Team 46

C.A. No. 13-01234

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee

Defendant-Appellant, Cross-Appellee

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee

Plaintiff-Appellant, Cross-Appellee

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

BRIEF FOR SHIFTY MALEAU

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JURISDICTIONAL STATEMENT

Federal district courts have original jurisdiction over any civil action arising under the laws of the United States, including the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq. (2012). 28 U.S.C. § 1331 (2012). The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear appeals from any final decision of the United States District Court for the District of Progress. *Id*. § 1291.

STATEMENT OF THE ISSUES

1. Whether Mr. Bonhomme is the real party in interest under FRCP 17 to bring suit against Mr. Maleau for violating section 301 of the CWA, 33 U.S.C. § 1331(a).

2. Whether Mr. Bonhomme - a foreign national - is a "citizen" under CWA section 505, 33 U.S.C. § 1365, who may bring suit against Mr. Maleau.

3. Whether Mr. Maleau's mining waste piles are "point sources" under CWA section 502(12), (14), 33 U.S.C. § 1362(12), (14).

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

5. Whether Reedy Creek is a "navigable water/water of the United States" under CWA section 502(7), (12), 33 U.S.C § 1362(7), (14).

6. Whether Mr. Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress dismissing Mr. Bonhomme's suit against Mr. Maleau under the CWA's citizen suit provision and denying Mr. Bonhomme's motion to dismiss the State of Progress's CWA citizen suit. (R. 4-5, 10). Mr. Bonhomme brought a civil action against Mr. Maleau under the CWA's citizen suit provision, 33 U.S.C § 1365, alleging that Mr. Maleau's piles of gold mining overburden, waste rock, and dirt constitute a point source that discharge arsenic into waters of the United States. Mr. Bonhomme claims that both Ditch C-1 and Reedy Creek are navigable waters. (R. 5).

Later, the State of Progress filed a citizen suit against Mr. Bonhomme, alleging that he violated the CWA by discharging arsenic, a pollutant, from his culvert, a point source, into Reedy Creek. (R. 5). Mr. Maleau intervened in this action under CWA section 505(b)(1)(B). (R. 5). The State and Mr. Maleau moved to consolidate their case with Mr. Bonhomme's citizen suit and the District Court granted the motion to consolidate. (R. 5). The defendant in both suits filed motions to dismiss. (R. 5).

The District Court held: (1) that Mr. Bonhomme is not a real party in interest ("RPI") under FRCP 17 because he is a front for Precious Metals International ("PMI"); (2) that Mr. Bonhomme is not a "citizen" under CWA section 505 because he is a foreign national; (3) that Mr. Maleau's mining waste piles are not "point sources" under CWA sections 502(12) and (14) because piles are not conveyances; (4) that Ditch C-1 is not a navigable water because it is a point source; (5) that Reedy Creek is a water of the Unites States under CWA sections 502(7) and (12); and (6) that Mr. Bonhomme violates the CWA by adding pollutants to Reedy Creek through his culvert. (R. 7-10).

Following the issuance of the District Court's order, all three parties filed a Notice of Appeal. (R. 1). Mr. Bonhomme filed a Notice of Appeal challenging each of the District Court's holdings except that Reedy Creek is a water of the United States. (R. 1-2). Mr. Maleau filed a Notice of Appeal challenging the District Court's holding that Reedy Creek is a water of the United States. (R. 2). Progress filed a Notice of Appeal challenging the District Court's holding that Ditch C-1 is not a water of the United States. (R. 2).

STATEMENT OF THE FACTS

PMI is a direct competitor of Mr. Maleau's gold mining business. (R. 7). PMI's presence is felt around the globe, and two of PMI's gold mines are located in the United States. (R. 7). Its leadership further evinces PMI's global reach: Mr. Bonhomme, the president of PMI, is a French

national, and not a citizen of the United States. (R. 1, 8). Mr. Bonhomme's affiliation with PMI is uncontested. Owning 3 percent of PMI stock, Mr. Bonhomme is the company's largest shareholder, and belongs to PMI's Board of Directors. (R. 7). Mr. Bonhomme owns a lodge adjacent to Wildman March that is solely used to host hunting parties attended primarily by PMI's business clients and associates. (R. 6-8).

Mr. Maleau owns a gold mining operation adjacent to the Buena Vista River, a traditionally navigable river in Lincoln County, Progress. (R. 5). Mr. Maleau trucks slag and overburden produced by his operation from Lincoln County to Jefferson County, where he places the materials on his property next to Ditch C-1, a drainage ditch. (R. 5). During some times of the year, rainwater runoff flows down and through the materials adjacent to Ditch C-1 and eventually reaches the ditch, which then transports the rainwater runoff and groundwater for three miles until it reaches Reedy Creek (R. 5). Ditch C-1 was constructed in 1913 to drain saturated soils for agricultural use. (R. 5). Groundwater and rainwater intermittently flow in the ditch, which is dry for up to three months per year. (R. 5). However, the ditch "has never floated a boat and it is too small to do so in the future." (R. 9).

The water in the ditch runs through Mr. Maleau's property to adjacent agricultural properties and when the water reaches Mr. Bonhomme's property, Mr. Bonhomme discharges the water through his culvert directly into Reedy Creek. (R. 5). Reedy Creek is the water supply for Bounty Plaza, a service area on Interstate 250 ("I-250"), and for farmers in both Progress and New Union. (R. 5). It is not navigable in the traditional sense and the parties do not allege that "it is or ever has been used for waterborne transportation or could be so used with reasonable improvements." (R. 9). Unlike the ditch, which lies only in Progress, Reedy Creek begins in the State of New Union before reaching the State of Progress, where it flows for several miles before

ending in a wetland, Wildman Marsh. (R. 5). Most of Wildman Marsh is owned and managed by the U.S. Fish and Wildlife Service as a National Wildlife Refuge. (R. 6). It is a destination for duck hunters and serves as a temporary home to migratory waterfowl. (R. 5-6).

Mr. Bonhomme's property fronts part of the wetlands and he uses the property for duck hunting activities with his business and social acquaintances. (R. 6). Use of Mr. Bonhomme's property for hunting parties has declined from eight to two parties per year. (R. 6). To support the contention that the arsenic in Reedy Creek and Wildman Marsh comes from Mr. Maleau's property, PMI conducted sampling and analyses to support Mr. Bonhomme's allegations. (R. 7). Mr. Bonhomme's attorney and expert witness fees are paid by PMI. (R. 7).

STANDARD OF REVIEW

Review of a motion to dismiss under FCRP 12(b)(6) for failure to state a claim upon which relief can be granted is an issue of law reviewed *de novo. Boyle v. United States*, 200 F.3d 1369, 1371 (Fed. Cir. 2000). To survive a motion to dismiss, a party's 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). The District Court dismissed Mr. Bonhomme's complaint after determining that he is an improper plaintiff in this suit. (R. 10). In the State of Progress's citizen suit, the District Court denied Bonhomme's motion to dismiss, holding that Progress adequately stated a cause of action against him. (R. 10).

SUMMARY OF THE ARGUMENT

The District Court erred in holding that Reedy Creek is a water of the United States, but correctly held that Mr. Bonhomme is not a real party in interest ("RPI") under FRCP 17, that Mr. Bonhomme is not a "citizen" under CWA section 505, that Mr. Maleau's mining waste piles are not "point sources" under the CWA, that Ditch C-1 is not a navigable water regulated by the

CWA, and that Mr. Bonhomme violates the CWA by allowing pollutants to flow into Reedy Creek through his culvert. (R. 1-2, 7-10).

