While the examples enumerated in the definition of point source are not exclusive, "the words used to define the term . . . evoke images of physical structures and instrumentalities that systematically act as a means of conveying pollutants from an industrial source to navigable waterways." *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (2nd Cir. 1993). A pile of dirt and rock sitting on a plot of land does not evoke images of a "physical structure" or of an "instrumentality that systematically conveys" pollutants into navigable waters. *Id.*

Bonhomme relies heavily on *Sierra Club v. Abston Const.*, 620 F.2d 41, 45 (5th Cir. 1980). In *Sierra*, the court held that "surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution." *Id.* at 47. In *Sierra*, defendant strip-miners constructed "sediment basins" on steep slopes in order to catch runoff from flowing into a creek. *Id.* at 43. They also created "drainage basins" at the bottom of their spill piles, which were covered in "gullies and ditches." These drainage basins also included a pipe as a primary means of outflow into the sediment basins. *Id.* at 46.

The definition of point source excludes "unchannelled and uncollected surface waters." *See, e.g., Consolidated Coal v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979); *App. Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). In *Sierra*, the defendants clearly channeled and collected surface waters when they created collection pools. Further, these pools discharged through pipes, a quintessential example of a point source. Contrary to *Sierra*, Maleau has made no modifications to his land whatsoever in an effort to collect and channel surface water. All that he has done is place his overburden in piles.

B. Absent an allegation that the stormwater is discretely collected and conveyed to a "navigable water", Bonhomme's allegations of generalized stormwater runoff are insufficient to establish the overburden piles as point sources.

"[A]llegations of generalized stormwater runoff do not establish a 'point source' discharge absent an allegation that the stormwater is discretely collected and conveyed to waters of the United States." *Ecological Rights Foundation v. Pacific Gas and Elec. Co.*, 713 F.3d 502, 509 (9th Cir. 2013). However, Bonhomme relies on a proposition set forth in *Sierra*:

> [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 mere collection of rock and other materials.

Sierra, 620 F.2d at 45. Of course, the Fifth Circuit did not rely on this proposition in finding the miners' site to be a point source. It relied on the "confined system" language of *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) that when a system fails "because of flaws in the construction or inadequate size to handle the fluids utilized . . . the escape of liquid from a confined system is from a point source." Maleau does not have a "confined system" that was constructed to "handle the fluids utilized." *Id.* His overburden piles are incapable of failure, because that would imply they serve a functional purpose.

The proposition set forth in *Sierra* is a product of the location and facts of the case. The spoil piles in *Sierra* are referred to as steep with "gullies and ditches" running down them. *Id.* at 43. In contrast, rainwater merely percolates through Maleau's piles. (R. at 5.) The piles in *Sierra* were in mountainous coal-country where steep slopes of stripped-away land, rain, and gravity mix together in a recipe for heavy erosion. *Id.* In contrast, Maleau's piles are located on un-mined agricultural land that is presumably much flatter. (R. at 5.) Had the *Sierra* Court been

considering Maleau's overburden piles, it is highly unlikely it would have put forward the proposition regarding unmodified land and spill piles.

In *Ecological Rights*, plaintiff alleged that rainwater falling on defendant's utility poles became contaminated with wood preservatives and was carried into San Francisco Bay, its tributaries, and its adjacent wetlands. *Ecological Rights*, 713 F.3d at 508-509. The Ninth Circuit held, "utility poles are not discernible, confined and discrete conveyances that channel and control stormwater." The court pointed out that in cases cited by plaintiff where point sources were found where: "(1) the CWA specifically identif[ied] as point sources, (2) [they] were constructed for the express purpose of storing pollutants or moving them from one place to another, or (3) no one disputed were points sources." *Id.* at 509-510.

Similar to the utility poles in *Ecological Rights*, Maleau's piles of overburden are not point sources. The CWA does not specifically identify overburden piles as point sources. *See* § 502(12). The piles were not created, much less constructed, for the express purpose of storing pollutants or moving them from one place to another. *See also South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 96 (2004) ("The Act's examples of point sources-pipes, ditches, tunnels, and conduits-are objects of transport, but do not generate, pollutants). Finally, as evidenced by this case, whether or not the piles are point sources is very much in dispute.

