C.A. No. 13-01234

In the United States Court of Appeals
for the Twelfth Circuit

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee.

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

AND

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

v.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGRESS
Nos. 155-CV-2012 & 165-CV-2012

BRIEF FOR THE STATE OF PROGRESS
Plaintiff-Appellant, Cross-Appellee

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STATEMENT OF JURISDICTION

The State of Progress filed a complaint in the United States District Court for the District of Progress seeking review under 28 U.S.C. § 1331 (2006). On July 23, 2012, the district court issued an order granting Shifty Maleau's motion to dismiss and denying Jacques Bonhomme's motion to dismiss. (R. 10). The district court's order is final, and this Court has proper jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

1. Whether Bonhomme, lacking standing, is the real party in interest to bring suit against Maleau under Federal Rule of Civil Procedure 17.

2. Whether Bonhomme, as a French national, qualifies as a "citizen" for the purposes of the Clean Water Act's citizen suit provision.

3. Whether Reedy Creek, as a continuously flowing interstate water that is used in interstate commerce, is a "water of the United States" for the purposes of the Clean Water Act.

4. Whether Ditch C-1, as a continuously flowing body of water that can affect interstate commerce, and a tributary of Reedy Creek, is a "water of the United States" under the Clean Water Act.

5. Whether Bonhomme, through his addition of arsenic to Reedy Creek from a culvert on his property, violates the Clean Water Act.

6. Whether Maleau's mining waste piles, which are not "discernible, confined and discrete conveyances," qualify as a "point source" under the Clean Water Act.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court for the District of Progress granting a motion to dismiss filed by Shifty Maleau ("Maleau") and denying a motion to dismiss filed by Jacques Bonhomme ("Bonhomme"). (R. 10). After proper notice, the State of Progress ("Progress") filed a civil action against Bonhomme under the Clean Water Act's ("CWA") citizen suit provision, 33 U.S.C. §1365 (2006), alleging that he was in violation of 33 U.S.C. §

1311(a) (2006). (R. 5). Maleau intervened as a matter of right in Progress's case under 33 U.S.C. § 1365(b)(1)(B) because Bonhomme had his own § 1365 complaint pending against Maleau. *Id.*

As the two actions involved common questions of law and fact, Progress and Maleau moved to consolidate their pending cases with the action pending between Bonhomme and Maleau under Federal Rule of Civil Procedure 42(a). *Id*. The district court (Remus, J.) granted the motion to consolidate. (R. 5).

Both defendants filed motions to dismiss. (R. 5). On July 23, 2012, the district court issued an *Opinion and Order*, granting Maleau's motion to dismiss, denying Bonhomme's motion to dismiss without prejudice, (R. 10), and holding that (1) Bonhomme is not a real party in interest pursuant to Federal Rule of Civil Procedure 17 because he is a front for Precious Metals International, Inc. ("PMI"); (2) Bonhomme is unable to bring a citizen suit under the CWA because he is a foreign national; (3) Maleau's mining waste piles are not "point sources" under the CWA because piles are not conveyances; (4) Ditch C-1 is not a navigable water because it is a point source and it does not fit the traditional understanding of "navigable waters"; (5) Bonhomme violates the CWA by allowing arsenic added by Maleau to discharge into Reedy Creek through his culvert, which is a point source; and (6) Reedy Creek is a navigable water for the purposes of the CWA. (R. 1-2). In drawing these conclusions, the district court found for Maleau on all issues, except that Reedy Creek is a navigable water. (R. 10).

Bonhomme filed a Notice of Appeal challenging the first five holdings of the district court. (R. 1-2). Maleau filed a Notice of Appeal challenging the sixth holding of the district court. (R. 2). Progress filed a Notice of Appeal challenging the district court's holding that Ditch C-1 is not a navigable water. *Id*. On September 14, 2013, this Court issued an order directing the parties to brief the issues listed above. (R. 2-3); s*ee infra* Statement of the Issues.

STATEMENT OF FACTS

Maleau is a citizen of Progress. (R. 6). He owns two properties in Progress: one in Lincoln County, and one in Jefferson County. (R. 5). Additionally, he operates an open pit gold mining and extraction operation on his property in Lincoln County, *id*., and is one of the region's largest employers. (R. 6). Maleau's operation is adjacent to the traditionally navigable Buena Vista River, also located in Progress. (R. 5). His operation requires CWA permits, and there is no evidence that he is in violation of those permits. *Id*. Maleau transfers overburden and slag from his property in Lincoln County to his property in Jefferson County, where it is placed in piles adjacent to Ditch C-1 ("the Ditch"). *Id*.

The Ditch "is a drainage ditch dug into saturated soils to drain them sufficiently for agricultural use." (R. 5). It is three feet across and one foot deep on average, and "contains running water except during annual periods of drought lasting from several weeks to three months." *Id.* The Ditch begins before Maleau's property line, and after passing Maleau's, runs three miles through agricultural properties before it hits Bonhomme's land and discharges through a culvert underneath a farm road on his property, directly into Reedy Creek. *Id*. An association of landowners constructed the Ditch in 1913 and both Maleau and Bonhomme have restrictive covenants in their deeds that require them to maintain the Ditch. *Id*. Agricultural properties between Bonhomme and Maleau's still use the Ditch for drainage. *Id*.

Bonhomme is a French national, and thus not a citizen of the United States. (R. 8). He is the president of PMI, as well as its largest shareholder and a member of its Board of Directors. *Id*. PMI owns five gold minds around the world, including two in the United States, but none are located in Progress or the neighboring state of New Union. *Id*. Regardless, PMI "is in direct competition with Maleau and his mining business." *Id*. Bonhomme's property in Jefferson

County also fronts part of Wildman Marsh ("the Marsh")—"an extensive wetlands and a stopover essential to over a million ducks and other waterfowl during their twice annual migrations." (R. 5-6). Most of the Marsh is within the Wildman National Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service ("the USFWS"). (R. 6). The Marsh is a destination spot for local duck hunters, including individuals from Progress, New Union, and five neighboring states, as well as others from around the nation and even from foreign countries. *Id*. The duck hunting activities bring in over $25 million in local revenue. *Id*. Bonhomme owns a hunting lodge, located on the edge of his property near the Marsh, which he uses to host duck hunting parties for his business clients and associates. (R. 7-8).

