Nos. 155-CV-2012 and 165-CV-2012

In the United States Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

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

BRIEF FOR JACQUES BONHOMME
Plaintiff-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

The District Court below had federal jurisdiction over the claims in this action pursuant to 33 U.S.C. § 1365. The District Court further had subject matter jurisdiction pursuant to 28 U.S.C. §1331 because the claims arise under the laws of the United States. Appellate jurisdiction is based upon 28 U.S.C. § 1291. The District Court entered an Order on July 23, 2012 granting Maleau's Motion to Dismiss in case No. 155-CV-2013. This Order also denied Bonhomme's Motion to Dismiss in case No. 165-CV-2013. The parties in these cases subsequently filed timely notice of appeal.

STATEMENT OF THE ISSUES

The following issues are presented before this Court for review:

(1) Whether the District Court erred in holding that Bonhomme is not the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

(2) Whether the District Court erred in holding that Bonhomme is not a "citizen" as defined under CWA § 505, 33 U.S.C. 1365(g) to bring suit against Maleau.

(3) Whether the District Court erred in holding that Maleau's mining piles are not "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

(4) Whether the District Court erred in holding that Ditch C-1 is not a "navigable water or water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14).

(5) Whether the District Court erred in holding that Reedy Creek is a "navigable water or water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12).

(6) Whether the District Court erred below in holding that Bonhomme violated the CWA because Maleau is the but-for-cause of the addition of arsenic into Reedy Creek.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court of the District of Progress granting Shifty Maleau's ("Maleau") Motion to Dismiss and denying Jacques Bonhomme's ("Bonhomme") Motion to Dismiss. (R. 10). Bonhomme brought a civil action under the Clean Water Act's ("CWA") citizen suit against Maleau for a violation of the CWA as a result of Maleau's unauthorized discharge of arsenic into Ditch C-1. 33 U.S.C. § 1365; (R. 4-5). The State of Progress ("Progress") filed a citizen suit against Bonhomme alleging that he violated the CWA by discharging arsenic from his culvert into Reedy Creek. (R. 5). Maleau intervened in this separate action against Bonhomme under CWA § 505(b)(1)(B). (R. 5). Thereafter, *Bonhomme v. Maleau* and the new case were consolidated. (R. 5).

Soon after consolidation, the Defendants in each suit filed Motions to Dismiss. The District Court of Progress held that: (1) Bonhomme was not the real party in interest to bring a suit against Maleau for a violation of the CWA; (2) Bonhomme lacked standing under the CWA to bring a "citizen" suit against Maleau because Bonhomme is a foreign national; (3) Maleau was not in violation of the CWA because his mining piles could not be a "point source" pursuant to the Act; (4) Maleau was not in violation of the CWA because Ditch C-1 could not be a "navigable water/water of the United States" pursuant to the Act; (5) Reedy Creek is a "navigable water/water of the United States" under the CWA; and (6) Bonhomme was in violation of the CWA despite Maleau being the but-for cause of the addition of arsenic in Reedy Creek (R. 7-10). The District Court then dismissed Bonhomme's complaint against Maleau and denied Bonhomme's Motion to Dismiss Progress's suit. (R. 10). Notice of Appeal challenging the District Court's holdings then followed.

STATEMENT OF THE FACTS

Maleau operates a gold mining and extraction operation on a property in Jefferson Count, Progress, adjacent to the Buena Vista River. (R. 5). He transports the slag and overburden from his mining operations at this property to another property he owns located in Lincoln County, Progress. (R. 6). Once he transports this slag and overburden material from his mining operations to this property, he dumps it out and arranges it into piles. (R. 6).

When it rains, runoff is created from these piles. (R. 6). The rain runs down and through the piles and becomes contaminated with arsenic, a poisonous substance. (R. 6). Channels have eroded as a result of the continual runoff from these mining piles towards Ditch C-1. (R. 6). Now, once it rains, the runoff flows down and through the piles, through these identifiable channels on Maleau's property, and directly discharges into Ditch C-1. (R. 5-6).

Ditch C-1 is three (3) miles long and begins before Maleau's property. (R. 6). It is three (3) feet across and one (1) foot deep on average. (R. 6). After flowing through Maleau's property, Ditch C-1 eventually crosses downstream into Bonhomme's property. It then discharges through a culvert located underneath a farm road on Bonhomme's property directly into Reedy Creek. (R. 6).

Bonhomme is a French citizen who owns property adjacent to Wildman Marsh. (R. 6). A hunting lodge sits atop his property, near the point at which Reedy Creek flows into Wildman Marsh. (R. at 6). Bonhomme tested the water of Ditch C-1 both upstream and downstream of Maleau's property for traces of arsenic, which is commonly associated with mining and extraction activities. (R. 6). Upstream of Maleau's property, arsenic is undetectable in Ditch C-1. (R. 6). Directly below Maleau's property, Ditch C-1 arsenic is present in high concentrations. (R. 6). The concentration of arsenic present in Ditch C-1 progressively decreases the more downstream from Maleau's property the water was tested. (R. 6). Therefore, Bonhomme's tests indicate that Maleau's mining piles are responsible for the arsenic contamination of Ditch C-1. (R. 6).

Bonhomme's tests also indicate that arsenic is present in significant concentrations in Reedy Creek, just below the point where Ditch C-1 discharges into the Creek. (R. 6). However, no arsenic was found in Reedy Creek upstream from where Ditch C-1 discharges into the Creek. (R. 6). The results of additional testing indicates that arsenic is present in significant concentrations just below the point where Ditch C-1 empties into Reedy Creek. Arsenic is commonly associated with gold mining and extraction. (R. 6).

Precious Metals International, Inc. (PMI) operates five gold mines, two of which are in the United States. (R. 7). Bonhomme is PMI's largest individual shareholder and the President of its Board of Directors. (R. 7). To this point, PMI has provided financial support to Bonhomme's action by paying fees for attorneys and expert witnesses as well as the costs involved with sampling and analyzing water in Ditch C-1 and Reedy Creek. (R. 8).

STANDARD OF REVIEW

The District Court's factual findings on the scope of CWA jurisdiction are reviewed for clear error. *See Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005). The court's conclusions of law are reviewed *de novo*. *See Id.* The District Court below granted Maleau's Motion to Dismiss and denied Bonhomme's Motion to Dismiss. This Court reviews a district court's grant and denial of motions to dismiss *de novo*. *See Holly v. Scott*, 434 F.3d 287, 288-89 (4th Cir. 2006) ("We review de novo a court's denial of a motion to dismiss under Rule 12(b)(6)."), *cert denied*, 126 S. Ct. 2333 (2006); *see also*, *Ga. Mfg. Hous, v. Spalding C.*, 148 F.3d 1304, 1307 (11th Cir. 1998).

SUMMARY OF THE ARGUMENT

The District Court erred in holding that Bonhomme is not the real party in interest as required by Rule 17(a) of the Federal Rules of Civil Procedure, FED. R. CIV. P. 17(a),

Bonhomme is not a "citizen" as defined by the CWA § 505, 33 U.S.C. 1365, Ditch C-1 is not a "navigable water" under CWA § 505, 33 U.S.C. § 1362(7),(14), and that Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property, regardless of who added the arsenic to Ditch C-1. However, the District Court properly held that Reedy Creek is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. 1362(7), (12).