Mr. Bonhomme is not entitled to bring a citizen suit under section 505 of the CWA because he is not a citizen of the United States. Section 505's use of the word "citizen" is not ambiguous, and its definition of "citizen" does not allow foreign nationals the right to bring a citizen suit. The context of the word "citizen" in section 505 demonstrates that foreign nationals are not authorized to bring citizens suits, and granting foreign nationals the right to bring citizen suits renders Congress's use of the word "citizen" superfluous and directly contradicts congressional intent regarding who is a proper party in a CWA suit.

The District Court properly held that Mr. Bonhomme is not the RPI under FRCP 17. The RPI is the party who, under the relevant substantive law, possesses the right to bring a claim. Mr. Bonhomme does not possess the right to a claim under the CWA because he is not a "citizen." Even if Mr. Bonhomme were entitled to bring a claim, because any injury suffered by Mr. Bonhomme is suffered indirectly, as a result of a direct injury to PMI, he is not the RPI. Furthermore, granting Mr. Bonhomme RPI status undermines the preclusive purpose of FRCP 17.

Mr. Maleau did not violate the Clean Water Act because he did not engage in any activity prohibited under the Act. Specifically, he did not discharge a pollutant from a point source into a navigable water. 33 U.S.C. § 1251(a), (b). Liability under the Act requires both a "point source" and discharge into "navigable waters," but neither element exists with regard to any of Mr. Maleau's activities that are referenced in this suit.

Mr. Maleau placed piles of mining overburden adjacent to Ditch C-1 (R. 5). These piles are not "discernable, confined, and discrete conveyance[s]" under the Act. 33 U.S.C. § 1362(14). They are piles of dirt and stone which do not act to convey pollutants in any confined,

discernable, and discrete manner. Instead, they merely function as an obstacle over and through which water rainwater runs with the force of gravity. (R. 5). These types of objects were not intended to be regulated under the CWA, and do not give rise to liability under the Act.

Neither are Ditch C-1 and Reedy Creek navigable waters within the meaning of the Act. Supreme Court precedent requires that navigable waters must be 1) navigable in fact, tributaries to a water that is navigable in fact, or capable of being made navigable; or 2) waters with a continuous surface connection or significant nexus to a navigable water. *See Rapanos v. United States*, 547 U.S. 715, 739, 779 (2006); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 172 (2001). Each of these factors is missing here. Reedy Creek is not navigable in the traditional sense and the parties do not allege that it could be made navigable "with reasonable improvements." (R. 9). Likewise, Ditch C-1 is intermittent and "too small" to float a boat. (R. 5, 9). Furthermore, neither body has a substantial effect on intrastate commerce within the meaning of Supreme Court Commerce Clause jurisprudence, and the EPA regulations defining all intrastate waters as navigable are invalid because they allows any effect on interstate commerce, rather than a substantial effect, to confer jurisdiction.

Should this Court decide that Reedy Creek is a navigable water, this finding would constitute the final element necessary to hold Mr. Bonhomme liable under the CWA. It is undisputed that Mr. Bonhomme conveys polluted rainwater through a culvert on his property into Reedy Creek. A culvert is a point source that can carry pollutants into navigable waters. *See Rapanos*, 547 U.S. at 743 (specifically identifying culverts as structures held to be point sources). And Mr. Bonhomme's culvert conveys pollutants directly into Reedy Creek. (R. 5). These facts thus establish the necessary elements for CWA liability: a point source and conveyance of a pollutant into waters of the United States. Any arguments by Bonhomme relating to causality

have been clearly rejected by the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (holding, *inter alia*, that a defendant need not be the original source of pollution to be liable under the CWA).

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED THE CASE BECAUSE MR. BONHOMME IS NOT A "CITIZEN" UNDER SECTION 505 OF THE CWA, AND PMI, NOT MR. BONHOMME, IS THE RPI UNDER FRCP 17.

As a French national, Mr. Bonhomme is not a "citizen" under section 505 of the CWA and cannot file a citizen suit against Mr. Maleau. Section 505(a) provides that "any *citizen* may commence a civil action on his own behalf" against any person or governmental entity who violates an effluent limitations standard under section 301 of the CWA. 33 U.S.C. § 1331(a). (emphasis added). Section 505 citizen suits are intended to function as an additional "enforcement tool" of the CWA. S. Rep. No. 99-50, at 28 (1985).

The CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." CWA § 505(g); 33 U.S.C. § 1365(g). The term "person" is further defined in section 502(5) to mean "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §1362(5). Section 505's language, context, and legislative history demonstrate that foreign nationals are not "citizens" under section 505 of the CWA. Because Mr. Bonhomme is not a "citizen," he is not entitled to bring suit under section 505 of the CWA. Even if Mr. Bonhomme could bring a citizen suit under section 505, he does not meet the procedural requirement of FRCP 17 because he is not the RPI.

A. The term "citizen" in section 505(a) of the CWA unambiguously excludes foreign nationals from bringing suit because: 1) The language of the statute indicates that "citizen" is meant to retain its meaning; and 2) The context of the use of the word "citizen" indicates that foreign nationals are not meant to be encompassed by this word.

When interpreting a statute, courts first look to the statute's language to "determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41 (1997). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* If a phrase or word is determined to be unambiguous, "judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

The language of section 505(a) indicates that the term "citizen" refers to nationals of the United States. Sections 505(g) and 502(5) define the term "citizen" used in section 505(a); these definitions, along with the context in which these words are used, show that the word "citizen" is not ambiguous and that foreign nationals may not bring citizen suits under the CWA.

1. The definition of "citizen" In sections 505(g) and 502(5), along with the accompanying language of section 505(a), demonstrate that this word is unambiguous.

The term "citizen" in section 505(a) is not ambiguous. The Merriam-Webster dictionary defines "citizen" in two predictable ways: 1) as "a person who legally belongs to a country and has the rights and protection of that country," and; 2) as "a person who lives in a particular place." (MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/ dictionary/citizen (last visited Nov. 14, 2013)). When a word is not defined by statute, courts "normally construe it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). Here, the word "citizen" is defined by sections 505(g) and 502(5). These definitions demonstrate this word is not meant to include foreign nationals.

Both the definition of "citizen" as "a person or persons," and the corresponding definition of "person" give entities other than natural humans the right to bring a citizen suit under section 505(a), but they do not broaden the scope of the word "citizen" to include foreign nationals. A definition that broadens the scope of a narrow word does not, contrary to Mr. Bonhomme's skewed belief, deprive that word of its significance within a statute. *See SWANCC*, 531 U.S. at 171-72. In *SWANCC*, the Supreme Court rejected an attempt by the Army Corps of Engineers to expand the meaning of "navigable waters." *Id.* The Corps argued that the separate use of the term "navigable waters" in a different section of the CWA served as proof that the statutory definition of the term "navigable waters" could include isolated bodies of water within the state. *Id*. at 172. The Court rejected this argument, reasoning that to include isolated bodies of water within the term "navigable waters" would render the term "navigable" meaningless. *Id*.