After completing water tests, Bonhomme filed a complaint against Maleau alleging that arsenic coming from Maleau's waste piles on his Jefferson County property is fouling the waters of Reedy Creek and the Marsh, thus making him afraid to continue to use the Marsh for his hunting parties. (R. 6). Arsenic is a well-known poison that is commonly associated with gold mining and extraction. *Id*. Additionally, Bonhomme claims that he "has decreased his hunting parties from eight a year to two a year"; however, Maleau maintains that the decrease in parties "is more likely a result of the general decline of the economy over the last few years." *Id*.

The water tests that Bonhomme conducted were paid for by PMI.[1] (R. 7). Although no samples were taken on Maleau's property, Bonhomme tested the water in the Ditch upstream and downstream of Maleau's property, and found that upstream, arsenic was undetectable, and that downstream, it was present in high concentrations. (R. 6). He also found that as the Ditch flows from Maleau's property towards Reedy Creek, "the concentration of arsenic decreases in proportion to the increasing flow in the Ditch." *Id*. He tested the water near the discharge from

[1] Notably, PMI is also paying the attorney and expert witness fees for Bonhomme. (R. 7).

his culvert into Reedy Creek and found that arsenic was undetectable upstream from the culvert, and present in "significant concentrations" below the culvert. *Id*. He also found that arsenic was detectable at low levels throughout the Marsh, although there have been "no notable changes in the flora and fauna" surrounding Bonhomme's hunting lodge. *Id*. Additionally, the USFWS detected arsenic in three Blue-winged Teal in the Marsh. *Id*.

Arsenic enters the Ditch through rainwater runoff that "flows down" Maleau's mining waste piles and "percolates through them," eventually entering soil that has been eroded by gravity. (R. 5). This soil erosion forms pathways for the runoff, leaching and carrying arsenic, to reach the Ditch. *Id*. From there, the arsenic flows through the Ditch until it is discharged through a culvert, owned by Bonhomme, into Reedy Creek. *Id*. At about fifty miles in length, Reedy Creek is an interstate water that flows through both Progress and New Union. *Id.* It "maintains water flow throughout the year," and is used by farmers, whose products are sold in interstate commerce, for irrigation. *Id*. The Creek also serves as a water supply for a service plaza on a federally-owned highway that sells gasoline and food. *Id*. Reedy Creek begins in New Union, enters Progress, and ends in the Marsh. *Id*. The arsenic enters Reedy Creek through Bonhomme's culvert, and enters the Marsh through Reedy Creek. *Id*.

In its suit against Bonhomme, Progress is acting in its prosecutorial discretion to protect the waters of the state, including the Marsh, and to protect Maleau, a citizen of Progress. *Id*. at 6.

STANDARD OF REVIEW

The district court granted Maleau's motion to dismiss. This Court reviews a district court's decision to grant a motion to dismiss *de novo*. *Okwu v. McKim*, 682 F.3d 841, 844 (9th Cir. 2012). Additionally, this Court may affirm a decision of the district court on any ground made manifest by the record. *Salmeron v. United States*, 724 F.2d 1357, 1364 (9th Cir. 1983).

SUMMARY OF THE ARGUMENT

Bonhomme is unable to bring suit against Maleau for violating § 1311(a). First, Bonhomme lacks standing because he does not have an injury in fact that is fairly traceable to Maleau's activities and that is likely to be redressed by a decision in Bonhomme's favor. Second, acting as a front for PMI, he is not the real party in interest to bring the suit against Maleau. Finally, as a French national, he is not a "citizen" for the purposes of the CWA's citizen suit provision.

Reedy Creek is a navigable water. Characteristics of Reedy Creek comply with the Supreme Court's definition of "waters of the United States": it is a continuously flowing body of water and is referred to in common language as a water formation (*i.e.* it is a "creek"). Additionally, Reedy Creek is an interstate water, flowing between the States of New Union and Progress. Even though Reedy Creek is not considered traditionally navigable because it is not an aquatic highway capable of supporting travel, the CWA holds an expansive view of navigability, and Reedy Creek is used in interstate commerce: Bounty Plaza, a rest stop on a federally funded interstate highway, uses Reedy Creek as a water supply, and farmers use it to irrigate crops that are then sold in interstate commerce.

The Ditch is a navigable water. Degradation of the water flowing from the Ditch could negatively affect interstate commerce in the Marsh, which is used by interstate duck hunters who produce $25 million in local revenue. Additionally, the Ditch is a tributary of Reedy Creek because its waters flow into Reedy Creek, which is consistent with EPA regulation defining CWA jurisdiction. The Ditch also complies with the Supreme Court's definition of a "water of the United States": it is a relatively permanent, continuously flowing body of water, even though

it is annually affected by drought, and restrictive covenants require property owners to maintain it. These characteristics are contrary to the notion that the Ditch could be a point source.

Bonhomme violates the CWA by discharging arsenic into Reedy Creek through a culvert on his property. The statutory construction of the CWA focuses § 1311(a) liability on the "discharge" point and the "owner" of that point source, rather than on the origin of the pollutant. Additionally, the examples listed in the EPA's definition of "point source" are items that do not generate pollutants, but merely transport them. Futhermore, the CWA is a strict liability statute. All that is needed for a party to be found liable is proof that the party discharged a pollutant, through a point source, into a navigable water, which is exactly what Bonhomme has done here.

Maleau is not in violation of § 1311(a) because his mining waste piles are nonpoint sources, and thus not subject to the CWA's permitting requirements. To be a "point source," as defined by the CWA, an item must be a "discernible, confined and discrete conveyance." Because Maleau's piles are (1) not explicitly listed in the CWA's definition of point source; (2) were not constructed for the purpose of storing or transferring pollutants; and (3) are not unquestionable conveyances, they are not point sources. Furthermore, there is no evidence in the record that Maleau has collected or channeled rainwater runoff in any way as to render his piles point sources. Thus, Maleau's waste piles are nonpoint sources for the purposes of the CWA.