The only alteration to Maleau's land is that some piles of dirt and rock now lay upon it. Maleau has made no effort to channel or collect surface water. The piles do not resemble any of the defined point sources under § 502(12), nor do they confine or transport pollutants. Any incidental percolation of pollutants is solely the product of nature and not of man. Maleau's

overburden piles do not constitute "discernible, confined and discrete conveyance[s]" and therefore are not point sources.

IV. Ditch C-1 is not a "navigable water/water of the United States" because it constitutes a point source, and alternatively fails both tests under *Rapanos*.

A. Ditch C-1 is not a "navigable water/water of the United States" because as a ditch it is considered a point source.

"[W]aters of the United States" under CWA § 502(7) refers "more narrowly to water [a]s found in in streams and bodies forming geographical features such as oceans, rivers, [and] lakes, or the flowing or moving masses, as of waves or floods, making up such streams or bodies." Rapanos, 547 U.S. at 732. In contrast, Ditch C-1 is merely three feet wide and has an average depth of only one foot of water. This does not include the annual droughts when the ditch is dry for up to three months. (R. at 5.) Bonhomme and Progress want this court to categorize this agricultural drainage ditch as a "navigable water." This would do more than giving the term "navigable" limited import; it would give it no import. Applying the definition "navigable waters" to "man-made drainage ditches . . . [would] stretch . . . the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land is Waters' approach to federal jurisdiction." *Id.* at 733.

The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." § 502(12). It is significant that the CWA specifically includes the term "ditch" within its definition of "point source." § 502(14). "The definition of 'discharge' would make little sense if the two categories were significantly overlapping." *Rapanos*, 547 U.S at 735. It would be a statutory stretch to categorize Ditch C-1 as a "navigable water," as ditches are laid out in the definition of "point source" in plain language. § 502(14).

See Id. at 735-736 ("The separate classification of 'ditch[es], channel[s], and conduit[s]' . . . shows that these are, by and large, not 'waters of the United States").

Categorizing Ditch C-1 as a "navigable water" would lead to an awkward result given the structure and language of the CWA. The Second Circuit encountered an issue similar to this one in *U.S. v. Plaza Health Laboratories, Inc*., 3 F.3d 643 (2nd Cir. 1993). In *Plaza Health*, the court stated "we assume that Congress did not intend the awkward meaning that would result if we were to read 'human being' into the definition of 'point source.' *Id.* at 647. The court laid out what the result would be and how it would occur as follows. Section 301(a) reads, "the discharge of any pollutant by any person shall be unlawful." Section 502(12) defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from a point source." Together these read "the addition of any pollutant to navigable waters *from any point source by any person* shall be unlawful." *Plaza Health*, 3 F.3d at 647. If the court were to include "human beings" within the definition of "point source," the prohibition would read: "the addition of any pollutant to navigable waters *from any person by any person* shall be unlawful." *Id.* The court found this to "make no sense" and would make the definition of "point source" incomprehensible. *Id.*

Categorizing Ditch C-1 as a "navigable water" instead of a point source would make no sense and render the definition of "discharge of a pollutant" incomprehensible. The definition of "discharge of a pollutant" would potentially read "any addition of any pollutant to *navigable waters from navigable waters*. Or perhaps, "any addition of any pollutant to a *point source from a point source*." From a linguistic and structure standpoint, it would make no sense to call Ditch C-1 a "navigable water" when ditches are clearly categorized as "point sources" under the CWA. *See* § 502(14).

B. Ditch C-1 is not a "navigable water/water of the United States" because it does not pass either standard under *Rapanos*.