The logic used in *SWANCC* applies just as forcefully in this case: the broader definition of the narrow word, "citizen," does not deprive that word of its meaning as "a person who legally belongs to a country and has the rights and protection of that country." (MERRIAM-WEBSTER.COM). Here, even though "citizen" is defined as including "a person or persons having an interest which is or may be adversely affected," the additional definition of "person" indicates that this word is used to broaden the categories of entities, not individuals, who may bring suit under this statutory provision. To broaden the term to include foreign nationals would render the term "citizen" meaningless. *See SWANCC*, 531 U.S. at 171-72.

The existence of an alternate definition of "citizen" does not render this word ambiguous because the susceptibility of a word to alternate meanings "'does not render the word . . . whenever it is used, ambiguous,' particularly where 'all but one of the meanings is ordinarily eliminated by context.'" *Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) (quoting *Deal v. United*

States, 508 U.S. 129, 131–32 (1993)). The context in which the word "citizen" is used affirms that foreign nationals are not permitted to bring citizen suits.

2. The context of the word "citizen," demonstrates that the word is not meant to include foreign nationals.

In addition to the statutory language, this Court must also look to the context in which the word "citizen" is used in section 505. *See U.S. Dept. of Energy v. Ohio*, 503 U.S. 607, 622 (1992) ("The term's context, of course, may supply a clarity that the term lacks in isolation."); *see also FCC v. AT&T*, 562 U.S. ___, 131 S. Ct. 1177, 1183 (2011) ("when interpreting a statute . . . we construe language . . . in light of the terms surrounding it.") (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)). The term's context lends further proof that "citizen" in section 505 means "a person who legally belongs to a country and has the rights and protection of that country," and not foreign nationals. (MERRIAM-WEBSTER.COM).

Section 505(a)'s separate use of the terms "citizen" and "person" within the same section indicates Congress's intent to give "citizen" a meaning separate and apart from the use of the word "person" on its own. Section 505(a) of the citizen suit provision reads, in pertinent part: "any *citizen* may commence a civil action on his own behalf – (1) against any *person* (including (i) the United States, and (ii) any other governmental instrumentality . . .)" (emphasis added). 33 U.S.C. § 1365(a). Section 505(a) makes clear that "person" and "citizen" are two separate terms with distinct meanings. Under section 505(a), "person" encompasses entities other than natural human beings. If Congress had wanted to permit foreign nationals the ability to bring citizen suits, it could have chosen to use the word "person" as a stand-alone word, rather than nest this word within the definition of "citizen." Because Congress did not do so, the statutory context indicates that "citizen" is meant to retain a separate, narrower meaning from the use of the word "person" in isolation.

Use of the word "person" throughout the CWA further proves that its use to define the word "citizen" serves to expand the scope of the types of entities that can bring citizen suits. There are other sections of the CWA where the term "person" is defined for the section in which it appears. Section 311(a)(7) of the CWA defines "person" to exclude the additional entities included in sections 505(a) and 502(5). 33 U.S.C. § 1321(a)(7). The varying definitions of "person" throughout the text of the CWA evince that the term "person" in the definition of "citizen" is not meant to broaden the categories of *individuals*, but rather the categories of *entities*, that can bring citizen suits. Use of the word "person" in other sections of the CWA to signify individuals, without mention of nationality, and with the exclusion of other entities, thus signals that Congress intended the word "citizen" to retain the meaning usually attributed to that word: "a person who legally belongs to a country." (MERRIAM-WEBSTER.COM).

B. Even if the word "citizen" in section 505(a) is ambiguous, the word "citizen" does not allow foreign nationals to bring suit under the citizen suit provision because: 1) Doing so renders Congress's use of the term "citizen" superfluous; and 2) Legislative history indicates Congress did not intend to allow foreign nationals to bring a citizen suit.

Even if this Court determines that the word "citizen" is ambiguous, foreign nationals should not be allowed to bring citizen suits because doing so renders Congress's use of the word "citizen" superfluous and directly undermines Congressional intent.

Effect should be given, "if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) ("Judges should hesitate ... to treat [as surplusage] statutory terms in any setting"); *Bailey v. United States*, 516 U.S. 137, 146 (1996) (finding that Congress used two separate terms "because it intended each term to have a particular, nonsuperfluous meaning"). If the meaning of a phrase or word remains unclear, courts may turn

to the legislative history of a statute to determine the phrase or word's meaning. *See Ratzlaf*, 510 U.S. at 147-48 ("In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."). Because inclusion of foreign nationals under section 505(a) renders the term "citizen" superfluous, and the statute's legislative history indicates to the contrary, foreign nationals may not bring citizen suits.

1. Allowing foreign nationals to bring suit under the citizen suit provision of the CWA renders Congress's use of the term "citizen" superfluous.

Congress used the word "citizen" in section 505(a) to limit the scope of individuals who can bring citizen suits under the CWA. Courts should give effect to each word used in a statute and avoid construction "which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883); *see also Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) ("'we are obliged to give effect, if possible, to every word Congress used.'") (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Mr. Bonhomme contends that "citizen" includes foreign nationals because the definition of "citizen" under section 505(g) allows "any person" to bring a citizen suit. (R. 7-8). Mr. Bonhomme's interpretation asks this court to believe this definition means the phrase "any person" includes foreign nationals, but to include foreign nationals in this definition implies that Congress overlooked the significance of the word "citizen" in section 505.

Every word in a statute must be given a meaning, and to argue that foreign nationals can bring a citizen suit renders the word "citizen" meaningless. *Id*. If Congress intended to allow any natural person, regardless of nationality, to bring suit, the statute would not have included the word "citizen." Instead Congress could just as easily have excluded the word "citizen" from section 505(a), and instead written that "any person" could bring a citizen suit. Furthermore,

Congress's differentiation between "citizen" and "person" within section 1365(a) provides additional evidence of their intent to retain the ordinary, narrow meaning of "citizen."

2. The CWA's legislative history confirms Congress's intent to limit citizen suits to citizens of the United States.

The legislative history of the 1972 amendments to the CWA helps demonstrate Congress's intent to grant the right to bring citizen suits to individuals who are citizens of the United States.

A statement by Senator Muskie, chairman of the Senate Subcommittee on Air and Water Pollution, during a floor debate, shows that the Act's framers did not understand the word "citizen" to include foreign nationals. The Second Circuit cited Senator Muskie's explanation in an opinion:

> [E]very *citizen of the United States* has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a *citizen of the United States*, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved.

Sierra Club v. SCM Corp., 747 F.2d 99, 106 (2d Cir. 1984) (quoting the floor debate) (emphasis added). Senator Muskie's use of the phrase "of the United States," modifies the immediately preceding word "citizen" and helps demonstrate that the term "citizen" is not meant to include foreign nationals of the United States. This legislative history also demonstrates that "citizen" in section 505 does not mean "a person who lives in a particular place," since similar language in House Bill 11896, which would have restricted the definition of "citizen" to mean "a citizen of the geographic area having a direct interest which is or may be affected," was rejected. *Id.* at 105 (quoting the floor debate).

The Senate Conference Report on the 1972 CWA amendments does not contradict Senator Muskie's statement. The Report explains that the definition of the term "citizen" was

amended from the prior definition to "reflect[] the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*." S. CONF. REP. NO. 92-1236 (1972). In *Sierra Club v. Morton*, the Supreme Court held that in order to grant standing to a non-profit organization, the party bringing suit must allege an actual injury. 405 U.S. 727, 734-35 (1972). Congress's acknowledgment of this case does not serve as proof that foreign nationals can bring citizen suits, and a determination of the meaning of the word "citizen" cannot end by jumping into an analysis of standing.