Bonhomme is the real party in interest because he has standing under § 505 of the CWA, 33 U.S.C. 1365. Even if the court requires Bonhomme to demonstrate that he is the real party in interest independent of standing, the facts reveal that Bonhomme, not PMI, holds the legal right sought to be enforced under the CWA. By identifying PMI as a party who ultimately stands to indirectly benefit from the imposition of an injunction and/or civil penalty, the court misconstrued the real party in interest rule. The primary purpose of the rule is to ensure that the named party holds a substantive right to recover, thus protecting the defendant from duplicative litigation by the party actually entitled to a recovery. Because damages are not available under the CWA, any relief to Bonhomme will simultaneously redress PMI's supposed injury; requiring PMI's joinder only burdens PMI's shareholders with shouldering the costs of unnecessary litigation. In a similar vein, PMI's control over the Bonhomme's litigation and Bonhomme's adequate representation of PMI in this action, each provide an independent basis for precluding PMI from a bringing suit arising from the same facts in the future, thus ensuring finality upon the conclusion of the present case.

Bonhomme has standing under the CWA, regardless of his national citizenship. Although the term "citizen" is ambiguous, the Legislature clearly defined "citizen" for purposes of citizen enforcement action under the CWA. In light of the Legislature's clear intent to avail any person "having an interest which is or may be adversely affected," the court is required to determine standing solely by the relationship between the defendant's prohibited conduct and the plaintiff's

"interest which may be adversely affected." 33 U.S.C. § 1365(g). By supplementing the clear definition of citizen under the CWA's citizen-suit provision with an additional requirement that the plaintiff hold United State's citizenship, the District Court exceeded its authority.

The District Court erred in holding that Maleau's mining piles could not be a "point source". (R. 9). The District Court erroneously concluded piles could not be a "point source" under CWA §§ 502(12) and (14). It inappropriately applied a narrow definition of the term, when in fact, Congress intended for it to be applied broadly. (R. 9). Whether an object constitutes as a "point source" is a fact-specific inquiry. Further, the description of a pile fits within the broad definition of what constitutes as a "point source" pursuant to the CWA. Moreover, the EPA has issued guidance on this issue, and has explicitly listed piles as being a potential "point source" under the CWA. The District Court therefore erred in concluding that piles could not be a "point source" under the CWA.

The District Court erred in denying Bonhomme's Motion to Dismiss. Maleau's activities violated the CWA because it was foreseeable that the discharge of arsenic, a pollutant, from his mining piles would enter a navigable water or United States water. Therefore, Maleau is in clear violation of the Act and liability of this violation should rest squarely upon his shoulders. Furthermore, the plain language of the CWA indicates that there must be an "addition" of a pollutant in order for there to be a violation of the CWA. *See* 33 U.S.C. § 1311. Bonhomme never introduced a pollutant into the water. He merely transferred water already polluted by Maleau. Accordingly, he never violated the CWA because there was no "addition". In further support, the EPA has supported this interpretation of the meaning of "addition" according to the CWA. The District Court should have given the EPA's reasonable interpretation of this definition deference. Consequently, the District Court erred in denying Bonhomme's Motion to Dismiss.

ARGUMENT

I. BONHOMME IS THE REAL PARTY IN INTEREST.

Rule 17(a) of the Federal Rules of Civil Procedure requires that an "an action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17. Although the "real party in interest" lacks a precise definition, it is generally understood as "the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery." *See e.g.*, *Farrell Constr. Co. v. Jefferson Parish, La.,* 896 F. 2d 136, 140 (5th Cir.1990); *In re Signal Intern., LLC*, 579 F. 3d 478, 487 (5th Cir. 2009); *United HealthCare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3 d 563, 569 (8th Cir. 1996); *Toussaint v. Howard Univ*., 2005 WL 6778614 (D.D.C. 2005) (observing that "[t[he focus of a Rule 17 'real party in interest' inquiry is whether the party bringing the action is the same party that is legally, as opposed to factually, aggrieved"). The purpose of the real party in interest rule is to enable the defendant to avail himself of evidence and defenses that he has against the real party in interest, and to assure that he will be protected against another suit brought by the party actually entitled to recover. *Celanese Corp. of Am. v. John Clark Indus.*, C.A.5 (Tex.) 1954, 214 F. 2d 551; *See also e.g.*, *Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Mgmt, Inc*., C.A.1 (Puerto Rico) 1980, 620 F. 2d 1; *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel Margaret*, D.C.La.1975, 441 F. Supp. 1, *aff'd* 565 F. 2d 958.

A. Because Bonhomme Has Standing Under the CWA, He is *Ipso Facto* the Real Party in Interest.

A plaintiff is a real party in interest if he "allege[s] facts sufficient to reveal that he suffered an injury, that the injury was caused by the defendant's illegal conduct, and that his injury could be redressed by a favorable outcome to the lawsuit." *Seckler v. Star Enter.,* 124 F. 3d 1399, 1406

(11th Cir. 1997) (citations omitted). Bonhomme's basis for standing is thoroughly discussed in section II.

B. Bonhomme, not PMI, is the Real Party in Interest Because the Right Sought to Be Enforced Belongs to Bonhomme.

The real party in interest is the holder of the right to be enforced. *Apter v. Richardson*, 510 F. 2d 351, 353 (7th Cir. 1975). Thus, the District Court's focus on "the party who will ultimately benefit from the recovery" is misplaced. *See Farrell Constr. Co.,* 896 F. 2d at 140; (R. at 6-7). In this case, Bonhomme holds a statutory right to bring a citizen suit under the CWA to enjoin Maleau's ongoing, unpermitted discharges into the Reedy Creek and Wildman Marsh in a manner that lessens *Bonhomme's* use and enjoyment for recreation. First, the district court's focus on Bonhomme's use of his hunting lodge for entertaining clients of PMI incorrectly presumes that PMI holds a right to, rather than a mere expectation of receiving, the benefits derived from Bonhomme's hosting of hunting outings at his previous frequency. Second, the District Court's conclusion that Bonhomme is not the real party in interest because he does not primarily reside at the hunting lodge improperly reduces the real party in interest rule to a mere test for diversity jurisdiction. While courts often rely on the real party in interest rule when ascertaining that an actual real party in interest has substituted a diverse plaintiff in his place in order to obtain diversity jurisdiction, the real party in interest rule is primarily intended "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter." *Celanese Corp. of Am. v. John Clark Indus.*, 214 F.2d 551, 556. Whether Bonhomme and Maleau are diverse is irrelevant because federal courts have jurisdiction over CWA citizen suits. Finally, the district court improperly concluded, prior to discovery, that Bonhomme lacks good faith inappropriately presumes certain facts to be true. "To

survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In dismissing Bonhomme's suit, the district court relied on its own assumptions of Bonhomme's motives, despite its responsibility to examine only the "facial plausibility" that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell v. Twombly*, 550 U.S. at 556)).

C. <u>A Subsequent Suit Brought By PMI, Inc. Will Be Precluded.</u>

PMI will be bound by the outcome of Bonhomme's present suit against Maleau, thus effectuating the objective of the real party in interest rule: "to ensure that the judgment will have proper res judicata effect." *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F. 2d 78, 84 (4th Cir. 1973) (citing *Celanese Corp. v. John Clark Indus., Inc*., 214 F. 2d 551 (5th Cir. 1954)); *See generally United Fed'n of Postal Clerks, AFL-CIO v. Watson*, 409 F. 2d 462, 470-471 (D.C. Cir. 1969), cert. denied, 396 U.S. 902 (1969). As a general rule, "one is not bound by a judgment in personam in a litigation in which he is not designated as a party." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), *See also, e.g., Richards,* 517 U.S. at 798; *Martin v. Wilks,* 490 U.S. 755, 761, (1989); *ZenithRadio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 110 (1969). However, under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties *or their privies* from relitigating issues that were or could have been raised in that action. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (emphasis supplied); *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*., 94 U.S. 351, 352-353 (1877).