ARGUMENT

I. BONHOMME LACKS STANDING TO BRING SUIT AGAINST MALEAU; REGARDLESS, HE IS NOT THE REAL PARTY IN INTEREST.

A. Bonhomme lacks standing because he does not have an injury in fact that is fairly traceable to Maleau's activities and that is likely to be redressed by a decision in Bonhomme's favor.

Article III of the United States Constitution limits judicial review in federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. Over time, the Supreme Court has

established that "the irreducible constitutional minimum of [Article III] standing contains three elements": (1) the plaintiff must have suffered an "injury in fact" that is both "concrete and particularized" and "actual or imminent"; (2) the injury must be fairly traceable to the defendant's action; and (3) it must be likely that the injury will be redressed by a judicial decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). If the plaintiff cannot meet all three parts of this test, then the suit must be dismissed for lack of standing. *LPA Inc. v. Chao*, 211 F. Supp. 2d 160, 163 (D.C. Cir. 2002).

To establish a concrete and particularized injury, the plaintiff must have more than a "generally available grievance about the government." *Lujan*, 504 U.S. at 573-74 (explaining that "claiming only harm to his and every citizen's interest" and "seeking relief that no more directly and tangibly benefits him than it does the public at large…does not state an Article III case or controversy"). In *Sierra Club v. Morton*, 405 U.S. 727 (1972), for example, the plaintiffs alleged that the change in aesthetics and ecology from a proposed development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." 405 U.S. at 734. Despite the magnitude of the project and the large area it would impact, the Court found that the plaintiffs lacked standing. *Id*. at 734-35 (noting that an injury in fact "requires more than an injury to a cognizable interest"; "it requires that the party seeking review be himself among the injured," and finding that "[t]he Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the..development"). Conversely, in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), the Court found that affidavits and testimony that showed that the discharges at issue "directly affected" the plaintiff's "recreational,

aesthetic, and economic interests," were more than "general averments" and "conclusory statements," and thus "enough for injury in fact." 528 U.S. at 183-85.

If an injury is not actual, it must be imminent. *Lujan*, 504 U.S. at 564. Even if it is imminent, however, it still must be concrete and particularized. *Id*. at 560. In *Lujan*, for example, plaintiffs submitted signed affidavits about their direct interaction with an endangered species and cited future plans to revisit the areas in question; yet they were found to lack imminent injury because their future plans were unspecific and undocumented. *Id*. at 564 (stating that an intent "to return to the places they had visited before—where they will presumably…be deprived of the opportunity to observe animals of the endangered species—is simply not enough").

Bonhomme claims two "injuries": (1) he is afraid that he won't be able to continue to use his marsh for hunting parties, as he has done in the past, and (2) he submits that there has been a decline in his hunting parties from eight a year to two a year. (R. 6). His first claim of injury is similar to that in *Lujan*, where the Court found that because the plaintiffs lacked reservations or return tickets, their injury was not imminent. 504 U.S. at 564. Bonhomme's second claim of injury is purely hypothetical and conjectural. There has been "no notable changes in the flora and fauna surrounding the hunting lodge," and it is possible that the number of yearly hunting parties that Bonhomme hosts has diminished because of the decline in the economy over the past few years. (R. 6). While the presence of arsenic in the water is undoubtedly an environmental risk, in order for an injury to be concrete and particularized, it must not just be an "injury to the environment, but an injury to the plaintiff." *Morton*, 405 U.S. at 734-35. Indeed, Bonhomme is not the only duck hunter who uses the marsh; it is a "major destination" that "attracts [duck] hunters from around the nation and even a few foreign countries." (R. 6). That not one of the other duck hunters, who would most likely share concern for the marsh and potentially a similar

alleged injury, has joined Bonhomme in bringing this action is further proof that Bonhomme does not have an injury.[2]

Although not having an "injury in fact" is sufficient to establish that Bonhomme lacks standing, *see Chao*, 211 F. Supp. 2d at 163, Bonhomme likewise fails the "causation" and "redressability" requirements. To meet the causation prong, the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (internal punctuation and citation omitted). As stated above, there have been no changes in the flora and fauna surrounding Bonhomme's hunting lodge, nor has Bonhomme asserted a more traceable injury such as arsenic pollution in his drinking water. (R. 6). Thus, there is no causal link between the defendant's action and Bonhomme's injury. Furthermore, it is at issue in this appeal whether Maleau's waste piles are the cause of discharge of the arsenic into the waters surrounding Bonhomme's property. Indeed, Bonhomme, for the purposes of the CWA, may be the source of the pollution himself. *See infra* Sections V and VI.

Finally, it is not "substantially likely," as opposed to "merely speculative," that Bonhomme's injury will be redressed by a decision in his favor. *Lujan*, 504 U.S. at 561. First, it is not clear that the decline in Bonhomme's hunting parties would be resolved, as the decrease may be due to the down economy and not to the presence of arsenic in the Marsh. (R. 6). Secondly, Bonhomme's fear that he won't be able to use the Marsh for hunting parties in the

[2] Additionally, it is worth noting that all of the testing that led to Bonhomme's discovery of the arsenic, and thus his claiming injury, was done by Bonhomme himself, at the expense of PMI. (R. 6, 7). Before Bonhomme can assert an injury, Progress submits that an additional, unbiased investigation would need to be completed to confirm that the results of Bonhomme's tests are accurate. For the purposes of this appeal, however, this Court must "accept the facts alleged in the complaint as true." *Cordiano v. Metacon Gun Club, Inc.* 575 F.3d 199, 204 (2d Cir. 2009) (internal punctuation and citation omitted).

future, (R. 6), like the claim of injury in *Lujan*, does not constitute a "concrete and particularized" injury, and thus would be difficult for the district court to redress. *See Lujan*, 504 U.S. at 568-71. Because Bonhomme lacks standing to bring suit against Maleau, the district court did not err in granting Progress and Maleau's motion to dismiss.