C. PMI, not Mr. Bonhomme, is the RPI under FRCP 17 because: 1) PMI, not Mr. Bonhomme, suffers a direct injury; and 2) The purpose of FRCP 17 is undermined by naming Mr. Bonhomme the RPI.

FRCP 17 states that "[a]n action must be prosecuted in the name of the real party in interest." A "real party in interest" ("RPI") is the person who, under the relevant substantive law, possesses the right to a claim and is entitled to enforce that right. *Weissman v. Weener*, 12 F.3d 84 (7th Cir. 1993); *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992). Under FRCP 17, courts "are concerned only with whether an action can be maintained in the plaintiff's name." *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750 (7th Cir. 2008). Similar to the requirement of prudential standing, FRCP is "used to designate a plaintiff who possesses sufficient interest in the action to entitle him to be heard on the merits." *Weissman*, 12 F.3d at 86. And FRCP 17(a) is considered the codification of the "well-established prudential-standing limitation . . . that a litigant cannot sue in federal court to enforce the rights of a third part[y]." *Rawoof*, 521 F.3d at 757. FRCP 17's RPI requirement is thus meant to "protect the defendant against a subsequent action by the party actually entitled to recover," and to insure that a judgment "will have its proper effect as res judicata." FED. R. CIV. P. 17 (advisory comm.'s note). Mr. Bonhomme is not the RPI under

FRCP 17 because he does not possess the substantive right to a claim under section 505 of the CWA, and granting him RPI status renders the purpose of FRCP 17 moot.

1. Mr. Bonhomme does not possess the right to a claim under the citizen suit provision because any injury alleged by him is derivative and suffered as a consequence of a direct injury to PMI.

Under section 301 of the CWA, Mr. Bonhomme does not possess the right to a claim against Mr. Maleau, and thus cannot be the RPI under FRCP 17. Civil actions for violations of section 301(a) can be commenced by any "citizen" under the "citizen suit" provision of the CWA. 33 U.S.C. § 1311(a). Because Mr. Maleau is not a "citizen" under section 505 of the CWA, he does not possess the substantive right to bring suit against Mr. Maleau.

Even if this Court finds that Mr. Bonhomme is a "citizen" entitled to bring a citizen suit, because he suffers a derivative injury as a result of a direct injury to PMI he is nonetheless not the RPI. *See Weissman*, 12 F.3d 84. In *Weissman*, the Seventh Circuit held that a plaintiff, a 50 percent shareholder of a company, was not the RPI, even though he personally guaranteed a corporate debt, because he was not the party directly affected by the defendant's failure to secure a loan. 12 F.3d at 86. The Seventh Circuit reasoned that the company in *Weissman* was the RPI because it suffered the most direct harm as a result of the plaintiff's failure to secure a loan. *Id.* Harm suffered by the plaintiff was considered derivative of the injury incurred by the company and the plaintiff was not granted status as the RPI. *Id* at 87.

Like the shareholder in *Weissman,* Mr. Bonhomme suffers only derivative, rather than direct, injuries as a result of any alleged violations by Mr. Maleau. Mr. Bonhomme's injury is not more direct simply because he owns the lodge adjacent to Wildman Marsh. *See Weissmann*, 12 F.3d at 87 (finding that plaintiff did not suffer direct injury, even though he personally guaranteed a loan). Mr. Bonhomme does not reside at the lodge adjacent to Wildman Marsh. The

lodge, occupied only two to eight times a year, is used solely for hunting parties hosted by Mr. Bonhomme, acting in his capacity as President of PMI, to cater to the business clients and associates of PMI. Because these hunting parties are primarily held for the benefit of PMI, it is clear that PMI, rather than Mr. Bonhomme, suffers a direct injury as a result of the decline in the number of parties hosted at the lodge. Any harm alleged by Mr. Bonhomme, given his use of the lodge for the benefit of PMI, is thus derivative.

That Mr. Bonhomme is the majority shareholder of PMI stock does not change this result, because, "shareholders are most directly inflicted by injury inflicted on the corporations, since their investment is wiped out." *Id.* That PMI, rather than Mr. Bonhomme, suffers a direct injury is further evidenced by PMI's payment of Mr. Bonhomme's attorney and witness fees. Additionally, PMI conducted or paid for the sampling and analyses to support Mr. Bonhomme's contention that arsenic comes from Mr. Maleau's property. (R. 7).

2. Allowing Mr. Bonhomme to proceed as the RPI undermines the preclusive purpose of FRCP 17.

Because PMI suffers direct injury by the alleged violation of CWA section 301, its role as the RPI fulfills the preclusive purpose of FRCP 17. Having PMI as the RPI insures that Mr. Maleau will not have to defend himself against a suit alleging a violation of section 301 more than once. *See Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 142 (5th Cir. 1990) (purpose of RPI "is to assure a defendant that a judgment will be final and that res judicata will protect it from having to twice defend an action"). It is important to close the door on any opportunity for PMI to bring a subsequent suit against Mr. Maleau in order to avoid double counting. *Weissman*, 12 F.3d at 86 ("When the injury is derivative, recovery by the indirectly injured person is a form of double counting.") (internal quotes omitted). Additionally, PMI, as the corporation directly affected by any alleged violation of section 301, is best situated to

compensate shareholders who may suffer derivative injuries as a result of the decreased number of hunting parties, and thus the appropriate RPI. *See id*. at 86-87.

II. MR. MALEAU DID NOT VIOLATE THE CWA BECAUSE HE DID NOT DISCHARGE A POLLUTANT FROM A POINT SOURCE INTO A NAVIGABLE WATER.

When Congress enacted the CWA in 1972, it chose to "recognize, preserve, and protect the primary responsibilities and rights of states" to further the CWA's goal of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a), (b). In so doing, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of states" to reduce pollution and "to plan the development and use (including restoration, preservation, and enhancement of land and water resources." *Id*. § 1251(b). Therefore, the CWA prohibits the unauthorized "discharge of any pollutant by any person" into "navigable waters." *See id*. § 1311(a), 33 U.S.C. § 1362(7), (12). "[D]ischarge" is defined as the "addition of any pollutant to navigable waters from any point source." *Id*. § 1362(12). In turn, "navigable waters" are defined as "waters of the United States, including the territorial seas" and "point source" is defined as "any discernible, confined and discrete conveyance" including "any pipe, ditch, channel, tunnel, [or] conduit . . . ." 33 U.S.C. § 1362(7), (14). CWA sections 402 and 404 create permitting systems for the discharge of pollutants. Prior to the discharge of all point-source pollutants, other than dredge and fill materials regulated under section 404, an entity must obtain a permit under the EPA-administered section 402 National Pollutant Discharge Elimination System ("NPDES") scheme. *Id*; 33 U.S.C. § 1342. Mr. Maleau was not required to obtain a 402 permit because the mining waste piles are not point sources and neither Ditch C-1 nor Reedy Creek are navigable waters within the meaning of the CWA.

A. Mr. Maleau's waste piles are not point sources because piles of dirt and stone are not "discernable, confined, and discrete conveyance[s]."

In enacting the CWA, Congress distinguished between point source and nonpoint sources, regulating additions of pollutants from point sources, but not nonpoint sources. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). When the source of a pollutant "being discharged into a waterway is not a 'point source,' it is not a 'discharge of pollutants' for purposes of the Clean Water Act." *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1304 (N.D. Ga. 1996). This Court should hold that Mr. Maleau's waste piles cannot be point sources because they do not constitute the means by which the pollutants are ultimately deposited into navigable waters and do not convey any water in a defined, discrete, and discernible manner.