1. PMI Will Be Adequately Represented by Bonhomme.

"[A] nonparty may be bound by a judgment because [he] was adequately represented by someone with the same interests who [wa]s a party to the suit." *Taylor v. Sturgell*, 553 U.S. 880,

894 (2008) (quoting *Richards v. Jefferson Cnty., Ala,* 517 U.S., 793, 798 (1996) (internal quotation marks omitted)). Here, PMI's potentially enforceable interest in Reedy Creek and Wildman Marsh's suitability for duck hunting is identical to the interest that forms the basis of Bonhomme's suit. Accordingly, PMI's hypothetical action would involve facts, allegations, and evidence that are indistinguishable from those presently before the court. As a result, Bonhomme's "adequate representation" of PMI would bar PMI from relitigating the issues in Bonhomme's suit. Moreover, Bonhomme is PMI's largest individual shareholder and President of its Board of Directors, and is relying entirely on PMI's financial support. *See* R. at 8. PMI has paid Bonhomme's expenses, including attorney fees, expert witness fees, and the costs of sampling analysis. *Id*. In fact, PMI itself has even conducted some of the sampling. *Id*. Thus, Bonhomme's fiduciary duties to PMI as a result of his position as President of PMI's Board of Directors precludes PMI from relitigating issues necessarily decided in a suit brought by a fiduciary's action for the beneficial interest of a nonparty. *See Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 593 (1974).

2. PMI is Bound by the Judgment in this Action Because PMI Controls Bonhomme's Litigation.

As an additional independent ground for preclusion, a nonparty is bound by a judgment if he "assume[d] control" over the litigation in which that judgment was rendered. *Sturgell*, 553 U.S. at 895(quoting *Montana v. U.S.,* 440 U.S. 147 (1994); *see also Schnell v. Peter Eckrich & Sons, Inc.,* 365 U.S. 260, 262 (1961); RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982). As explained above, PMI's unrestricted control over Bonhomme's enforcement action renders PMI bound "by the determination of issues decided as though he were a party." RESTATEMENT (SECOND) OF JUDGMENTS § 39 (1982); *See Sturgell*, 553 U.S. at 894.

D. Bonhomme is a Real Party In Interest Because He is a Party Authorized By Statute.

Rule 17(a) (1) (G) permits "a party authorized by statute" to "sue in his own [name] without joining the person for whose benefit the action is brought. FED. R. CIV. P. 17(a) (1) (G). Discussed in detail in section II below, Bonhomme is "a party authorized by statute" because section 1365 of the CWA expressly authorizes his suit.

II. BONHOMME HAS STANDING TO PURSUE THIS ACTION.

Bonhomme has satisfied all conditions precedent to a citizen suit. The record indicates that Bonhomme has provided adequate notice, the EPA is not currently prosecuting an enforcement action against Maleau, and the alleged violation is ongoing. Thus, to have standing, Bonhomme must only further demonstrate that (1) he has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.,* 528 U.S. 167, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992)).

A. The CWA's Definition of "Citizen" Is Unambiguous, and Thus, Controlling.

When a statute's text is clear, the statute must be applied according to its terms so as to effectuate the Legislature's intent. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). And, if the result does not "shock the general moral or common sense," the court is bound by the statute's plain meaning. *Barnhart v. Sigmon Coal Co., Inc*., 534 U.S. 438, 450 (2002) (citing *Md. Dept. of Ed. v. Dep't of Veterans Affairs,* 98 F. 3d 165, 169 (C.A.4 1996)). The court's "first job" is to determine congressional intent, using traditional tools of statutory construction. *NLRB v. Food and Commercial Workers,* 484 U.S. 112, 123, (1987). The "starting point is the language of the statute," but "in expounding a statute, [courts] are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990) (internal citation omitted). In addition, courts should

not apply the "ordinary meaning" of a word that is already defined in the statute. *Mohamad v. Palestinian Auth*., 132 S. Ct. 1702, 1706-07 (2012).

Admittedly, the word "citizen" does not have a singular meaning; the manner in which context informs the meaning of the term "citizen" is observed in Socrates's famed remark: "I am a citizen, not of Athens or Greece, but of the world." Socrates (470 BC to 399 BC). However, the text of the CWA conveys Congress's intent to avail certain persons, regardless of their nation of citizenship, with enforcement authority under section 1365. Section 1365 authorizes "citizens" to bring CWA enforcement actions against any person allegedly discharging pollutants into waters of the United States in violation of an effluent limitation. 33 U.S.C. § 1365(f) (1). An "effluent limitation" is defined to include "an unlawful act under sub section (a) of section 1311," which, in turn prohibits the discharge of any pollutant from a point source without an NPDES permit. *Washington Wilderness Coalition v. Hecla Min. Co.,* 870 F. Supp. 983, 986 (E.D. Wash. 1994), e.g. *Sierra Club v. Abston Constr. Co., Inc.,* 620 F.2d 41 (5th Cir.1980); *U.S. v. Earth Sciences, Inc.,* 599 F.2d 368, 370 (10th Cir.1979); *Hawaii's Thousand Friends v. Honolulu,* 806 F.Supp. 225, 229 (D.Hawaii 1992).

Congress specified that in the context of CWA enforcement actions, "'citizen' means a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Therefore, an individual's standing to bring a "citizen suit" is determined solely by the relationship between the defendant's prohibited conduct and the plaintiff's "interest which may be adversely affected." Clearly, the district court's creation of a requirement that a plaintiff possess *United States* citizenship violates the general rule that "[a] definition which declares what a term means ... excludes *any* meaning that is not stated." 2A George Sutherland, *Statutes and Statutory Construction* § 47.07, at 152 (5th ed.1992) (emphasis added).

B. Bonhomme Satisfies All Requirements for Article III Standing.

To satisfy Article III's standing requirements in a CWA citizen enforcement action, an individual plaintiff must demonstrate (1) he has suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely that the injury will be redressed by a favorable decision. *Laidlaw,* 528 U.S. at 180-181. Thus, "if a Clean Water Act plaintiff meets the constitutional requirements for standing ((1) injury in fact, (2) fairly traceable to defendant, and (3) redressable by the relief sought) then he *ipso facto* satisfies the statutory threshold as well." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F. 3d 149, 155 (4th Cir. 2000).

1. Bonhomme Has Been Injured Because His Use and Enjoyment of the Reedy Creek and Wildman Marsh Has Been Harmed.

An individual plaintiff adequately alleges injury in fact when he alleges that a personal or recreational value in an affected area has been lessened. Moreover, the claimed injury must not be severe; "an identifiable trifle is enough for standing." *United States v. SCRAP*, 412 U.S. 669, 689 (1973), *See e.g., Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000); *Or. Natural Dessert Ass'n v. Dombeck,* 172 F. 3d 1092, 1094 (9th Cir.1998). In fact, plaintiff's "reasonable concerns" may establish an injury in fact. *See Laidlaw*, 528 U.S. at 169 (citing *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)).

Bonhomme's impaired interest in the suitability of the Reedy Creek and Wildman Marsh for duck hunting constitutes an injury in fact. As a result of elevated levels of arsenic in Reedy Creek and Wildman Marsh, Bonhomme has curtailed his use of the marsh for duck hunting by 75%. R. at 6.[1] Thus, Bonhomme's injury is akin to the injury suffered by the plaintiff in *Gaston Copper* who "[swam] less in and [ate] less fish from" a lake he believed was contaminated by the defendant's excedeences of its NPDES permit. *Gaston Copper*, 204 F. 3d at 156. In addition,

[1] Bonhomme has decreased his hunting parties from eight a year to two a year. R. at 6.