B. Bonhomme is not a real party in interest because he did not bring the case against Maleau on his own behalf, as required under § 1365.

Federal Rule of Civil Procedure 17 states that "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a)(1). The real party in interest is "the party that has a substantive right that is enforceable under the applicable substantive law." *Scheufler v. General Host Corp.*, 895 F. Supp. 1416, 1418 (D. Kan. 1995), *aff'd*, 126 F.3d 1261 (10th Cir. 1997). Additionally, the CWA requires, as part of its citizen suit provision, that an action be commenced by a citizen "*on his own behalf*." 33 U.S.C. § 1365 (emphasis added).

Even if the Court finds that Bonhomme has standing, he is still unable to bring his claim against Maleau because he is not the real party in interest. Bonhomme did not bring suit against Maleau on his own behalf. Instead, he brought suit as a front for PMI. The record makes clear that PMI has an interest in the outcome of Bonhomme's lawsuit against Maleau: PMI (1) paid for Bonhomme's tests to determine the presence of arsenic in the water; (2) is paying for Bonhomme's attorney's fees; (3) is paying for Bonhomme's expert witnesses; and (4) is in "direct competition with Maleau and his mining business." (R. 7).

In light of these facts, PMI is a "required party," and thus should have been joined as a party in Bonhomme's lawsuit. Fed. R. Civ. P. 19(a)(1). Although "[t]here is no prescribed formula for determining…whether a person…is an indispensable party," *Niles-Berment-Pond Co. v. Iron Moulders' Union, Local No. 68*, 254 U.S. 77, 80 (1920), "the absent party must be interested in the controversy." *Washington v. United States*, 87 F.3d 421, 427-28 (9th Cir. 1936)

(discussing questions to consider in determining the interest of the absent party). PMI is not only paying for various aspects of Bonhomme's lawsuit and in "direct competition" with Maleau, but it is also using Bonhomme's land for recreational business activity in the form of duck hunting. (R. 7-8). Thus, PMI is an "interested party," and necessarily, an "indispensable" one. *Washington*, 87 F.3d at 428.

An additional factor in determining whether joinder of a party is necessary is whether the final determination, in the absence of such party, will "be consistent with equity and good conscience." *Id*. at 428. Here, not joining PMI as a party, may result in Maleau's inability to obtain necessary discovery, as the party he would want to obtain discovery from has not been joined in the case. (R. 7). Additionally, this would lead to Maleau's inability to craft a full defense for a full and fair disposition of the case.[3] *Id*. Because Bonhomme's case against Maleau was not brought by the real party in interest, who is PMI, the district court did not err in granting Progress and Maleau's motion to dismiss on this issue.

II. AS A FRENCH NATIONAL, BONHOMME IS NOT A CITIZEN, AND THE PLAIN LANGUAGE MEANING OF THE CITIZEN SUIT PROVISION PROHIBITS HIIM FROM BRINGING HIS CLAIM.

As a foreign national, Jacques Bonhomme is precluded from filing a citizen suit under the CWA. In addition to the constitutional standing requirement, actions under the CWA are limited to "citizens." 33 U.S.C. § 1365. Bonhomme is a foreign national of France. (R. 8). Therefore, he cannot bring a citizen suit under the CWA.

"Citizen," is defined in the CWA as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Also, it is defined in Black's Law Dictionary

[3] Indeed, the district court may very well have been required to join PMI . Fed. R. Civ. P. 19(a)(2). However, PMI lacks standing in this suit for the same reasons that Bonhomme does. *See supra* Part I.A. Thus, any failure to join PMI by the district court is harmless error. *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 913 (1st Cir. 1989).

as, "[a] person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy *all* its civil rights and protections; a member of the civil state, entitled to *all* its privileges." BLACK'S LAW DICTIONARY 278 (9th ed. 2009) (emphasis added). Citizen standing has been granted to States, municipalities, and domestic companies. 33 U.S.C. § 1362(5) (2006). Senate Conference Reports on the CWA state that the "[d]efinition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*." S. Rep. No. 92-1236, at 146 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823. *See Morton*, 405 U.S. 727. The CWA definition is, therefore, intended to reflect the Article III aspect of standing. *See supra* Part I.

While citizen suit provisions have given persons the ability to file enforcement actions under the CWA, it is necessary for traditional concepts of domestic citizenship to remain intact. Citizen suit provisions have been construed as powers granted to "private attorneys general." *Middlesex Cnty. Sewarage Auth. v. Nat'l Sea Clammers Ass'n*., 453 U.S. 1, 13 (1981). The phrase "attorneys general" itself derives from an elective office, the right of which to vote for is expressly limited to *citizens* of the United States ("The right of citizens of the United States to vote shall not be denied or abridged." U.S. Const. amend. XV). Thus, while citizen suits have given persons the power to litigate under the CWA, the classical requirements of citizenship, as embodied within the Constitution, have not been abandoned, and therefore Bonhomme is not a citizen. (R. 7).

Bonhomme would advocate for an expanded view of "citizen" that goes beyond the plain language of the CWA; yet, such an interpretation would be contrary to the necessary and traditional practice of differentiating between citizens and non-citizens. *See* U.S. Const. art. IV. § 2 ("The citizens of each state shall be entitled to all privileges and immunities of *citizens* in the

several states.") (emphasis added). *See also* U.S. Const. art. II § 1 ("No person except a natural born *citizen,* or a *citizen* of the United States . . . shall be eligible to the office of President."). Other areas of the Constitution give rights and privileges to "persons" or "the people." *See* U.S. Const. amend. IV ("The right of the *people* to be secure in their persons, houses, papers, and effects."). *See also* U.S. Const. amend. I ("the right of the *people* peaceably to assemble"). A plain language analysis of word choice is of utmost importance in determining the application of rights and privileges contained in the Constitution, and is just as important when determining authority that has been granted under the CWA.