The question of whether a discharge occurred "from a point source is fact-laden; the court must consider evidence of the 'precise nature' of Defendant's facility." *Wash. Wilderness Coal. v. Hecla Min. Co.*, 870 F. Supp. 893, 989 (E.D. Wash. 1994). Three key facts should guide this Court to the conclusion that Mr. Maleau's piles are nonpoint sources: (1) the piles do not convey any pollutants because rainwater already naturally moves through it without assistance or guidance to Mr. Bonhomme's ditch; (2) even if there is a scintilla of evidence that the piles guided rainwater slightly, the direction of the eroded channels was created by nature, and not "by man" under EPA regulations; (3) and finally, the piles are not the means by which pollutants are ultimately deposited into navigable waters because neither Bonhomme's ditch nor Reedy Creek are "waters of the United States."

Congress, in defining point source, "exclude[d] unchanneled and uncollected surface waters" from the definition. *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) *overruled on other grounds by EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). Surface water runoff can in some circumstances constitute point source pollution, but only when it is

"collected or channeled by man." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009) (citing 40 C.F.R. § 122.2). The CWA's definition involves "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 Labs., Inc.* 3 F.3d 643, 646 (2d Cir. 1993). Mr. Maleau's piles are neither physical structures nor a means of conveying pollutants from an industrial source to navigable waterways. Mr. Maleau's piles have not collected or channeled any pollutants in a significant way. They acted instead as merely an obstacle over and through which rainwater has flown with the force of gravity on its way to Ditch C-1. (R. 5).

Mr. Bonhomme cited *Sierra Club v. Abston Const. Co.* to the lower court in this present case in an attempt to support his erroneous contention that the slag and overburden piles could constitute point sources. (R. 8). But that case is neither controlling nor persuasive here. In *Abston*, miners deposited overburden directly next to a creek. 620 F.2d 41, 43 (4th Cir. 1980). The piles were highly erodible and carried runoff directly into the creek, which the court regarded as a water of the United States. *Id*. The Fifth Circuit held that the spoil piles were "point sources" under the CWA because they acted as the "means by which pollutants are ultimately deposited into a navigable body of water." *Id.* at 46.

Even under the Fifth Circuit's extremely broad test, Mr. Maleau's overburden and slag piles are not "point sources" under the Act. Unlike the miners' spoil piles in *Abston*, which discharged contaminated water directly into a navigable body of water, the water contacting Mr. Maleau's piles was not the means by which the pollutants were ultimately deposited into a navigable body of water. The water was pulled through channels by gravity into a ditch, not a navigable body of water or waters of the United States. (R. 5). The piles are carried by Ditch C-1

for miles before ever reaching anything remotely similar to water of the United States. Thus, the slag and overburden piles do not fit the definition of a point source under the CWA.

If any pollutants reach navigable waters from Mr. Maleau's property, it is through natural rainwater runoff that is controlled by gravity, not any defined conveyance. This case is also analogous to *Hudson Riverkeeper Fund, Inc. v. Harbor at Hastings Assocs.*, 917 F. Supp. 251 (S.D.N.Y. 1996). In *Riverkeeper*, the Southern District of New York considered a claim that a building constituted a point source because rainwater leaked into the building, collected trash and debris, and then passed into a river nearby. *Id.* at 257. The court rejected the idea that the building could be a point source on those grounds, finding that "any discharge of material [from the building] would not be deliberate or systematic." *Id.* Just like the building in *Riverkeeper*, there is no systematic or deliberate conveyance through Mr. Maleau's piles.

Mr. Maleau's mining activity should be subjected only to state regulation through "areawide waste treatment management plans," since nonpoint source regulatory power is vested in the states. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (citing CWA § 208, 33 U.S.C. § 1288). This situation may indeed be one that needs rectification since pollution is spreading, but litigation under the CWA is not the appropriate response. This case involves a nonpoint source, which is "nothing more than a pollution problem *not* involving a discharge from a point source," and those issues are resolved through state land-use regulation, not the CWA. *Id.* at n.28 (emphasis in original).

B. Neither Ditch C-1 nor Reedy Creek are navigable waters because: 1) They do not meet the standards set out in Supreme Court CWA precedent; 2) Neither body has a significant effect on intrastate commerce within the meaning of Supreme Court Commerce Clause jurisprudence; and 3) Ditch C-1 is a point source that channels groundwater.

Mr. Maleau never triggered the CWA because Ditch C-1 and Reedy Creek are not "navigable waters" under the Act. Navigable waters are defined as "waters of the United States,

including the territorial seas." 33 U.S.C. § 1362(7). Neither Ditch C-1 nor Reedy Creek are waters of the United States under Supreme Court CWA and Commerce Clause jurisprudence. Therefore regulating Ditch C-1 and Reedy Creek must be left to the states.

1. Ditch C-1 and Reedy Creek are not navigable waters because: a) they are not navigable in fact, tributaries to a water that is navigable in fact, and cannot be made navigable in fact; and b) they do not have a significant nexus to any navigable water.

This court should adopt a rule that a water of the United States exists only where 1) a water is navigable in fact, a tributary to a water that is navigable in fact, or may be made navigable in fact; or 2) where a non-navigable water has a significant nexus to, or a significant effect on, a water that is navigable in the traditional sense. *See SWANCC*, 531 U.S. 159 (2001); *Rapanos*, 547 U.S. 715; *see also In re Needham*, 354 F.3d 340, 345 (5th Cir. 2001), *reh'r en banc denied*, (2001) (applying a more stringent rule that the CWA does not permit regulation of tributaries that are neither navigable nor adjacent to navigable waters).

Under this rule, federal jurisdiction would not extend to either Reedy Creek or Ditch C-1. This rule would not mean less protection for the environment. Instead, as intended by Congress, state and local laws would sufficiently regulate these non-navigable waters that do not affect navigable waterways. A holding to the contrary "would result in a significant impingement of the States' traditional and primary power over land and water." *SWANCC*, 531 U.S. at 174 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)).

Like Ditch C-1, Reedy Creek is not navigable in fact. Without more, this is not enough to escape the CWA's jurisdiction because "waters of the United States" means more than traditionally navigable waters. *Rapanos*, 547 U.S. at 731 (plurality op.); *SWANCC*, 531 U.S. at 167; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (upholding jurisdiction over wetlands that actually bordered a navigable waterway). While navigability in

fact is not required, the Court has twice emphasized that "the qualifier 'navigable' is not devoid of significance." *Rapanos*, 547 U.S. at 731 (plurality op.) (citing *SWANCC*, 531 U.S. at 172). The rule advanced above would ensure that the statutory term "navigable" is not stripped of significance.

a. The Ditch and the Creek fail the SWANCC test because neither body has a connection to navigable waters.