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas. CWA § 502(7). The traditional definition of "navigable waters" is "navigable-in-fact." Whether a water is "navigable-in-fact" depends on whether a water is or ever has been used for waterborne transportation or could be so used with reasonable improvements. *See generally United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940). The definition of "navigable waters" has been broadened in recent years. "[T]he Act's definition of 'navigable waters' as 'the waters of the United States' makes clear that the term 'navigable' as used in the Act is of limited import. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Of course, the Supreme Court qualified that statement when it said, "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172.

The preeminent case interpreting the term "waters of the United States" under the CWA is *Rapanos*, 547 U.S. 715. In *Rapanos*, the Supreme Court considered whether four wetlands in Michigan, which were situated near ditches and man-made drains that emptied into traditional navigable waters, constituted "waters of the United States" under the CWA. *Id.* at 729. The court issued a split decision interpreting "waters of the United States" under two different tests. A few circuits have concluded that Justice Kennedy's "significant nexus" test is controlling. *See, e.g., Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *U.S v. Robison*, 505 F.3d 1208 (11th Cir. 2007); *U.S. v. Gerke Excavating*, 464 F.3d 723 (7th Cir. 2006). Others have held that CWA jurisdiction attaches under either *Rapanos* test. *See, e.g., U.S. v. Bailey*, 571 F.3d 791 (8th Cir. 2009); *U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006).

1. Under the plurality test, Ditch C-1 is not a "navigable water/water of the United States."

The Plurality interpreted the phrase "waters of the United States" to include only "relatively permanent, standing or continuously flowing bodies of water . . . ." *Rapanos*, 547 U.S. at 739. Therefore, in terms of determining federal jurisdiction under the CWA, "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. *Id.* at 742.

To show that Ditch C-1 is a "navigable water/water of the United States" under the plurality standard, Bonhomme must show "that the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters) . . . ." *U.S. v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009). Ditch C-1 could be a relatively permanent body of water as it contains water for at least nine months of the year. It also has a continuous surface connection to Reedy Creek. (R. at 5.) However, neither Reedy Creek nor Wildman Marsh are considered "waters of the United States." Ditch C-1 fails the plurality standard under *Rapanos.*

2. Under the concurrence test, Ditch C-1 is not a "navigable water/water of the United States."

The CWA covers wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." When wetlands are "adjacent to navigable-in-fact waters . . . [the government] may rely on adjacency to establish its jurisdiction." *Rapanos*, 547 U.S. at 782 (kennedy, J., concurring). However, the government "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetland based on adjacency to nonnavigable tributaries." *Id.* "[U]nder Justice Kennedy's concurrence, a water can be considered 'navigable' under the CWA only if it possesses a 'significant nexus' to waters that 'are or were navigable in fact or that could readily be so made.'" *Robison*, 505 F.3d

at 1222 (citing *Rapanos*, 547 U.S. at 759). Neither Reedy Creek nor Wildman Marsh are "waters of the United States," therefore Ditch C-1 cannot possess a significant nexus to a navigable water. Ditch C-1 fails the concurrence standard under *Rapanos*.

V. Reedy Creek is not a "navigable water/water of the United States" because it is not a channel of interstate commerce, it is not an "interstate water" under the pertinent federal jurisprudence, and it fails both of the *Rapanos* tests.

A. Neither Reedy Creek nor Wildman Marsh are "interstate waters" within the meaning of EPA's definition of "the waters of the United States" because they are not "navigable waters" within the meaning of the pertinent federal jurisprudence.

The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." CWA § 502(7). Progress and Bonhomme argue that Reedy Creek falls within "waters of the United States," because the EPA includes "interstate waters" within the definition of "waters of the United States." 40 C.F.R. § 122.2. They also argue that the wetlands in Wildman Marsh are "waters of the United States" simply because they are federal property. (R. at 10.) This "expansive approach might be arguable if the CWA defined 'navigable waters' as 'water of the United States.' But 'the waters of the United States' is something else." *Rapanos*, 547 U.S. at 732. The original definition of "waters of the United States" meant navigable-in-fact. *See Appalachian*, 311 U.S. at 406. The definition has been expanded in recent years. *See. e.g., SWANCC*, 531 U.S. at 172; *Riverside*, 474 U.S. at 133. The CWA only covers "navigable waters" as interpreted by the pertinent federal jurisprudence. CWA jurisdiction does not attach just because Reedy Creek crosses from the State of New Union into the State of Progress. (R. at 5.) Reedy Creek must meet the standards set forth under *Rapanos* to be covered under the CWA. *See Rapanos*, 547 U.S. 715.