Indeed, the Supreme Court has granted foreign nationals the ability to bring suit. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 409 (1964). In *Sabbatino,* the court stated that, "[t]he privilege of suit has been denied only to governments at war with the United States, or to those not recognized by this country." Additionally, in *Disconto Gesellschaft v. Umbreit*, the court declared that "[a]lien citizens . . . are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights." 208 U.S. 570, 578 (1908). However, those suits are limited to those related to violations of fundamental rights; basic human rights such as personal liberty, the enjoyment of property interests, and political freedom have been afforded to non-citizens. *See Plyler v. Doe*, 457 U.S. 202, 211-212 (1982) (illegal aliens are protected by the Equal Protection Clause). In *Wong Wing v. United States*, 163 U.S. 228, 238 (1896), resident aliens were entitled to Fifth and Sixth Amendment protections. *See also* 28 U.S.C. § 1350 (2006) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."). None of the aforementioned fundamental rights that have been accorded to non-citizens are at issue here; Bonhomme's liberty has not been compromised and he is as capable of applying for and

receiving a discharge permit as any other person. (R. 9). The right to sue for an alleged violation of the CWA is a privilege reserved to *citizens* of the United States, and because Jacques Bonhomme is not a citizen, he lacks standing and the district court did not err in granting the motion to dismiss on this issue.

III. REEDY CREEK IS A NAVIGABLE WATER SUBJECT TO CWA JURISDICTION BECAUSE IT IS A CONTINUOUSLY FLOWING INTERSTATE WATER THAT IS USED IN INTERSTATE COMMERCE.

A. As a continuously flowing body of water, Reedy Creek fits the Supreme Court's definition of "water of the United States" under the *Rapanos* plurality test.

Reedy Creek is a navigable water because its characteristics comply with the Supreme Court's definition of "waters of the United States," as set out in the plurality test[4] in *Rapanos v. United States*, 547 U.S. 715 (2006) (Scalia, J., plurality opinion). The Supreme Court defined the term "water of the United States" as "relatively permanent, standing, or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Rapanos*, 547 U.S. at 739 (citation omitted). Like the Buena Vista River, a "traditionally navigable" water that "maintains water flow throughout the year," Reedy Creek is a continuously flowing body of water that does not dry up in periods of drought. (R. 5). Thus, Reedy Creek satisfies the first part of the *Rapanos* definition of "waters of the United States." *See Rapanos*, 547 U.S. at 739.

[4] If Justice Kennedy's "significant nexus" test, as described below, were applied, then there would not be enough information in the record to determine whether Reedy Creek is a "water of the United States," because that test requires a "significant nexus" to a traditional navigable waterway. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). Reedy Creek is not a traditional navigable waterway, and it is unclear what its location is in relation to the Buena Vista River, which is a traditional navigable waterway. (R. 5). However, so long as one of the *Rapanos* tests are met, then a "water of the United States" can be found. *Rapanos*, 547 U.S. at 810. *See United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

Reedy Creek is also a water with "geographic features" that can be referred to in "ordinary parlance" as a water formation. *See id*. While "creek" is not included within the above list, "creek" is "defined as 'a natural stream of water . . . .'" *United States v. Brink*, 795 F. Supp. 2d 565, 578 (S.D. Tex. 2011) (quoting *Merriam-Webster* 2011). Because a "creek" is a "stream," and "stream" is included in the *Rapanos* list of waters that would qualify as a "water of the United States," Reedy Creek satisfies the second part of the Supreme Court's definition. Therefore, Reedy Creek is a "water of the United States," subject to CWA jurisdiction, because it is continuously flowing, and is named as a water body that is consistent with the *Rapanos* definition. *See* 33 U.S.C. § 1362(7).

B. Reedy Creek is a navigable water under the CWA because it is an interstate water that is used in interstate commerce.

1. As a body of water that flows between the States of New Union and Progress, Reedy Creek is an interstate water, and, subsequently, is a navigable water pursuant to the CWA.

As an interstate water, Reedy Creek is considered a navigable water under the CWA. The CWA defines "navigable water" as "the waters of the United States . . . ." 33 U.S.C. § 1362(7). In an EPA regulation, "waters of the United States" was further defined to include "[a]ll interstate waters." 40 C.F.R. § 122.2 (2013). The declaration that "*all* interstate waters" fall under the definition of "waters of the United States," suggests that there are no qualifications limiting the regulation's scope, so long as the water's range reaches more than one state's boundaries. *Id*. (emphasis added).

In *United States v. Cooper*, 482 F.3d 658 (4th Cir. 2007), the court applied the "interstate waters" provision and determined that because the water at issue in that case was a tributary of an interstate water that flowed through two states, that it, in turn, was also a "water of the United States." 482 F.3d at 660 (citing 40 C.F.R. § 122.2). Here, like in *Cooper*, where the water

extended beyond state boundaries, Reedy Creek begins in New Union and ends in Progress, effectively rendering it an interstate water. (R. 5). Because Reedy Creek is an interstate water, it is a "water of the United States," subject to the jurisdiction of the CWA. *See* 40 C.F.R. § 122.2. *See also* 33 U.S.C. § 1362(7).

2. Reedy Creek is a navigable water because it is used in interstate commerce, serving as the water source of a service station on a federally funded interstate highway, and as the source of irrigation for crops sold in interstate commerce.

Because Reedy Creek is used in interstate commerce, it is subject to CWA jurisdiction as a navigable water. *See* 33 U.S.C. § 1362(7). There are "three broad categories of activity that Congress may regulate under its commerce power": (1) "channels of interstate commerce"; (2) "instrumentalities of interstate commerce"; and (3) "those activities having a substantial relation to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Traditional navigable waters were required to be "navigable in fact," meaning that they had to be aquatic highways capable of supporting travel. *Nat'l Wildlife Fed'n v. Alexander*, 613 F.2d 1054, 1059 (D.C. Cir. 1979).