Bonhomme's recreational interest in the Reedy Creek and Wildman Marsh is not derived from an interest of the general public. Unlike the general public, Bonhomme's recreational interest in Reedy Creek and Wildman Marsh arises from a tangible connection to the impaired waters: Bonhomme owns property and a hunting lodge within the affected area. Thus, the fact that Bonhomme owns a hunting lodge that he now uses with less frequency illustrates that Bonhomme stands to benefit "more directly and tangibly" than the general public if relief is granted. *See Defenders of Wildlife*, 504 U.S. at 573-574.

2. Bonhomme's Reduced Use and Enjoyment of Reed Creek and Wildman Marsh are Fairly Traceable to Maleau's Alleged Discharges.

A plaintiff's injury must be fairly traceable to the defendant's violation of the CWA, and not the result of an action by a third party not before the court. *Defenders of Wildlife*, 504 U.S. at 560. A plaintiff's injury is fairly traceable to the defendant's conduct when he demonstrates that the discharged pollutant "causes or contributes to the kinds of injuries alleged by the plaintiffs." *Pub. Interest Research Grp. of N. J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F. 2d 64, 72 (3d Cir. 1990); *accord Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F. 3d 546, 556-57 (5th Cir. 1996); *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F. 3d 255, 264 (4th Cir. 2001).

Bonhomme's reduced use of the Reedy Creek and Wildman Marsh is a direct result of Maleau's unpermitted discharge of arsenic. (R. at 6.) While arsenic is undetectable in Ditch C-1 upstream of Maleau's property, "[j]ust below the Maleau property, arsenic is present in Ditch C-1 in high concentrations. *Id*. In addition, "[a]s Ditch C-1 flows from the Maleau property toward Reedy Creek, the concentration of arsenic decreases in proportion to the increasing flow in the Ditch." *Id.* Finally, "arsenic is commonly associated with gold mining and extraction and is a well-known poison." *Id.* This evidence indicates that Maleau discharges arsenic that ultimately reaches Bonhomme's property and the surrounding waters. Accordingly, Bonhomme's reduced use

of the Reedy Creek and Wildman marsh because of arsenic in the water establishes a causal connection that is fairly traceable to Maleau's unpermitted discharges of arsenic.

3. Bonhomme's Injuries are Redressable By the Relief Sought.

To satisfy the redressability requirement, the plaintiff must demonstrate that his injury is likely to be redressed by a favorable decision. *Valley Forge Christian Coll. v. Am United for Separation of Church and State;,* 454 U.S. 464, 472 (1982) (quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 41(1976)). This requirement ensures that a plaintiff "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin,* 422 U.S. 490, 508 (1975). For relief, the CWA allows citizens to seek injunctions and civil penalties to redress injuries resulting from another's violation of effluent limitations. 33 U.S.C. § 1311, 1365(b). However, "a plaintiff must demonstrate standing separately for each form of relief sought." *Laidlaw*, 528 U.S. at 185. A plaintiff seeking injunctive relief shows redressability by "alleg[ing] a continuing violation or the imminence of a future violation" of the statute at issue." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 106-107 (1998); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F. 3d 149 (4th Cir. 2000). In addition, the Court has recognized that "all civil penalties have a deterrent effect," and a court may seek to deter future violations by basing the penalty on the economic benefit that the violator would realize through non-compliance with the CWA. *See Laidlaw,* 528 U.S. at 185 (citation omitted); *see also Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 48 (N.D.N.Y. 2003) *aff'd in part and remanded*, 451 F. 3d 77 (2d Cir. 2006).

Bonhomme's reduced use and enjoyment of the Reedy Creek and Wildman Marsh is a direct result of evidence that Maleau is discharging arsenic into those waters; injunctive relief and civil penalties each redress Bonhomme's injury. Bonhomme's infrequent use and enjoyment of Reedy Creek and Wildman Marsh for hunting will continue until and unless the court enjoins

Maleau from discharging arsenic in observable quantities into the waters. Maleau's discharge of arsenic arises from his gold mining and extraction operations, specifically his removal of overburden and slag from its original location in Lincoln County, Jefferson. Furthermore, Maleau continues to engage in gold mining and extraction operations and will thus continue to profit from avoiding costs associated with complying with the CWA's effluent limitations.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE OVERBURDENED MINING PILES COULD NOT BE CONSIDERED A "POINT SOURCE" UNDER THE ACT.

The District Court dismissed Bonhomme's CWA complaint reasoning that it failed because the mining piles, which created arsenic runoff, did not fit within the definition of a "point source" pursuant to the CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14). (R. 1). An individual is in violation of the Act if they discharge a pollutant from a "point source" into a U.S. water unless they are in compliance with a CWA permit that they must obtain from the EPA. 33 U.S.C. 1311(a). To establish a violation of the prohibition against unpermitted discharges, a plaintiff must sufficiently plead that the defendant: (1) discharged; (2) a pollutant; (3) into navigable waters; (4) from a point source; (5) without a permit. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141-42 (10th Cir. 2005) (citing *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982)). The District Court erred when it erroneously concluded that, the mining piles could not be considered a "point source" because "piles are not normally considered to be conveyances." (R. 9). When in fact, courts have found that objects similar to mining piles are considered "point sources" under the CWA. *See Abston Constr. Co.*, 620 F.2d at 46-47.

The District Court erred when it held that the mining piles were not a point source under the Act for the following reasons. First, determining whether an object is a point source is a fact specific inquiry. Therefore, the District Court prematurely dismissed this issue. Second, the CWA states that all "discernible, confined and discrete conveyance[s]" are deemed "point sources." 33

U.S.C. § 1362(14). The definition of "point source" is broad - Congress intended for it to be so - and historically, courts have appropriately construed it in such a manner. The District Court erred in narrowly defining what can be considered a "point source". Lastly, the EPA has issued a regulation stating that piles can be considered as a point source in some circumstances. Under the *Chevron* doctrine, the District Court erred when it did not give deference to the EPA's reasonable interpretation of what constitutes as a "point source".

A. Whether an object or structure is a point source is a fact specific inquiry.

Under Motion to Dismiss procedural standards, a court must take the well-plead facts of the non-moving party as true. The District Court below erred because it dismissed Bonhomme's claims that Maleau violated the CWA prematurely because it erroneously concluded that piles cannot be "point sources". (R. 9). Instead, whether an object is a "point source" is a fact-specific inquiry. *See, e.g.*, *Abston Constr. Co.*, 620 F.2d at 46-47; *Comm. to Save Mokelumne R. v. E. Bay Mun. Util. Dist.*, 13 F.3d 305 (9th Cir. 1993); *U.S. v. Oxford Royal Mushroom Prod., Inc.*, 487 F. Supp. 852, 854 (E.D. Pa. 1980) (Denying a motion to dismiss because whether surface runoff was a "point source" is a fact specific inquiry); *U.S. v. Frezzo Brothers, Inc.*, 546 F. Supp. 713, 726 (E.D. Pa. 1982); *Ga. v. City of E. Ridge, Tenn.*, 949 F. Supp. 1571 (N.D. Ga. 1996).