The Court in *SWANCC* held that CWA section 404 does not apply to wetlands "isolated" from, or having no connection to, navigable waters. *SWANCC*, 531 U.S. at 171-72. The Court explained that a holding to the contrary would invoke the "outer limits" of Congressional power, and result in a regulation of land use, a function traditionally left to the states. *Id*. at 173-74. In enacting the CWA, Congress did not usurp state powers, rather it chose to recognize and protect the rights of states "to plan the development and use . . . of land and water resources . . . ." *Id*. at 174 (citing 33 U.S.C. § 1251(b)). Therefore, Congress only asserted jurisdiction over navigable waters, waters that could be made navigable, or waters that are tributaries to or connected to navigable waters. *See id*. at 172 ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."). Here, Ditch C-1 and Reedy Creek are not navigable in fact. (R. 9). Nor is there any indication that these bodies are connected to a water that is navigable in fact, may be made navigable in fact, or is a tributary to a water that is navigable in fact. (R. 5, 9).

b. The Ditch and the Creek fail both the *Rapanos* plurality and concurrence tests because there is no continuous surface connection or significant nexus between Ditch C-1, Reedy Creek, and navigable waters.

The *Rapanos* plurality and concurrence lay out two tests for determining whether a water is navigable within the meaning of the CWA. Under the plurality test, waters of the United States do not include "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Rapanos*, 547 U.S. at 739. Rather, waters of the United States include only relatively permanent standing or flowing bodies of water or wetlands with a "continuous surface connection" to waters that are navigable in fact. *Id*. All parties agree that Ditch C-1 flows only intermittently and provides drainage for rainfall. (R. 5). Furthermore, neither waterbodies are navigable in the traditional sense, nor may they be made navigable with "reasonable improvements." (R. 9). Likewise, there is no continuous surface connection between the Creek and waters that are navigable in fact. Therefore, under the standard set by the plurality, neither body is a water of the United States.

Under Justice Kennedy's concurrence test, non-navigable waters do not qualify as waters of the United States unless they have a "significant nexus" to a navigable waterway or a tributary to a navigable waterway. *Rapanos*, 547 U.S. at 779. A significant nexus exists only where the non-navigable body "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. Of course, Ditch C-1, Reedy Creek, and Wildman Marsh feed into each other. But none qualify as navigable waters and none have a significant nexus with a navigable water (R. 5, 9). Therefore, the plurality test is not met.

Circuit courts are split as to whether to apply the *Rapanos* plurality or concurrence tests.[1] But it doesn't matter which test this court chooses to apply, because Ditch C-1, Reedy Creek, and Wildman Marsh are not navigable waterways. Therefore, it doesn't matter whether they have a significant nexus or continuous surface connection with each other.

c. Under these tests, Wildman Marsh cannot bootstrap Reedy Creek into categorization as a water of the United States.

The District Court mistakenly found that Wildman Marsh confers "navigable" status on Reedy Creek. (R. 10). Wildman Marsh itself is not a navigable water under the CWA, therefore any connection between the Marsh and Reedy Creek is irrelevant for the purposes of determining whether the Creek is a water of the United States. Wildman Marsh is not navigable in fact and has no connection to a navigable water. That it is owned by the federal government and supports migratory birds is insufficient under *SWANCC* and *Rapanos*, which collectively define waters of the United States as either of the following: navigable in fact, a tributary to a water that is navigable in fact, a water that may be made navigable in fact, or a non-navigable water that has a significant nexus to a water that is considered navigable. None of these elements are present here.

d. This rule that Mr. Maleau advocates is consistent with the history of federal regulation over the navigation power.

Congress intended federal jurisdiction under the CWA to mirror jurisdiction under the navigation power, which authorizes regulation of non-navigable waters that significantly affect navigation or interstate commerce. Under this traditional power, the federal government asserted jurisdiction "over waters that were or had been navigable in fact or which could reasonably be so

[1] *Compare United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (finding that jurisdiction can be established under either test) *and United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006) (looking to Justice Steven's instruction that jurisdiction should attach if either test is met) *with United States v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007), reh'g en banc denied (the concurrence is "the controlling rule").

made." *SWANCC*, 531 U.S. at 172. Neither Wildman Marsh, Reedy Creek, nor Ditch C-1 fall within the scope of this power. In enacting the CWA, Congress was fully aware of the Court's decisions defining the federal navigation power, and based federal jurisdiction under the CWA on that power, with one key expansion. As the Court noted in *Riverside Bayview*, "In both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation." 474 U.S. at 136. "Beyond Congress' desire to regulate wetlands adjacent to 'navigable waters,'" there is "no persuasive evidence" that Congress sought to further extend jurisdiction to "nonnavigable, isolated" waters. *SWANCC*, 531 U.S. at 171.

2. The mere fact that Reedy Creek crosses state lines does not make it a "navigable water" because a) the CWA and Commerce Clause jurisprudence do not authorize EPA's regulations defining all intrastate waters as navigable; and b) Reedy Creek and Ditch C-1 do not have a significant effect on interstate commerce.

The EPA's section 402 regulations define "waters of the United States" as waters that are used or may be used "in interstate or foreign commerce"; "all interstate waters, including interstate 'wetlands'"; and "all other waters . . . the use, degradation or destruction of which *would affect or could affect* interstate or foreign commerce." 40 C.F.R. § 122.2 (emphasis added). The regulations also capture tributaries of the waters described above. *Id*.

a. The regulations are contrary to Supreme Court case law because they allows any effect on interstate commerce, rather than a substantial effect to confer jurisdiction.

The regulations exceed the EPA's authority as limited by the Commerce Clause. In *United States v. Lopez*, 514 U.S. 549, 551 (1995), the Supreme Court considered the constitutionality of the Gun-Free School Zones Act, in which Congress made it a federal offense for any individual to possess a firearm in a school zone. The Court concluded that the Act exceeded Congress's authority under the Commerce Clause because it did not regulate a

commercial activity or require that gun possession be connected to interstate commerce. *Id*. For these same reasons, the EPA regulations that extend jurisdiction to *all* interstate waters cannot be upheld under the Commerce Clause.

The EPA regulations do not regulate commerce, therefore they cannot be upheld as consistent with the CWA. A creek is a creek, not commerce. The Commerce Clause only allows the federal government to regulate commerce - not creeks. As the Court said in *Lopez*, "commerce . . . is traffic . . . it is intercourse . . . commercial intercourse between nations and parts of nations." *Id*. at 553. As this case illustrates, a creek that merely crosses state lines is not enough to facilitate commerce, traffic or commercial intercourse. Under *Lopez*, the Supreme Court held that Congress may only permissibly regulate three categories of activity under its commerce power: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and (3) "those activities that substantially affect interstate commerce." *Id*. at 558-59 (citations omitted).

Neither Reedy Creek nor Ditch C-1 fit within any of these categories. It is clear that Reedy Creek and Ditch C-1 are not channels or instrumentalities of interstate commerce, because the water bodies cannot be made capable of navigation and therefore cannot carry any persons or things in interstate commerce. (R. 5). Nor are the water bodies themselves things in interstate commerce - there is no commerce in creeks. Therefore, if federal jurisdiction over Reedy Creek and Ditch C-1 is to be upheld, it must be under the third *Lopez* factor. *Lopez*, 514 U.S. at 559.

The interpretation that an interstate water is a water of the United States if it merely affects or could affect interstate commerce is invalid for two reasons. The EPA regulation at 40 C.F.R. § 122.2 is invalid on its face because it does not require that the regulated activity have a substantial effect on interstate commerce, but only that it "could affect interstate or foreign

commerce." This standard is directly at odds with the third *Lopez* factor, which requires a *substantial* effect on interstate commerce. *See also United States v. Morrison*, 529 U.S. 598, 609 (2000).

b. The three areas of inquiry established in *Lopez* for determining whether there are substantial effects on interstate commerce are not met here.