B. Neither Reedy Creek nor Wildman Marsh are "waters of the United States" because they are not channels of interstate commerce.

The EPA's definition of "waters of the United States" includes "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce." 40 C.F.R. § 122.2. Congress may regulate three categories of activity under its commerce power. First, Congress may regulate the channels of interstate commerce. Second, Congress may regulate the instrumentalities of interstate commerce, or persons and things in interstate commerce. Third, Congress may regulate activities having a substantial relation to interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 558 (1995).

Bonhomme and Progress argue that Reedy Creek is a "water of the United States" that is currently used in interstate or foreign commerce. First, they argue that Wildman Marsh, which is at the terminus of Reedy Creek, is necessary for the interstate migration of waterfowl. (R. at 9.) However, they cannot rely on the presence of migratory birds in Wildman Marsh in order to categorize it or Reedy Creek as a "water of the United States." In *SWANCC*, the court struck down this "migratory bird rule," which extended CWA jurisdiction to intrastate waters which "are or would be used as habitat by other migratory birds which cross state lines." *SWANCC*, 531 U.S. at 164.

Next, Bonhomme and Progress focus on Wildman Marsh's status as a popular duck hunting destination that brings in money to the local economy from interstate hunters. (R. at 6.) In *SWANCC*, the corps made a similar argument stating that people spent over a billion dollars per year on recreational pursuits in connection to migratory birds. *Id.* at 173. The corps was making an argument under prong three of *Lopez*, that they should be able to regulate the property because of Congress' power to regulate activities that "substantially affect interstate commerce." *Lopez*, 514 U.S. at 558. The Supreme Court did not allow the Corps' prong three argument, and this court should not allow one to be made now.

In *SWANCC*, the Supreme Court found the ponds had no significant nexus with traditional navigable waters. They distinguished those ponds from the wetlands in *Riverside* because those wetlands actually abutted a navigable waterway. *SWANCC*, 531 U.S. at 167-68. "The distinction was important because, the Court reasoned, Congress did not intend to assert regulatory jurisdiction to the full extent of its Commerce Clause power when it enacted the Clean Water Act; it intended to exert nothing more 'than its power over navigation." *American Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 180 (D.D.C. 2008).

The District Court correctly stated that for a waterway to fall within Congress' commerce power under *Rapanos*, the waterway must be a within the first prong of *Lopez*. (R. at 9-10.) Under the first prong in *Lopez*, Congress may regulate the channels of interstate commerce. *Lopez*, 514 U.S. at 558. Congress' power under the CWA over navigable waters is an "aspect of the authority to regulate channels of interstate commerce." *U.S. v. Deaton*, 332 F.3d 698, 706 (3rd Cir. 2003); *Gibbs v. Babbit*, 214 F.3d 483, 490-91 (4th Cir. 2000). The term "channel of interstate commerce" refers to "navigable rivers, lakes, and canals . . . the interstate railroad track system . . . the interstate highway system . . . air traffic routes." *Gibbs*, 214 F.3d at 490-91.

The Code of Federal Regulations gives some typical examples of what constitute "instrumentalities and channels of interstate commerce."

> (a) Typical examples. Instrumentalities and channels which serve as the media for the movement of goods and persons in interstate commerce or for interstate communications include railroads, highways, city streets; telephone, gas, electric and pipe line systems; radio and television broadcasting facilities; rivers, canals and other waterways; airports; railroad, bus, truck or steamship terminals; freight depots, bridges, ferries, bays, harbors, docks, wharves, piers; ships, vehicles and aircraft which are regularly used in interstate commerce.