Bonhomme sufficiently plead that the mining piles were a discrete conveyance, which constituted as a "point source" under the Act. (R. 4). He alleged that the mining pile runoff contained arsenic, an undisputed pollutant, which was introduced by eroded natural channels into Ditch C-1, and thereafter, Reedy Creek. (R. 4-5). Whether these overburdened mining piles are or are not a "point source" under the Act is a factual question. *Oxford Royal Mushroom Prods., Inc.*, 487 F. Supp. at 854. "The law is clear; uncollected surface runoff may, but does not necessarily, constitute as a discharge from a point source." *Id.* Consequently, the District Court erred in

prematurely dismissing Bonhomme's complaint when it concluded that piles could never be a "point source". (R. 5).

B. <u>The weight of authority supports finding that mining piles can constitute as a "point source" under the Clean Water Act.</u>

1. The mining piles are an identifiable discrete conveyance point.

The term "point source" is defined as "any discernible, confined and discrete conveyance *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged." 33 U.S.C § 1362(14) (emphasis added). This definition makes plain that a point source as defined by the Act need not be limited to a pipe or channel. The District Court erred when it narrowly interpreted what can constitute as a "point source". *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) ("We interpret the term 'point source' broadly"**)**; *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991, *rev'd in part on other grounds*, 505 U.S. 557 (1992) ("The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.").

Maleau has contended that the definition of "point source" does not include his overburden mining piles and cites in support *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) and *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). (R. 9). Both cases are distinguishable because neither involve a clearly identifiable object, like the mining piles in this instance, which created polluted runoff. Instead, courts have gone to the extent to include the following as "point sources": bulldozers and backhoes, ships and airplanes, natural runoff, scrap piles, and **mining piles**. *See, e.g.*, *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063 (9th Cir. 2011), cert. granted 2012 WL 2368686 (U.S. 2012) (natural runoff); *Peconic Baykeeper, Inc. v.*

Suffolk Cnty., 600 F.3d 180 (2d Cir. 2010) (trucks and helicopters considered a point source); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'grs*, 311 F.Supp. 2d 91 (D.D.C. 2004) (Bulldozers, dump trucks, and other earth-moving equipment considered a "point source"); *Abston Constr. Co.*, 620 F.2d at 45 (spoil piles from mining operations considered a "point source").

None of the abovementioned cases cited involve a traditional pipe or channel in order for the courts to conclude that there was indeed a conveyance of a pollutant from a "point source" under the Act. It is clear that when courts apply the appropriate broad definition of "point source", objects such as mining spoil piles fit neatly within the "point source" category. This point is illustrated in *Abston Constr. Co.*, where the Fifth Circuit Court explicitly held that **mining spoil piles** were a "point source" under the Act. 620 F.2d at 45. Furthermore, all of the abovementioned cases were more recently penned than both cases Maleau has cited in his argument. Consequently, the court below erred when it prematurely concluded that the mining piles could not be considered a "point source" under the Act.

2. The runoff is channeled into Ditch C-1.

If the fact that the mining piles are an identifiable and discrete conveyance point alone is not enough to persuade this Court that they should be considered a "point source" under the existing weight of authority. In further support that the mining piles are a "point source", the runoff from the mining piles is channeled and therefore the piles should be considered a "point source" under the Act. (R. 5). Courts have concluded that when otherwise non-point source runoff is channeled or collected, it then becomes a "point source". *Id.*

It is undisputed that channels have eroded from the continuous runoff from these mining piles. (R. 5). These channels run directly into Ditch C-1. (R. 5). These facts are directly akin to the ones in *Abston*. Therefore, this Court should find that the District Court below erred in holding that the mining piles were not "point sources".

C. The EPA Regulations Have Included Mining Piles As A Point Source.

Congress did not directly speak on the issue of what should be considered a "point source" under the Clean Water Act. Instead, it chose not to give a definitive answer to what constitutes as a "point source" and elected to provide a non-exhaustive list for guidance. Thus, what constitutes as a "point source" is ambiguous by the open-ended nature of the term. The EPA has issued a guidance statement which specifically identifies "piles" as a point source, instead of a nonpoint source. "In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location **(such as a pile)** but generally results from land runoff, precipitation, atmospheric deposition or percolation."[2] (Emphasis added). The EPA is entitled to deference if they resolve an ambiguity in a reasonable manner. *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Therefore, the District Court erred when it did not defer to the EPAs reasonable interpretation that a pile can be considered a "point source" under the Act and dismissed Bonhomme's complaint.

D. Public policy weighs strongly in favor of finding that the mining piles are a "point source".

The Clean Water Act was enacted for the express purpose of restoring and maintaining "…the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). It has been stated that "[t]he 'cornerstone' and 'fundamental premise'" of the Clean Water Act" is the regulation of the discharge of pollutants. *Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 644 (9th Cir. 2007) (citations omitted). One method to further this goal of the Act, is the NPDES program, which regulates the discharge of pollutants into protected bodies of water.

This Court must consider facts alleged by Bonhomme as true; however, these facts strongly support the conclusion that Maleau is responsible for the introduction of Arsenic into Ditch C-1 and

[2] EPA Office of Water, *Nonpoint Source Guidance* 3, 5 (1987).

thereafter Reedy Creek. (R. 6). The Act was expressly enacted in order to prevent such circumstances – where there is an identifiable object or discrete point that is introducing a pollutant into a water body. *See Se. Alaska Conservation Council*, 486 F.3d at 644. Excluding regulating the discharge of arsenic from these mining piles would run contrary to the express purpose and goals of the CWA because they are directly the cause of the pollution. Consequently, this Court should find that the District Court erred in holding that the mining piles are not a "point source".

IV: THE DISTRICT COURT CORRECTLY HELD REEDY CREEK AS A NAVAGABLE WATER UNDER THE ACT.

The court was correct to reject Maleau's argument that Reedy Creek is not a "navigable water" under the Act because it is not in fact navigable.

Reedy Creek is a "navigable water" under the Act because it is an (1) interstate water, that (2) affects interstate commerce and is used for international recreation, and (3) is a primary tributary to an in fact water of the United States.

A. Reedy Creek is a "navigable water" because it is an interstate water.

Although Reedy Creek is not used for navigation in the traditional transportation sense, it is a water of multiple United States. Reedy Creek is a fifty-mile long body that extends from the State of New Union into the State of Progress. (R. 5). By extending a across multiple state lines, the creek removes itself from an individual state's jurisdiction and places it into the federal government's. See *Riverside,* 474 U.S. 121 at 124; *Rapanos v. U.S.*, 547 U.S. 715 (2006); see also 33 U.S.C. § 1251(b) quoted in *Solid. Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001)("*SWANCC*"). To hold otherwise would result in constitutional and federalism questions the courts look to avoid. *Id.*

B. Reedy Creek is a "navigable water" because it is used in and affects interstate commerce and international recreation.

Because power to regulate under the Act comes from Congress' Commerce Clause powers, jurisdiction extends to waters that are or may be susceptible to use in interstate or foreign commerce. 33 C.F.R. §328(a)(1); see *SWANCC*, 531 U.S. 159; *Riverside,* 474 U.S. 121 This includes uses by industries in interstate commerce or that could be used by interstate or foreign travelers for recreational or other uses. 33 C.F.R. §328(a)(1); see *SWANCC*, 531 U.S. 159; *Riverside,* 474 U.S. 121, and intrastate waters where "the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. §328(a)(3); See also *U.S. v. Lopez*, 514 U.S. 549 (1995). It is not necessary that each individual instance of the activity affect commerce; it is enough that, taken in the aggregate, the class of activities in question has such an effect. *SWANCC*, 531 U.S. 159 at 192-193 (Justice Stevens, dissenting) (discussing *Perez v. U.S.*, 402 U.S. 146 (1971)). However, the authority is not unlimited. *SWANCC*, 531 U.S. 159 at 173 (citing *U.S. v. Morison*, 529 U.S. 598 (2000); *Lopez*, 514 U.S. 549)).