Reedy Creek is not considered a traditionally navigable waterway because it is not used for "waterborne transportation" and could not be used for such with "reasonable improvements." (R. 9). *See Alexander*, 613 F.2d at 1059. However, the CWA does not require Reedy Creek to be traditionally navigable to qualify as a "navigable water." 32 U.S.C. § 1362(7). *See United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003). The Supreme Court's definition of "water of the United States" does not include an element of traditional navigability, and Reedy Creek fits the components of that definition. *See supra* Part III. *See also* 33 U.S.C. § 1362(7). Additionally, EPA regulation has defined "waters of the United States" to include "[a]ll waters which are

currently used, were used in the past, or may be susceptible to use" in interstate commerce. 40 C.F.R. § 122.2.

"Use" does not require Reedy Creek to be used in the traditional sense. *Lopez*, 514 U.S. at 558. *See Alexander*, 613 F.2d at 1059. For example, in *Heart of Atlanta Motel, Inc. v. United States*, the Supreme Court ruled that the public accommodation provision of the Civil Rights Act of 1964 was constitutionally valid as applied to the motel because interstate travelers patronized the establishment. 379 U.S. 241, 261 (1964). The court reached this conclusion even though the "operation of the motel . . . [was] of a purely local character." *Id*. at 258.

Here, Reedy Creek is used in interstate commerce as the water supply for Bounty Plaza, a rest stop on a federally funded interstate highway; subsequently, it can be inferred that its patrons, like in *Heart of Atlanta Motel*, are interstate travelers, and that the food and gasoline available there is sold in interstate commerce. (R. 5). Additionally, farmers in both New Union and Progress use Reedy Creek to irrigate crops, which are sold in interstate commerce. *Id*. Because the CWA has jurisdiction over waters that are not traditionally navigable, in furtherance of its objective to protect the "waters of the United States," and because Reedy Creek is used within the course of interstate commerce activities, Reedy Creek is a navigable water under the CWA, and, therefore, the district court did not err in finding against Maleau on this issue.[5]

[5] Notably, the district court held that Reedy Creek is a navigable water. (R. 2).

IV. THE DITCH IS A NAVIGABLE WATER UNDER THE CWA BECAUSE IT IS AN INTRASTATE WATER THAT COULD AFFECT INTERSTATE COMMERCE, IS A TRIBUTARY OF REEDY CREEK, AND IS A RELATIVELY PERMANENT, CONTINUOUSLY FLOWING BODY OF WATER.

A. The Ditch is an intrastate water that, through the discharge of arsenic, does or could affect interstate commerce activities of the Marsh, which generates millions of dollars in revenue through interstate hunters' use of the Marsh to hunt migratory birds.

The Ditch is an intrastate water, the "use, degradation, or destruction of which would affect or could affect interstate . . . commerce" in the Marsh, 40 C.F.R. § 122.2, which is used by interstate duck hunters. (R. 6). *See also*, 33 C.F.R. § 328.3 (2013). This regulatory language came to be known as the Army Corps of Engineers' Migratory Bird Rule. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs.*, 531 U.S. 159, 164 (2001) (*SWANCC*). In *Hoffman Homes, Inc. v. Adm'r, U.S. EPA*, the court noted that, "[t]hroughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds," and used this as its basis for ruling that migratory birds could connect a wetland with interstate commerce. 999 F.2d 256, 261 (7th Cir. 1993). In *Cargill, Inc. v. United States*, 516 U.S. 955 (1995) (mem.) (Thomas, J., dissenting), Justice Thomas's dissent of the court's denial of *certiorari* explained that "the Corps' regulations [were] based on the assumption . . . that the self-propelled flight of birds across state lines" was enough for the Corps to claim jurisdiction over any migratory bird habitat. 516 U.S. at 958. In *SWANCC*, the Supreme Court effectively invalidated the Migratory Bird Rule for its overly broad interpretation; however, the language in that regulation is identical to the language used in existing EPA regulation. 531 U.S. at 176-77. *See* 40 C.F.R. § 122.2.

This case can be differentiated from the Corps' broad application of the Migratory Bird Rule. The Marsh is home to a migratory bird population; however, the Marsh is used by duck hunters from Progress, New Union, and other neighboring states. (R. 5-6). While the migratory

birds, alone, may not establish a sufficient connection to interstate commerce, here, duck hunting draws over $25 million dollars in local revenue. (R. 6). *See Cargill*, 516 U.S. at 958 ("The eagle feathers at issue . . . were actually items of interstate commerce, not simply airborne interstate travelers."). The presence of migratory birds, leading to substantial revenue generated by interstate hunters is within "the boundaries envisioned by Congress." *United States v. Buday*, 138 F. Supp. 2d 1282, 1285 (D. Mont. 2001). *See Lopez*, 514 U.S. at 558-559 (Congress has authority to regulate activities substantially affecting interstate commerce). Because the Ditch is an intrastate water, the degradation of which, through the addition of arsenic, could negatively affect the interstate commerce activities in the Marsh, the Ditch is a navigable water and subject to the jurisdiction of the CWA. [6] *See* 40 C.F.R. § 122.2. *See also* 33 U.S.C. § 1362(7).

[6] While it can be claimed that arsenic would negatively affect the interstate commerce activities in the Marsh without determining that the Marsh is a "water of the United States," doing so adds a compelling reason why the Ditch should be regulated under the CWA: the "objective" of the CWA is to "restor[e] and maint[ain] [the] chemical, physical and biological integrity of [the] Nation's waters," and in order to do so, there is "an interim goal of water quality which provides for the protection and propagation of . . . wildlife and provides for recreation in and on the water. . . ." 33 U.S.C. § 1251(a)(2) (2006). It would be inconsistent with these goals and objectives if the Marsh, as a "water of the United States," were continually polluted by the water flowing from the Ditch. (R. 6). To be a "water of the United States," the Marsh must have a continuous surface connection, as described in *Rapanos*. 547 U.S. at 742 (Scalia J., plurality opinion). It must be "difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. So long as the wetland is adjacent: "bordering, contiguous, or neighboring," a "water of the United States" then it will meet this test. 33 C.F.R. § 328.3(c) (2013). *See Rapanos*, 547 U.S. at 724. Here, Reedy Creek is a "water of the United States." *See supra* Part III. Reedy Creek ends at the Marsh. (R. 5). Thus, the record does not show any discernible barrier between Reedy Creek and the Marsh, and if there was one, "[w]etlands separated from other waters of the United States by man-made dikes, or barriers . . . are adjacent wetlands." 33 C.F.R. § 328.3(c). *See Rapanos*, 547 U.S. at 724. Because the Marsh is adjacent to Reedy Creek, it satisfies the *Rapanos* plurality test and is a "water of the United States." (R. 6). Additionally, it is worth nothing that the district court determined that Reedy Creek being a "water of the United States" because it rests on federally owned property was true to the plain meaning of "waters of the United States." (R. 10).