29 C.F.R. § 776.29. While the code lists "rivers, canals, and other waterways" under its examples of "instrumentalities and channels of interstate commerce," these must be read

contextually with the other examples. *Id.* Channels of interstate commerce encompass actual travel and transportation. Neither Reedy Creek nor Wildman Marsh fit anywhere within the scope of these examples. If Reedy Creek was "navigable-in-fact," there may be an argument, but it is not. (R. at 9.)

C. Reedy Creek is not a "navigable water" under the CWA because it fails the *Rapanos* plurality test.

The *Rapanos* plurality interpreted the phrase "waters of the United States" to include only "relatively permanent, standing or continuously flowing bodies of water . . . ." *Rapanos*, 547 U.S. 715. These bodies also must have a "continuous surface connection to bodies that are 'waters of the United States' in their own right . . . ." *Id.* at 742.

It is undisputed that Reedy Creek is a "relatively permanent" body of water, as it maintains its flow throughout the year. It is also undisputed that Reedy Creek has a continuous surface connection to Wildman Marsh. (R. at 5.) However, neither Wildman Marsh nor Reedy Creek are "waters of the United States" in their own right. In *U.S. v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009), the court laid out the showing that the government had to make under the *Rapanos* plurality standard. "First, that the adjacent channel contains a 'wate[r] of the United States,' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters) . . . ."

Wildman Marsh is not a "water of the United States." First, Wildman Marsh is not a "navigable-in-fact" waterway. *See Appalachian Electric*, 333 U.S. 377. Second, as discussed earlier, it is not currently used or susceptible to use in interstate commerce as it is not a channel of interstate commerce. Third, although Wildman Marsh is a federally-owned property, it still must be a "navigable water" under the pertinent federal jurisprudence. Therefore, Reedy Creek

is not connected to "traditional interstate navigable waters," and fails the plurality test. *Cundiff*, 555 F.3d at 211.

D. Reedy Creek is not a "navigable water" under the CWA because it fails the *Rapanos* concurrence test.

Justice Kennedy concluded that the CWA covered wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." When wetlands are "adjacent to navigable-in-fact waters . . . [the government] may rely on adjacency to establish its jurisdiction." *Rapanos*, 547 U.S. at 782. However, the government "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to non-navigable tributaries." *Id.*

Reedy Creek is not a "navigable-in-fact" water, therefore Wildman Marsh may not rely on its adjacency to Reedy Creek to establish CWA jurisdiction. Likewise, Wildman Marsh is not a "navigable-in-fact" water and Reedy Creek may not rely on its adjacency to Wildman Marsh to establish CWA jurisdiction. Therefore Bonhomme and Progress must establish a "significant nexus" between Reedy Creek and Wildman Marsh.

> Wetlands "possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' In contrast, when "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"

Id. at 780.

Even if Wildman Marsh was a water under the jurisdiction of the CWA, Reedy Creek lacks a significant nexus with it. Bohomme and Progress cannot show that Reedy Creek "significantly affects the chemical, physical, and biological integrity" of Wildman Marsh. *Rapanos*, 547 U.S. at 780. Reedy Creek does have a hydrologic connection to Wildman Marsh,

but, "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus . . . ." *Id.* at 785.

1. Reedy Creek does not have a significant physical nexus with Wildman Marsh.

It is not disputed that Reedy Creek eventually does flow into Wildman Marsh. However, this small creek does not significantly affect the physical integrity of the extensive wetlands that make up Wildman Marsh. *See Northern California River Watch v. City of Healdsburd* 496 F.3d 993, 1000 (9th 2007). In *River Watch*, the court found there to be a significant nexus between Basalt Pond and the Russian River. While the court did note that there was a surface connection, it noted that the two bodies were also connected hydraulically underground. "[A] change in the water level in one immediately affect[ed] the water level in the other." *Id.* A significant nexus such as the one in *River Watch* does not exist in this case.