The Supreme Court addressed the scope of the Act's Commerce Clause reach in *SWANCC*, 531 U.S. 159. The issue there was whether the Act applied to an isolated and wholly intrastate pond via the "Migratory Bird Rule." *Id.* The army Corps of Engineers used the Migratory Bird Rule to extended jurisdiction to waters that are used as a habitat by birds protected by the Migratory Bird Treaties or birds that cross state lines. 51 Fed. Reg. 41217. The Court noted two flaws in the approach. *Id*. First, the intrastate pond lacked both a physical and hydrological connection to an interstate water; and second, there was no interstate commerce connection to the water itself. *SWANCC*, 531 U.S. 159.

The pond in *SWANCC* was isolated from other waters and contained wholly within one state. *Id.* Therefore there was no nexus to an interstate water. *Id.* Further, the Corp. failed to

demonstrate how the Migratory Bird Rule related to the commerce activities at the pond. *Id*. The Court emphasis the relationship of the commercially related dredge filling of the pond with to the connection of a Migratory Bird Rule to commerce was too far removed. *Id.* To fall within the Act, there must be a relationship to the water. *Id.* at 162. There must be a "significant nexus" connecting the water in question to interstate commerce. *Rapano,s* 547 U.S. 715 at 726 (Discussing *SWANCC,* 531 U.S. 159 and *Riverside,* 474 U.S. 121).

Unlike the pond in *SWANCC* whose waters were both isolated from an interstate or traditionally navigable water and were wholly located within one state, Reedy Creek itself is an interstate body of water. (R.5.) The physical and hydrological connection of the creek to multiple states satisfies the Court's first requirement of an interstate water connection.

Second, unlike the far removed migratory bird connection, Reedy Creek's own water is used in interstate commerce and foreign recreation, (R. 5.). Further, the creek's water connection to interstate commerce is facially evident and its aggregate affect is neither minimal nor indirect. Farmers in multiple states use the creek's water for farming and irrigation. *Id.* The water in the Creek is directly applied to produce and agricultural products that themselves enter the stream of interstate commerce and farmers in multiple states. Generally *Id.* The Creek is the primary tributary to the Wildman Marsh, a federally owned preserve, where hunters travel from across the world and nation to shoot ducks and other wildlife. *Id.* Presence of arsenic in the area and local wildlife have already started to decrease the $25 million in commerce the area adds to the economy[3]. *Id.* The Creek is also used as a water supply for consumers and travelers conducting interstate commerce at Bounty Plaza, along Interstate 250. *Id.*

Further, the degradation of the Creek's water quality degrades interstate commerce. This is evidenced by the arsenic's direct effect on the integrity of the water supply, agriculture quality and

[3] Bonhomme has reduced the quantity of annual hunting parties from eight to 2. (R. at 6).

hunting on federal lands. To not extend jurisdiction under the Act would frustrate the Act's purpose and source of Congressional power over interstate commerce. Thus, Reedy Creek is a "water of the United States" because of its physical and direct connections to interstate commerce.

C. Reedy Creek is a "navigable water" because it is the primary tributary to an in fact water of the United States.

Wildman National Wildlife Refuge is owned and maintained by the United States Fish and Wildlife Service. (R. 5). The refuge is an extensive wetland that is under the direct jurisdiction of the Federal Government. (R. 6). Thereby if the federal owned wetlands can also be "navigable water" under the Act, the refuge is a "water of the United States."

The Supreme Court has affirmed the Army Corps of Engineers' inclusion of wetlands under the Act's "navigable water" jurisdiction. *Riverside,* 474 U.S. 121; see also *Rapanos* 547 U.S. 715. Wetlands are,

> "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." C.F.R §§ 328(3)(8)(b).

The Wildman Refuge is a true wetland with marshes and wildlife adapted for life in saturated soil. See generally (R.5). Because the Wildman Refuge is a wetland under the direct control of the federal government, in ownership and maintenance (R. 5), the refuge is under the Act's "water of the United States."

Reedy Creek is the primary tributary of Wildman Refuge. "Waters of the United States" encompass not only traditionally navigable waters susceptible to use in interstate commerce, but also their tributaries and adjacent wetlands. C.F.R §§ 328(a)(1); 328 (a)(5); 328(a)(7); *Riverside,* 474 U.S. 121. The potential for a pollutant to migrate from a tributary to a downstream "navigable water" sufficiently constitutes a significant nexus; the tributary does not need to be directly

connecting. See *U.S. v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *U.S. v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006). Maleau does not dispute that Reedy Creek dispenses water directly into the Wildman wetlands via a physical and hydrological connection. (R.5). Further, the arsenic found in Reedy Creek has been detected within the Wildman wetlands confirming the Creek's nexus to the wetlands is significant. (R. 6).

Maleau argues that the Creek does not fall under the Act because it is not actually navigable, but to deny jurisdiction over Reedy Creek would frustrate the purpose of the Act's goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's" wetlands. 33 U.S.C. § 1251(a); *Riverside,* 474 U.S. 121. The District court correctly held Reedy Creek as an "navigable water" because the creek is an interstate body of water extending across multiple states, is directly used in interstate commerce and international recreation, and is a primary tributary of an in fact water of the United States.

V. THE DISTRICT COURT ERRED IN HOLDING DITCH C-1 IS NOT WITHIN THE ACT'S JURISDICTION OVER "NAVIGABLE WATERS."

A. Jurisdiction under the Act is not determined by a water's name, but its function.

1. What's in a Name?

Shakespeare's "What's in a name? That which we call a rose by any other name would smell as sweet," Romeo and Juliet, act II, scene II, The Oxford Shakespeare (1914), reminds us that what matters is not what we call something, but what it is. The same adage applies when assessing whether a water is a "water of the United States" under the CWA. (See, e.g. *Deaton*, 332 F.3d 698 at 702).

In *Rapanos*, the Supreme Court plurality contemplated the challenges of relying on a term given to identify a water as a definition of what it is. 547 U.S. 715 at 736 n. 7 (Scalia, J., plurality) ("ditches, channels, conduits and the like can hold water permanently or intermittently"); see also

Rapanos, 547 U.S. at 735-736. Rather than rely on terminology, the Court calls for a fact specific inquiry on a case-by-case basis and an application of common sense and common usage to determine if a water falls within the Act. *Id.* at 732 n. 5.

The District court erred in finding Ditch C-1 does not fall within the Act because it is called a "ditch." Maleau also relied on the misnomer urging that the term "ditch" is used in the Act's definition of a "point source" and therefore cannot be a "navigable water." (R. 9). Had the court properly assessed the true function of the water, it would have found that what the facts refer to as "Ditch C-1" is in fact "Tributary C-1" or more precise, "Water C-1 of the United States." To prevent further discrimination in this analysis, we will simply refer to it as "C-1."

2. A Water can be classified as both a Point Source and a Navigable Water under the Act because the title is not what determines function or jurisdiction.

Maleau contends that C-1 cannot be a navigable water because the term "ditch" is contained in the statutory definition of "point sources" and the definitions are mutually exclusive. *Id.* at 9. The lower court cites *Rapanos* in support of his contention, *Id.*; however, the court erred in its reading of the case.