B. The Ditch is a navigable water under the CWA because, flowing through a culvert into Reedy Creek, it is a tributary of the Creek.

Because the Ditch is a tributary of Reedy Creek, it is a "water of the United States." *See* 40 C.F.R. § 122.2 (defining "waters of the United States" to include "tributaries"). "A 'stream which contributes its flow to a larger stream or other body of water' is a tributary." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (quoting *Random House College Dictionary* 1402 (rev. ed. 1980)). Congress's "authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the [CWA]." *Deaton*, 332 F.3d at 707 (4th Cir. 2003). The CWA embraces an expanded view of "navigable water" which goes beyond "the classical understanding of that term." *United States v. Riverside Bayview*, 474 U.S. 121, 133 (1985).

Even though *Deaton* was decided before *Rapanos*, its interpretation of Congressional intent is consistent with the *Rapanos* plurality: the CWA definition of "navigable waters" is not "limited to the traditional definition . . . which required that the 'waters' be navigable in fact, or susceptible of being rendered so." *Rapanos*, 547 U.S. at 730. The *Deaton* court decided, that the ditch in that case was a tributary, even though it passed through "several other nonnavigable watercourses before reaching the navigable" water. 332 F.3d at 708. However, in order for a water to fall under the jurisdiction of the CWA in the Fifth Circuit, it must be "actually navigable or . . . adjacent to an open body of navigable water." *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).

Even though the Ditch is man-made, it is not precluded from being considered a tributary. (R. 5). *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009). Here, Reedy Creek is a navigable water. *See supra* Part III. The Ditch flows for at least three miles before it flows through the culvert into Reedy Creek. (R. 5). The presence of the culvert between the Ditch and

Reedy Creek does not preclude the Ditch from being a tributary because the ditch in *Deaton* was a tributary that passed through multiple waterways before reaching the navigable water. (R. 5). *See Deaton*, 332 F.3d at 708.

Alternatively, if adjacency were required, as in the Fifth Circuit, then it may be determined by establishing a "hydrological connection" between a tributary and the navigable water. *Rapanos*, 547 U.S. at 728. The presence of "significant concentrations" of arsenic in Reedy Creek just below the discharge point, confirms that pollution in the Ditch has led to the pollution of the Creek, (R. 6), which establishes a "hydrological connection" supporting adjacency. *Rapanos*, 547 U.S. at 728. *See United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974) (The CWA exercises jurisdiction over nonnavigable tributaries because their pollution "not only may but very probably will affect" navigable waters). Because the Ditch flows into Reedy Creek, a navigable water, it is a tributary and subject to CWA jurisdiction.

C. The Ditch is a navigable water because it has a "continuous surface connection," and may have a "significant nexus," with Reedy Creek.

1. As a continuously flowing body of water, the Ditch fits the Supreme Court's definition of "water of the United States," as set out in the plurality test.

The Ditch is a navigable water because its characteristics satisfy the Supreme Court's definition of "water of the United States," pursuant to the *Rapanos* plurality test. In *Rapanos*, the plurality defined "waters of the United States" as "relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes." 547 U.S. at 739 (citation omitted). The *Rapanos* court did not exclude waters that experience annual dry periods. 547 U.S. at 732 n. 5.

"Waters of the United States" are distinguishable from point sources: "any discernible, confined and discrete conveyance," such as a "ditch," "from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2006). *See Rapanos*, 547 U.S. at 736. Point sources cannot be "waters of the United States" because "[t]he separate classification of 'ditch[es], channel[s], and conduit[s]—which are terms [that] ordinarily . . . describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large *not* 'waters of the United States.'" 547 U.S. at 735-736 (emphasis in original). However, even though a "ditch" is an example included in the definition of "point source," not every ditch is a point source; the *Rapanos* court ordered remand for the lower court to determine whether that ditch was a "water of the United States," and if all ditches were point sources then none would be analyzed to determine otherwise. 547 U.S. at 757.

Here, the Ditch is a "water of the United States." The Ditch has "continuously flowing" water, other than in times of drought when it is dry for up to three months out of the year. (R. 5). *See Rapanos*, 547 U.S. at 739. *See also United States v. Vierstra*, 803 F. Supp. 2d 1166, 1171 (D. Idaho 2011), *aff'd*, 492 F. App'x 738 (9th Cir. 2012) (concluding that a canal with seasonal flows was a "water of the United States"). The Ditch is also "relatively permanent," because property owners, through whose land the Ditch flows, possess restrictive covenants that require them to maintain the ditch. (R. 5). *See Rapanos*, 547 U.S. at 739. Additionally, even though the Ditch is man-made, it is not precluded from being a "water of the United States." *Vierstra*, 803 F. Supp. 2d at 1170. The Ditch is consistent with what the Supreme Court has described as "open waters." *See Rapanos*, 547 U.S. at 735 (citing *Riverside Bayview*, 474 U.S. at 132; *SWANCC*, 531 U.S. at 167). "'[I]solated, intrastate waters" are not "waters of the United States." *Rapanos*, 547 U.S. at 726 (citation omitted). Here, the Ditch is not a separate, solitary water because it

discharges into Reedy Creek. (R. 5). For these reasons, the Ditch meets the Supreme Court's definition of a "water of the United States," and is subject to the jurisdiction of the CWA.

2. Pursuant to the Kennedy concurrence test, the Ditch has a "significant nexus" with Reedy Creek, supporting the conclusion that the Ditch is a "water of the United States," subject to the jurisdiction of the CWA.