Most cases implementing the significant nexus analysis do so in regards to wetlands' effects on downstream navigable waters. *See, e.g., U.S. v. Donovan*, 661 F.3d 174, 186 (3rd Cir. 2011) ("wetlands retain water . . . and perform important functions, such as reducing sediment loads and pollutants from storm water"); *Cundiff*, 555 F.3d at 211 ("wetlands perform significant ecological functions in relation to the Green River . . . ."). *U.S. v. Bailey*, 571 F.3d 791, 797 (8th Cir. 2009) (pollutant trapping, flood control, and runoff storage). These cases focused on the importance of wetlands and how they "significantly affect the chemical, physical, and biological integrity" of their downstream waters. *Rapanos*, 547 U.S at 180. Reedy Creek does not possess the critical functions of wetlands that Justice Kennedy had in mind when writing his concurrence in *Rapanos*, "wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage." *Id.* at 779. Small

waterways, like Reedy Creek, simply do not have capability to significantly affect the physical integrity of an expansive wetland such as Wildman Marsh.

2. Reedy Creek does not have a significant biological or chemical nexus with Wildman Marsh.

Bonhomme and Progress assert that Reedy Creek affects the biological and chemical integrity of Wildman Marsh. While arsenic has been detected in Reedy Creek in significant concentrations, it is only detectable at lower level throughout Wildman Marsh. (R. at 6.) In *U.S. v. Robson*, 505 F.3d 1208, 1223 (11th Cir. 2007), the court held that the government failed to satisfy its burden by not presenting evidence about the "possible chemical, physical, or biological effect that Avondale Creek may have on the Black Warrior River, and there was no evidence presented of any actual harm suffered by the Black Warrior River." Here, although Bonhomme and Progress may have presented evidence about the "possible chemical, physical or biological" effect that Reedy Creek has had on Wildman Marsh, they have presented no evidence of actual harm suffered by Wildman Marsh. There have been no notable changes in the flora and fauna surrounding Bonhomme's hunting lodge as a result of arsenic. The U.S. Fish and Wildlife Service has detected arsenic in three migratory birds in Wildman Marsh, however, it is speculative to say that the source of the arsenic is Reedy Creek. (R. at 6.) When "effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." *Rapanos*, 547 U.S. at 780.

The lower levels of arsenic present throughout Wildman Marsh fail to significantly affect its chemical integrity. After all one of the primary reasons for protecting wetlands is the ability they have in filtering out pollutants. *See, e.g., Rapanos*, 547 U.S. at 180 (pollutant trapping); *Donovan*, 661 F.3d at 186 (reducing pollutants from storm water); *Cundiff*, 555 F.3d at 211 (filtering acid runoff from nearby mine); *and Bailey*, 571 F.3d at 797 (pollutant trapping). It is

hard to imagine that levels of arsenic not significant enough to affect plants and animals could significantly affect the chemical integrity of Wildman Marsh.

Under *Rapanos*, Reedy Creek fails the plurality test because it does not have a continuous surface connection to a "water of the United States." Reedy Creek also fails the concurrence standard because even if Wildman Marsh was a "water of the United States" it lacks a significant nexus with it. Reedy Creek fails both standards under *Rapanos* and is not a "navigable water/water of the United States."

VI. Bonhomme violates the CWA because the culvert on his property is a recognized point source under the statute and is actually responsible for the "addition" of pollutants into Reedy Creek.

Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant" into navigable waters from any "point source" without an NPDES permit. 33 U.S.C. § 1311(a) (1994). The CWA goes on to define "discharge of a pollutant" to "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C.A. § 1362(12) (2008).

A. Bonhomme's culvert does not need to generate pollutants in order to be a point source under the CWA.

Courts recognize culverts as point sources under the CWA. *Dague v. Burlington*, 935 F.2d 1343, 1354-1355 (2d cir 1991), *rev' on other grounds*, 505 U.S. 557 (1992). Point sources do not need to be the original sources of a pollutant for their owners to be found liable under the CWA. *Miccosukee*, 280 U.S. at 105. In that case, the Court held it determinative that the CWA's definition of "point sources" included objects that themselves generally do not generate pollution, but rather convey it into a "navigable water." *Id*. Point sources do not need to add anything new to the waters on which they are located in order to be in violation of the permit requirements of the CWA regulating **addition** of pollutants to these waters. *See Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009) *rehearing en*

banc denied, 605 F.3d 962, *certiorari denied*, 131 S.Ct. 643, 178 L.Ed.2d 512, *certiorari denied* 131 S.Ct. 645, 178 L.Ed.2d 512 (*emphasis added*) ([T]hese three pump stations are 'point sources' even though they add nothing to the water as they move it along").