In *Rapanos*, the Supreme Court addressed whether the CWA could extend to wetlands that were near ditches that eventually emptied into navigable waters. 547 U.S. at 730. In Justice Scalia's plurality, he noted the Act categorizes channels that "*typically* carry intermittent flows" from "navigable waters" by including them in the definition of "point source." *Id.* at 735 (emphasis added). Although the statutory definitions at play "conceive of "point sources" and "navigable waters" as separate and distinct categories" the statute's definition of "discharge" "would make little sense if the two categories were *significantly* overlapping." *Id.* (emphasis added). Thus, the plurality did not establish "point sources" and "navigable waters" as mutually exclusive; it

conceded potential overlap. Further, the plurality explained that "[t]he separate classification of 'ditch[es]' . . . shows that they are, *by and large*, not [navigable waters]," *Id.* at 736. (emphasis added), and noted many courts in the past have held "ditches" to be "navigable waters." *Id.* at 727-728. See, e.g., *Deaton*, 332 F.3d 698 (Finding a roadside ditch was a navigable water); *Parker,* 386 F.3d 993 ("ditches and canals […] are navigable waters if they are tributaries of a larger body of water"). As such, the classification of a water as a "ditch" may typically imply the water is not a navigable water, but it does not require or guarantee the water does not fall within a specific definition of the Act. As we will demonstrate, C-1 falls under the Act's definition of navigable water.

B. C-1 is a "navigable water" because it is a tributary of Reedy Creek.

A body of water does not need to be navigable in fact to be a "water of the United States" under the Act. *Riverside,* 474 U.S. 121. Regulatory definitions of "waters of the Unites States, thereby encompass not only traditionally navigable waters susceptible to use in interstate commerce, but also their tributaries and adjacent wetlands. See C.F.R §§ 328(a)(1); (a)(5) and (a)(7); *Riverside,* 474 U.S. 121. Tributaries means the entire tributary system whose water eventually flows into a navigable water, including roadside ditches, see *Rapanos* 547 U.S. 715 at 807 (Steven, J., Concurrence) (citing *Deaton*, 332 F.3d 698 at 707), *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993 (11th Cir. 2004) ("ditches and canals, as well as streams and creeks" are navigable water if they are tributaries of a larger body of water.") Jurisdiction occurs where a nexus between a waterway and a traditional "navigable water" exist. *SWANCC*, 531 U.S. 159. The potential for a pollutant to migrate from a tributary to a downstream navigable water constitutes a significant nexus. See *Deaton*, 332 F.3d 698; *Hubenka*, 438 F.3d 1026.

C-1 is a navigable water because it is the primary tributary of Reedy Creek. The *Deaton* court held the Army Corps jurisdiction over a roadside ditch reasonable because water that entered the ditch "eventually flow[ed]" into a navigable water. 332 F.3d 698 at 702. Unlike the indirect roadside ditch in *Deaton* which had the potential for pollutants to travel more than twenty miles via downstream tributaries, C-1 has a direct physical connection to Reedy Creek and a demonstrable chemical impact. *Id.* (R. 5). The significance of these connections has caused arsenic in C-1 to degraded both the water quality and the natural wildlife habitat downstream of the creek, including health concerns regarding ingestion by humans or wildlife. *Id.* As a tributary with demonstrable flow into an interstate "water of the United States" C-1 is also a "navigable water."

1. *Rapanos* should not be used to determine jurisdiction over tributaries.

Since the sweeping acceptance of tributaries as waters of the United States, the Supreme Court in *Rapanos* addressed whether wetlands near ditches that eventually empty into navigable waters fall within the Act. 547 U.S. at 726 -728. Maleau alleges that *Rapanos* holds weight in our case, but *Rapanos* is easily differentiated on both its facts and law thus, it should not be applied.

Rapanos court analyzed how to clarify where land and water begins in wetlands. *Id.* at 724-725. This extensive analysis is not appropriate in our case as neither party argues that C-1 is a wetland or that it is not a water.

The *Rapanos* plurality explicitly stated that the opinion is about non-traditional water pollutants such as "dredge or fill material [… which] are solids" and "do not readily wash downstream." *Id.* at 723. Although the type pollutant released has no bearing on whether a water is within the Act, it does highlight why wetlands require additional analysis that traditional waters do not. The Act looks to protect the integrity of water, not land, and if the mechanism by which the pollutant reaches a larger water of the United States is land, the Act does not apply. See *Rapanos*;

see also *SWANCC*, 531 U.S. 159. The mechanism by which arsenic is entering Reedy Creek and the Wildman Refuge is the water C-1.

Rapanos not only differs in its application to wetlands, as opposed to traditional waterways, it also differs in how far removed the wetlands were from a traditional water of the United States. The Court considered whether saturated soils near nonnavigable secondary and tertiary tributaries of navigable waters fell within the Act's jurisdiction. *Id*. The analysis is a step further removed than we need to go today. C-1 is a defined primary tributary water that directly enters a larger interstate water. It is neither a seconday tributary, nor a wetland adjacent to a nonnavigable water. Entering a *Rapanos*-like analysis is unnecessary.

Because *Rapanos* has fundamentally different facts and legal analysis than C-1, Bonhomme argues that it should not be applied to the present case. Bonhomme further argues that due to the fundamental difference between the analysis of wetlands and tributary assertions of jurisdiction, the *Rapanos* opinion does not alter the traditionally accepted analysis of tributaries as navigable waters under the Act. (See, e.g. *Moses*, 496 F.3d 984 at 989 (*Rapanos* does not undercut preexisting tributary analysis). However, because Maleau looks to apply *Rapanos* to the present case, Bonhomme argues it in the alternative.

2. C-1 is a "navigable water" under the Act under both the *Rapanos* Plurality and Concurrence tests.

Although *Rapanos* was about wetlands of nonnavigable tributaries, the U.S. Courts of Appeals have held that where connected waters or tributaries are being analyzed as "waters of the United States," Justice Kennedy's concurrence is the applicable rule of law, not the plurality. See *United States v. Robison et al.*, 505 F.3d 1208 (11th Cir. 2007); *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *Moses*, 496 F.3d 984; *San Francisco Baykeeper et al. v. Cargill Salt Division et al.,* 481 F.3d 700 (9th Cir. 2007). In *Rapanos*, the entire Court

agreed that the phrase “waters of the United States” encompasses nonnavigable waters. 547 U.S. at 726 -728 at 730 (Scalia, J., plurality); *Id.* at 767 (Kennedy, J., concurring); *Id.* at 792 (Stevens, J., dissenting), but failed to agree on much else.

In the concurring opinion, Justice Kennedy urged that in order for the Act to apply to a wetland, there must be a ‘significant nexus’ to waters that are or were navigable. *Id.* at 759 (quoting *SWANCC*, 531 U.S. 159). Relying on *Riverside*, he concluded that jurisdiction over wetlands adjacent to nonnavigable tributaries exists “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.” At 755 and 780. A "mere hydrologic connection should not suffice in all cases." *Id.* at 779. Rather, the “required nexus must be assessed in terms of the statute’s goals and purposes,” to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” *Id.*

Courts conflict on whether the “significant nexus” test affects the preexisting tributary rule. See, e.g. *Moses*, 496 F.3d 984 at 989 (*Rapanos* does not undercut preexisting Tributary analysis); contra. *Robison*, 505 F.3d 1208 (*Rapanos* plurality triggers a new analysis because it altered the tributary rule, but Kennedy concurrence is the appropriate analysis). However, the courts have agreed that where the nonnavagable tributary has a chemical, physical or biological affect on the navigable water, even a seasonal or intermittent affect, see *N. Cal.*, 496 F.3d 993; *Moses*, 496 F.3d 984 (holding a creek that flowed into a navigable river only two months out of the year had a significant nexus); the tributary satisfies the significant nexus test. See *Robison*, 505 F.3d 1208.