The Supreme Court in *SWANCC* expressly held that the navigability requirement cannot be read out of the CWA. *See* 531 U.S. at 173. Because the regulations purport to eliminate this requirement and set a speculative threshold for a nexus with interstate commerce, EPA exceeded its authority under the CWA as limited by the Commerce Clause.

Courts are to consider three factors in determining whether or not to uphold a regulation under the "substantial effects" category. *Lopez*, 514 U.S. at 559-65. These factors include whether 1) "the regulation controls a commercial activity, or an activity necessary to the regulation of some commercial activity"; 2) "the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce"; and 3) "the rationale offered to support the constitutionality of the statute . . . has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human endeavors, especially those traditionally regulated by the states." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1064 (1997).

EPA's regulations that extend federal jurisdiction over all interstate waters, no matter how insignificant, do not control a commercial activity, or an activity necessary to the regulation of some commercial activity. The mere status of being an interstate water is not fundamentally commercial in any sense. In applying this test in *Lopez*, the Court noted that the statute at issue

there was a criminal statute, and that "under our federal system, the states possess primary authority for defining and enforcing the criminal law." *Lopez*, 514 U.S. at 561 & n.3.

Similarly, in the CWA context, the Court in *SWANCC* stated that the application of the CWA to "isolated" wetlands would result in a "significant impingement of the States' traditional and primary authority over land and water use," and that Congress would not have "significantly changed the federal-state balance" unless it "clearly" so provided. 531 U.S. at 174. Likewise, the application of the Act to water bodies that are in no way connected to actually navigable waters just because they cross state lines would significantly affect states' rights. Congress chose in the CWA to preserve the primary rights of states to reduce pollution and plan the development and use of land and water resources. 33 U.S.C. § 125l(b). Here, EPA's impermissibly broad regulations are inconsistent with this intent to leave land and water use regulation to the states.

Second, the regulations fail to include a jurisdictional nexus requirement that ensures that each regulated instance of the activity affects interstate commerce. In *Lopez*, the statute did not "ensure, through case by case inquiry, that the firearms possession in question affects interstate commerce." 514 U.S. at 561. Just so with the EPA regulations, which categorically extend jurisdiction over *all* interstate waters, no matter whether they actually affect interstate commerce.

Third, there is no logical stopping point present in the EPA regulations. In fact, there is no stopping point at all: under the regulations, the federal government has jurisdiction over all waters that cross state lines, no matter how small or insignificant. The Supreme Court precedent on this matter is clear: under the CWA, there is a logical limit to the definition of waters of the United States which requires a nonnavigable water to have at least a significant nexus to a water that is in fact navigable. *See Rapanos*, 547 U.S. at 739. This stopping point allows the statutory

term "navigable" to retain meaning and avoids the absurd possibility that the EPA could regulate a puddle that straddles the line between Progress and New Union.

When the *Lopez* Court discussed *Wickard v. Filburn*, 317 U.S. 111 (1942), which justified regulation of homegrown wheat under the Commerce Clause, the Court rejected the idea that *Wickard* establishes that "all activities affecting commerce, even in the minutest degree may be regulated and controlled by Congress." *Lopez*, 514 U.S. at 558. The Court then cited *Maryland v. Wirtz*, 392 U.S. 183 (1968), for the proposition that "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Lopez*, 514 U.S. at 558 (citing *Wirtz*, 392 U.S. at 196 n.27). By providing water for farmers and one shopping center, Reedy Creek has no more than a trivial impact on commerce (R. 5). There is no logical stopping point to an interpretation that Congress may regulate a purely intrastate activity, the placement of mining overburden (X), where the regulation will affect an item, the water in Reedy Creek (Y), that eventually is used to grow another item (Z), agricultural crops, that may eventually be sold in interstate commerce and affect the market in agricultural crops (Z). This chain of causation is far too attenuated, and a far cry from the Court's most expansive reading of the Commerce Clause in *Wickard*, where the Court allowed regulation of wheat growing (X) that would affect the interstate market in wheat (X). *See Wickard v. Filburn*, 317 U.S. 111 (1942).

3. Furthermore, Ditch C-1 is not a navigable water because it: a) is more properly defined as a point source or conveyance and b) carries groundwater, which cannot be regulated as a "water of the United States."

Waters of the United States do not include drainage ditches or conduits that carry intermittent flows of groundwater and are more properly defined as point sources. (R. 5).

a. Ditch C-1 is either a "conveyance" or a "point source" and cannot simultaneously be a "navigable water."

This court should decline to classify Ditch C-1 as a "water of the United States." In *Rapanos*, Justice Scalia instructed that ditches are not generally "waters of the United States." 547 U.S. at 735-36. "[D]ischarge" of a pollutant" is "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(A). Therefore, the definitions

> conceive of 'point sources' and 'navigable waters' as separate and distinct categories. The definition of 'discharge' would make little sense if the two categories were significantly overlapping. The separate classification of 'ditch[es], channel[s], and conduit[s]' - which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow shows that these are, by and large, *not* 'waters of the United States.'

Rapanos, 547 U.S. at 735-36. Several courts have therefore held that structures like ditches are not navigable waters because they are either conveyances that indirectly discharge pollutants, or point sources. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1137, 1141 (10th Cir. 2005) (more than two miles of tunnel separated the "point source" and "navigable water"); *United States v. Ortiz*, 427 F.3d 1278, 1281 (5th Cir. 2005) (storm drain that carried flushed chemicals to a river, was a "point source").

No matter whether conduits like Ditch C-1 are considered under the "indirect discharge" or "point source" rationales, Justice Scalia noted that "the lower courts have seen no need to classify the intervening conduits as 'waters of the United States.'" *Rapanos*, 547 U.S. at 744. The court here should likewise decline to do so. A contrary holding would expand the CWA's scope to apply to nearly all interstate waters, no matter how small or insignificant. And under either rationale, if any CWA violation occurred here, it came not from the conveyance of groundwater in Ditch C-1, but from the discharge of arsenic from Mr. Bonhomme's culvert, a point source.

b. Moreover, Ditch C-1 contains groundwater, which is not regulable as a "water of the United States" according to courts, the Army Corps, and Congress.

The water in Ditch C-1 "is derived primarily from draining groundwater from the saturated soil." (R. 5). It only contains rainwater runoff "after rain events." (R. 5). On this issue of first impression, the Twelfth Circuit should join those courts that hold the CWA definition of "navigable waters" does not reach ditches like C-1 that predominantly channel groundwater, even where these waters are hydrologically connected to surface waters.

In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, the court recognized that groundwaters are not "navigable waters" under the CWA and that neither the CWA nor the EPA's regulations "asserts authority over groundwater merely on basis that it may be hydrologically connected with surface waters." 24 F.3d 962, 965 (7th Cir. 1994); *see also United States v. Johnson*, 437 F.3d 157, 161 n.4 (1st Cir. 2006) *withdrawn and vacated by* 467 F.3d 56 (2006) ("[n]othing in the . . . CWA or the regulations . . . could be construed as extending jurisdiction to a body of ground water."); *Patterson Farm, Inc. v. City of Britton*, 22 F. Supp. 2d 1085 (D.S.D. 1998) (groundwaters are not "navigable waters" even if discharges to groundwater migrate to surface water). In rejecting the argument that groundwater hydrologically connected to surface waters are waters of the United States, the court explained that the Act "does not attempt to assert national power to the fullest," therefore "'Waters *of the United States*' must be a subset of 'water'; otherwise why insert the qualifying clause in the statute?" *Id*.