B. Bonhomme's culvert transfers water from two distinct bodies of water, and therefore he violates the NPDES permit requirement by adding arsenic through his culvert.

"[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a discharge that demands an NPDES permit." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001). In order for there to be an "addition" of a pollutant under Section 502(12), "a point source must introduce the pollutant into the navigable water from the outside world." *Id*. at 491 *quoting National Wildlife Federation v. Gorsuch*, 693 F.2d 156, (D.C. Cir. 1982).

The Supreme Court has narrowly defined "addition" under a "unitary waters theory" using the now-infamous "ladle metaphor", which posits that "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." *Miccosukee*, 541 U.S. at 110. Under this theory, all of the navigable waters of the United States form one "pot", and no permit is required if a party is simply adding pollution from one navigable water to another navigable water. *Friends of* Everglades, 570 U.S. at 1217. The Court in *Miccosukee* premised this metaphor on the finding that the two bodies of water it examined were significantly connected hydrologically, as the levee that separated them formed an uncertain line. *Id*. The Court remanded to the lower court to decide whether or not the waterways at issue were meaningfully distinct from one other without applying its rule. *Id*. at 96.

This "unitary waters" theory does not necessarily represent a particularly functional principle for courts to follow, with the Eleventh Circuit characterizing it has having a "low batting average" that has "struck out in every court of appeals where it has come up to the plate."

Friends of Everglades, 570 F.3d at 1217. That court noted, however, that since *Miccosukee* had been decided, a final EPA regulation had been promulgated that adopted the "Unitary Waters" theory. *Friends of* Everglades, 570 F.3d at1218. The relevant portion of that regulation read:

> **(i) discharges from a water transfer**. Water transfer means an activity that conveys or connects **waters of the United States** without subjecting the water to intervening, municipal, or commercial use. The exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3(i) (*emphasis added*). The court, after applying *Chevron* deference to the regulation, held that the EPA's definition of "addition" only in terms of exchanges between **navigable waters** was reasonable and that the agency was entitled to deference. *Friends of Everglades*, 570 F.3d at 1228.

However, this "unitary waters" theory explicitly only applies where the transfer is between two navigable bodies of water. *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) *quoting* National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 FR 33697-01; 40 C.F.R. § 122.3(i). In *West Virginia Highlands Conservancy*, the court noted that the transfer of water between an acid mine drainage site and a bond forfeiture site was not a transfer between navigable waters, and therefore was not covered by the exception. *West* Virginia, 625 F.3d at 167.

Friends of Everglades and the regulation it interprets represent a much looser requirement of the NPDES permit system than many of the past precedents, a fact noted by the court itself. 570 F.3d at 1217-1218. That court noted that the Supreme Court had even "called a strike or two on the theory" in the *Miccosukee* case. *Id*. at 1218. However, the denial of certiorari represents the end of the appellate process and therefore establishes finality in a strong sense. *Amcast Indus. Corp. v. Detrex Corp.*, 45 F.3d 155, 158 (7th Cir. 1995). In applying these

precedents to the facts before this court, Maleau urges the court to see Bonhomme's argument as a red herring. This is because, quite plainly under the precedents argued herein, Ditch C-1 is itself a point source and not a navigable water.

C. Bonhomme misunderstands the role of causation under the permit requirements of the CWA, as the "proximate source" refers to the place at which the pollutant discharges into the **navigable** waterway.