In *N. California,* the court held that a pond had the significant nexus to the nearby river because the pond had an indirect hydrological via a subsurface aquifer and wetland percolation, 496 F.3d 993 at 1000; a physical effect when the pond occasionally overflowed into the lake, *Id.*; a

chemical affect by increasing the chloride concentrations in the lake, *Id.* at 1001; and a biological connection by collectively supporting the surrounding ecosystems and wetlands. *Id.*

Reedy Creek is a traditional navigable water because it extends across interstate lines and has an affect on interstate commerce. The physical, hydrological, chemical and biological connections that establish C-1 status as a tributary to Reedy Creek, infra. IV.2.(b), are the same characteristics that create a significant nexus between the waters.

C-1 is physically connected to Reedy Creek and empties all of its water into the creek as its tributary transferring any pollutants or chemicals into it. (R. 5). Like the chemical and biological affects in the *N. California* case, C-1 has demonstrable affects the Reedy Creek's integrity. But unlike the subsurface and percolation connection in the *N. California* case, C-1 has a regular and ongoing physical surface connection to the creek. (R. 5). The demonstrable physical, chemical and biological connections between C-1 and the creek establishes the requisite significant nexus to satisfy the *Rapanos* test making C-1 a "water of the United States" under the Act.

The district court erred in finding C-1 was not a "navigable water" under the Act. The court relied on the waterway's title and not its function. C-1 functions a the primary tributary for the interstate and traditionally "navigable" Reedy Creek. C-1 also has physical, biological and chemical nexuses with the creek which speak to both Justice Kennedy's concurring opinion in *Rapanos* and the Act's primary goals and purpose. As such, C-1 is a "navigable water" under the Act.

VI. THE DISTRICT COURT ERRED IN HOLDING BONHOMME RESPONSIBLE FOR A VIOLATION OF THE CLEAN WATER ACT.

The District Court below erred when it dismissed Bonhomme's claims under the CWA. First, it erred because Maleau is has violated § 301(a) of the Act and should be liable for the

discharge. Second, the court's ruling that Bonhomme has violated the Act runs contrary to the plain meaning of "addition".

The EPA has explicitly stated that the transfer of already polluted water into another body of water without introducing additional pollutants is not an "addition" under the Act. Thus, the District Court below therefore erred by not giving deference to the EPA's reasonable interpretation of the statute. Lastly, the District Court's holding runs contrary to public policy and logic in holding Bonhomme liable for an identified party that is responsible for the pollution.

A. Maleau is the identified responsible party for the discharge and it was foreseeable that the discharge would enter a U.S. body of water in violation of the Act.

The District Court below erred in dismissing Bonhomme's complaint because he sufficiently plead that Maleau was but-for cause of the discharge of arsenic into a U.S. water. By enacting CWA § 301(a), Congress imposed a duty upon the public to control the discharge of pollutants. The Act also established that under §301(a), an owner or operator of a point source that presents a significant threat of injury to the "chemical, physical, and biological integrity" must take reasonable steps to eliminate that threat. CWA § 101(a), 33 U.S.C. § 1251(a) (2006); *See Laidlaw Envtl. Servs., Inc.*, 528 U.S. at 180-81. Liability from an unauthorized discharge that results in the pollutant going through other "point sources" is imposed upon the initial conveyance. *See, e.g.*, *Friends of Sakonnet v. Dutra*, 786 F.Supp. 623, 629-30 (D.R.I. 1990) (Stating liability must lie with the person causing "the addition of any pollutant to navigable waters."). For example, in *Froebel v. Meyer*, the Seventh Circuit Court stated that an upstream discharger, not a downstream individual, should be held liable for a violation of the Act if it was foreseeable that the upstream discharge would reach a U.S. water. 217 F.3d 928, 938 (7th Cir. 2000) ("If for example, an industrial polluter operated a facility that dumped waste into a pond that feeds a tributary to a river that flows to the ocean, the facility would be the point source.").

This point is demonstrated in *Abston Constr. Co.*, where the Fifth Circuit Court held that miners were still liable for a violation of the Act despite their mining piles not being final point of discharge of the pollutant into a U.S. water. 620 F.2d at 45; ("[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water.") This scenario is directly on point with facts of the case under review. Therefore, the District Court erred in holding that Bonhomme was in violation of the Act.

B. <u>There was no "addition" of a pollutant by Bonhomme.</u>

1. EPA regulatory interpretation of "addition" should control.

When there is a question of statutory interpretation, a court should first look to the statute to determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If the "statute alone does not resolve the case," the court will turn to the agency regulations, "which are entitled to deference if they resolve the ambiguity in a reasonable matter." *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 277-78 (2009) (citations omitted).

The CWA prohibits the "discharge of any pollutant" without a permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). The CWA defines "discharge of a pollutant" as, "any addition of a pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). However, the Act does not expressly provide a definition of the term "addition". Therefore, there is a latent ambiguity of what constitutes as an "addition" under the Act.

The EPA's longstanding position is that the transfer of pollutants is not included in the term "discharge of pollutants." Indeed, the EPA articulated at the passage of the Act, that an "addition of pollutants to navigable waters from a point source" only occurs when a point source from outside navigable waters introduces a material meeting the definition of a "pollutant" into

navigable waters. The EPA further supported their position on this issue in cases contesting its decision not to require NPDES permits where there was merely only a transfer of already polluted water into a navigable water. *See, e.g.*, *Gorsuch*, 693 F.2d at 167; *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) (Holding a hydro-electric facility's transfer of water already polluted was not an "addition of pollutants" to navigable waters). This is a reasonable interpretation by the EPA to an ambiguous term. The District Court erred in not providing the EPA's interpretation deference. Consequently, this Court should hold that the District Court erred in dismissing Bonhomme's claims.

2. The plain meaning of the Act would not include the transfer of already polluted water.

In its plain meaning, "addition" clearly means that there must be an introduction or supplementation into an existing source. For example, one of the most commonly used dictionaries, Webster's, defines "addition" as:

> (1) a part added (as to a building or residential section); (2) the result of adding: increase; (3) the act or process of adding; *especially*: the operation of combining numbers so as to obtain an equivalent simple quantity; (4) direct chemical combination of substances into a single product.[4] (Emphasis in original).

The District Court's interpretation of "addition" runs contrary to the plain meaning of the word. Bonhomme alleged Maleau's mining spoil piles discharge arsenic runoff into Ditch C-1. (R. 4-5). This is the addition of the pollutant. The polluted water then goes through Bonhomme's culvert. But, the culvert does not introduce another pollutant or increase the amount of arsenic present in the water – the activity of Bonhomme's culvert is more akin to a simple transfer. (R. 5). Consequently, Bonhomme has not violated the Act because his actions do not correspond with the plain meaning of "addition" as his culvert never introduced anything into the water.

[4] "Addition." *Merriam-Webster Online Dictionary*. 2013. http://www.merriam-webster.com (2 Def. 2013).

CONCLUSION

This Court should hold that Bonhomme is a real party in interest to bring a citizen suit against Maleau. Maleau's activities are a violation of the CWA because his mining piles are a "point source" pursuant to the Act, which are conveying a pollutant into a body of water protected by the Act. Ditch C-1 and Reedy Creek are United States waters. Bonhomme is not in violation of the CWA because he is not introducing a pollutant, merely transferring one that is already present. Furthermore, Maleau is the but-for causation of the violation of the Act and should therefore be held liable. Consequently, this Court should reverse the District Court's Order granting Maleau's Motion to Dismiss and deny Bonhomme's Motion Dismiss and remand for further proceedings.

Respectfully submitted,

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Counsel for Bonhomme