The court in *Oconomowoc Lake* further explained that Congress purposefully excluded groundwater from regulation under the Act. The Senate Committee on Public Works explained why: regulating these waters is too "complex and varied from state to state." *Oconomowoc Lake*, 24 F.3d at 965 (citing S. REP. NO. 414, 92d Cong., 1st Sess. 73 (1972); *Exxon Corp. v. Train,*

554 F.2d 1310, 1325-29 (5th Cir. 1977)). Indeed, even the agencies charged with implementing the CWA agree that groundwater should not be considered a water of the United States. The Army Corps of Engineers advanced this interpretation, which the First Circuit upheld in *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1450-51 (1st Cir. 1992). While the EPA has noted connections between ground and surface waters on "several occasions," it ultimately left its regulatory definition alone. *Oconomowoc Lake*, 24 F.3d at 965-66. Therefore, this court should uphold the district court's ruling that Ditch C-1 is not a water of the United States and leave its regulation to the State.

III. ASSUMING THAT REEDY CREEK IS A NAVIGABLE WATER, MR. BONHOMME IS IN VIOLATION OF THE CWA BY ADDING POLLUTANTS THROUGH A POINT SOURCE TO A NAVIGABLE WATER.

If this court decides that Reedy Creek is a navigable water, it logically must also hold that Mr. Bonhomme is in violation of the CWA because he added a pollutant to navigable waters from a point source. While Mr. Maleau's spoil and overburden piles are not point sources, Mr. Bonhomme's culvert certainly is. *See Rapanos*, 547 U.S. at 743 (specifically identifying culverts as structures held to be point sources). The definition of point source under the CWA "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

Mr. Bonhomme attempts to avoid liability by invoking issues of causality. (R. 9). This argument ignores the fundamental truth that causality is simply not a factor in determining CWA liability. Instead, "the Act categorically prohibits any discharge of a pollutant from a point source without a permit." *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). And assuming that this Court determines that Reedy Creek is part of the waters

of the United States, Mr. Bonhomme did exactly what creates liability under the CWA: he discharged waters containing pollutants from his culvert without a permit. (R. 5-6).

Even assuming *arguendo* that causality had any relevance to liability under the CWA, Mr. Bonhomme would be the cause-in-fact. In *Miccosukee*, the Supreme Court briefly discussed the issue of causality, which was addressed in the Eleventh Circuit before the Supreme Court reviewed the case. 541 U.S. 95, 103-104. The Eleventh Circuit held that when a point source "changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water which it would not have otherwise flowed, that point source is the cause-in-fact." *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002) *vacated sub nom. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 (2004). Since the Supreme Court vacated the decision below in order to determine crucial facts relating to the distinctness of water bodies at issue, it did not officially affirm the Eleventh Circuit's test. *Miccosukee*, 541 U.S. 95 at 112. However, the Court did address the test by noting that new facts in that case might change the result of who is the cause-in-fact under the test, but the Court never rejected any portion of the test's validity or reasoning; the Court instead vacated on factual issues. *Id.* Even if this Court elects to use a causality test, Mr. Bonhomme's ditch is the cause-in-fact.

Under the Eleventh Circuit's causation test, Mr. Bonhomme is the cause-in-fact because his culvert transported polluted rainwater from the ditch into Reedy Creek. (R. 5). Bonhomme's culvert changed the natural flow of the contaminated water by draining groundwater from the saturated soil and by channeling rainwater runoff after rain events. (R. 5). The culvert controlled the flow of the water and "discharge[ed] the pollutants through a culvert underneath a farm road on Bonhomme's property directly into Reedy Creek." (R. 5).

This case is directly analogous to *W. Va. Highlands Conserv., Inc. v. Huffman*, 625 F.3d 159 (4th Cir. 2010). *Huffman* involved a citizen suit against the West Virginia Department of Environmental Protection ("WVDEP"), a state agency that sought to clean up acid mine drainage generated at several bond forfeiture sites in West Virginia, and those sites were actively discharging into state streams. *Id.* at 164. WVDEP argued that it was not liable for the discharges that occurred while it cleaned and operated the abandoned mining sites because it did not cause the discharges in the first place, but the Fourth Circuit staunchly rejected this argument: "there is simply no causation requirement in the [CWA]." *Id.* at 167. The Fourth Circuit referenced *Miccosukee*, noting that "permits are required for discharges from point sources that do not themselves generate pollutants, but merely convey pollutants to navigable waters." *Id.* at 168 (internal citations omitted). Despite arguments by WVDEP that finding liability would produce "absurd results," the court retorted that the Supreme Court in *Miccosukee* and other cases "make clear that under the CWA, the question of who generated pollutants is irrelevant. What matters is who is currently discharging pollutants into navigable waters." *Id.* at 168-69.

Under CWA precedent, Mr. Bonhomme has a duty to ensure that his culvert does not convey pollutants into navigable waters, regardless of where the pollutants originate. If this Court finds that Reedy Creek is part of the "waters of the United States" definition under 33 U.S.C. section 1362(7), it *must* find Bonhomme liable. Case law throughout the United States overwhelmingly holds that Mr. Bonhomme's causation arguments are immaterial. *See, e.g., United States v. Law*, 979 F.2d 977, 978 (4th Cir. 1992) ("The origin of pollutants in the treatment and collection ponds is therefore irrelevant"); *El Paso Gold Mines*, 421 F.3d at 1143 (holding that CWA's provisions "focus on the point of discharge, not the underlying conduct that led to the discharge"); *Comm. to Save Mokelumne River*, 13 F.3d at 309 (holding that a dam's

operators violated the CWA despite the fact that there was no net increase in the acidity of surface runoff compared to the acidity of the runoff before the facility was constructed).

CONCLUSION

This Court should uphold the decision of the United States District Court for the District of Progress on all issues, except that this Court should hold that Reedy Creek is not a water of the United States. Mr. Bonhomme is not a "citizen" under section 505 of the CWA, and even if he was conferred this status, he is not the RPI under FRCP 17 because he does not suffer a direct injury as a result of the alleged violations by Mr. Maleau.

Additionally, Mr. Maleau is not subject to CWA liability regardless of the party that brings suit because he does not meet the required elements for liability. Maleau's piles of overburden and spoil are not point sources because they do not convey pollutants in any defined, discrete, or discernible manner. The piles are merely an obstacle to rainwater that flows naturally with the force of gravity toward Ditch C-1. Reedy Creek and Ditch C-1 are not navigable waters under Supreme Court precedent because they do not even have a significant nexus to a traditionally navigable water. Furthermore, neither body substantially affects interstate commerce. Therefore, there is no federal jurisdiction over Mr. Maleau.

Finally, if this Court holds that Reedy Creek is a navigable water, it should affirm the District Court of Progress's holding that Mr. Bonhomme is liable under the CWA for discharging a pollutant from a point source into a navigable water. Mr. Bonhomme's attempts to invoke issues of causality are completely meritless. Causality is not an issue in CWA liability. Because Mr. Bonhomme's culvert is a point source and because polluted waters are discharged from that culvert into Reedy Creek, Bonhomme has met all of the elements for liability under the CWA, assuming this Court holds that Reedy Creek is a water of the United States.