The phrase "addition of a pollutant" under 502(12) does not refer to the creation of a pollutant, but rather the place at which the pollutant discharges into a navigable waterway. *Catskill Mountains Chapter*, 273 F.3d at 493. The court in *Catskill* uses the term "proximate source" to refer to this source. *Id*.

Bonhomme mistakenly relies upon the Eleventh Circuit's opinion in *Miccosukee I* to argue that because Maleau's piles might be the cause-in-fact of the arsenic release, they are the point source under the statute. *Miccosukee Tribe of Indians of Florida v. South Florida Water Management Dist.*, 280 F.3d 1364, 1368-69 (11th Cir. 2002). This argument is folly for two reasons. Firstly, the court held in that case that a point source was the cause-in-fact of a discharge of pollutants because the pollutant could not have entered the destination water but for the change in flow caused by the point source. *Id*. Secondly, and more importantly, the Supreme Court expressly vacated that judgment in *Miccosukee II*, 541 U.S. at 112. Vacated decisions, of course, have no precedential value whatsoever. *Durning v. Citibank, N.A.*, 950 F.3d 1419, 1424 (9th Cir 1991).

Bonhomme is clearly liable for the discharge of arsenic into Reedy Creek. Despite his contention that Maleau's piles are the but-for cause of the arsenic entering the water, his culvert concentrates and adds the arsenic to Reedy Creek. The culvert discharges the water from Ditch C-1 into Reedy Creek (R. at 5.) Upstream from the culvert, arsenic is undetectable in Ditch C-1.

(R. at 6.) However, once the culvert discharges water into Reedy Creek, arsenic is detectable in significant amounts. (R. at 6.) Whether or not this arsenic originates with Maleau's piles is irrelevant, as Bonhomme's culvert presumably concentrates the arsenic and represents the point at which the arsenic discharges into Reedy Creek. *Catskill Mountains Chapter*, 273 F.3d at 493. Therefore, Bonhomme's culvert violates the CWA, whether or not the arsenic originates from the piles.

Under issue one; Bonhomme is not the real party in interest under Rule 17. Fed Civ. P. 17(a). Under the shareholder-standing doctrine, Bonhomme cannot sue without joining PMI. Bonhomme cannot bring a direct suit or a derivative suit. This case should be dismissed with prejudice because there was ample time to add PMI as a party, and a remand would be prejudicial to Maleau.

Under issue two; Bonhomme lacks standing because he is foreign national and not a citizen of the United States as necessary under CWA § 505.

Under issue three; Maleau's overburden piles are not points sources because they are not expressly defined in the CWA. They do not channel and collect surface waters. The piles were not created for the express purpose of storing and transferring pollutants.

Under issue four; Ditch C-1 is not a "navigable water/water of the United States." First, ditches are point sources under the CWA. Second, Ditch C-1 fails both tests under the pertinent federal jurisprudence because it is not connected to "waters of the United States."

Under issue five; Reedy Creek is not a "navigable water/water of the United States." It has no effect on interstate commerce because neither it nor Wildman Marsh are channels of interstate commerce. It is not an "interstate water" within the meaning of the pertinent federal jurisprudence. It also fails both tests under *Rapanos*. It fails the plurality test, because it does

not have a continuous surface connection to a "water of the United States" in its own right. It fails the concurrence test, because Wildman Marsh is not a "water of the United States." Even if Wildman Marsh was a "water of the United States," Reedy Creek does not significantly affect the physical, chemical, or biological integrity of the extensive wetland.

Under issue six; Bonhomme violates the CWA because his culvert conveys the arsenic into Reedy Creek. The CWA does not defined addition of a pollutant in terms of creation, but in terms of location. Further, the water transfer rule does not apply because neither Ditch C-1 nor Reedy Creek are "waters of the United States."

Conclusion

For all of the preceding reasons, the decision of the United States District Court for the District of Progress finding for Maleau on issues one, two, three, four, and six should be affirmed. This court should reverse the district court's finding on issue five because Reedy Creek is not a navigable water within the meaning of CWA § 502(7).

Respectfully submitted,

Team #44