If Justice Kennedy's "significant nexus" test were to be applied with the expanded view of navigability, consistent with the CWA's application of "navigable waters," then there would be a "significant nexus" between the Ditch and Reedy Creek. *See Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). In the *Rapanos* concurrence, Justice Kennedy concluded that to "constitute 'navigable waters' under the [CWA], a water . . . must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." 547 U.S. at 759 (citing *SWANCC*, 531 U.S. at 167, 172). To apply the test, it must be established that the water at issue "'significantly affect[s] the chemical, physical, and biological integrity of'" a traditionally navigable water. *Rapanos*, 547 U.S. at 753 (citation omitted).

This approach was contrary to prior case law, "which explicitly rejected such case-by-case determinations of ecological significance . . . ." *Id*. at 753 (citing *Riverside Bayview*, 474 U.S. at 135, n. 9). By limiting the "significant nexus" test to waters with connections to navigable-in-fact waters, Justice Kennedy made the test inconsistent with previous rulings that navigability, under the CWA, has an expanded definition. *See Rapanos*, 547 U.S. at 731. *See also* 33 U.S.C. § 1251.

In *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707-708 (9th Cir. 2007), the court determined that the "effect on" the water at issue in that case was "speculative" and as a result, the water did not have a "significant nexus" to a navigable water. 481 F.3d at 708. Here, if the "significant nexus" test was not limited to connections with navigable-in-fact waters, then the

connection between the Ditch and Reedy Creek, evidenced by the presence of arsenic in both waters would be sufficient to meet the test because it is not speculative like the connection in *San Francisco Baykeeper*. (R. 6). However, if the test is strictly followed, then the Ditch would only be a "water of the United States" if it shared a "significant nexus" with a navigable-in-fact waterway, such as the Buena Vista River, and the record lacks sufficient evidence to support that finding. *See supra* Statement of Facts. Therefore, because Reedy Creek is a navigable water under the CWA, *see supra* Part III, and provided the application of the "significant nexus" test did not adhere to traditional navigability, then there is a significant nexus between the Ditch and Reedy Creek.

Even though *Rapanos* produced two tests to determine whether a body of water is a "water of the United States," neither test is controlling; in the *Rapanos* dissent, Justice Stevens, joined by three, all agreed that where "either the plurality's or Justice Kennedy's test is satisfied" then jurisdiction should be found. 547 U.S. at 810. *See Johnson*, 467 F.3d at 66. *See also In re: Smith Farms Enters., L.L.C.*, CWA Appeal No. 08-02, 2010 WL 4001418, at *7 (EAB Sept. 30, 2010) (EPA policy dictates that a "water of the United States" can be found through application of either test). Therefore, even if Justice Kennedy's "significant nexus" test cannot be extended to include non-traditional navigability, then it can and should be ruled that the Ditch is a "water of the United States," pursuant to the outcome of the above plurality test analysis, and subject to the jurisdiction of the CWA, and, therefore, the district court erred in granting Maleau's motion to dismiss on this issue.

V. BONHOMME VIOLATES § 1311(a) BY DISCHARGING ARSENIC INTO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY.

The CWA prohibits "the discharge of any pollutant by any person" unless authorized by permit issued under the National Pollutant Discharge Elimination System (NPDES). 33 U.S.C.

§§ 1311(a), 1342 (2006). The "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "point source" is:

> 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).

It is well established that culverts, like the one on Bonhomme's property (R. 5), are "conveyances," and thus point sources for the purposes of the CWA. *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). Bonhomme does not dispute that his culvert qualifies as a point source.[7] (R. 9). He argues instead that despite his ownership of the culvert, he is not liable under § 1311(a) because Maleau's waste piles are the "but-for-cause" of the addition of arsenic to Reedy Creek. *Id.* As explained below, Bonhomme's argument is unavailing because (1) Bonhomme is liable for the arsenic that is discharged into Reedy Creek through his culvert, regardless of the source of the pollutant, and (2) there is no causation requirement in § 1311(a).

A. <u>As the owner and operator of the culvert, Bonhomme is strictly liable under § 1311(a), regardless of whether his culvert is the originating source of the arsenic</u>.

In determining liability under § 1311(a), the CWA focuses only on the point of discharge and its owner, not on the origin of the pollutant. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005). The CWA is a "strict liability" statute, meaning that the negligence or intention of the party responsible for the discharge is irrelevant when determining whether a violation has occurred. *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979). All that is needed to show that a party is liable under § 1311(a) is proof that the party

[7] It is also undisputed that arsenic is a pollutant for the purposes of the CWA. (R. 8).

has discharged a pollutant, through a point source, into a navigable water. *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) (explaining that "a point source need not be the original source of the pollutant"). Additionally, the examples of point sources listed in the CWA are "objects that do not themselves *generate* pollutants but merely *transport* them." *Id*. (emphasis added). Furthermore, the statutory construction of the CWA makes clear that § 1311 liability focuses on the "addition" of the pollutant and the "owner" of the point source, not on the origin of the pollutant. *El Paso*, 421 F.3d at 1143-44.

In reviewing the definition of "discharge" ("any addition of any pollutant to navigable waters from any point source"), courts have found "addition" ambiguous. *See El Paso*, 421 F.3d at 1143; *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d Cir. 2001). Furthermore, Congress does not define "addition" anywhere in the CWA, *Catskill*, 273 F.3d at 486, and the legislative history is silent on the matter. *Id*. at 493.

The Tenth Circuit, in interpreting "addition," found it "apparent [that] the liability and permitting sections of the [CWA] focus on the point of discharge, not the underlying conduct that led to the discharge." *El Paso*, 421 F.3d at 1143. The court first reviewed various sections of the CWA that focus specifically on the *discharge* of the pollutant, rather than any prior action. *Id*. For example, § 1311(e) states that limitations established by this section "shall be applied to all point sources of discharge of pollutants," and § 1342(a)(1) states that the EPA may "issue a permit for the discharge of any pollutant." 33 U.S.C. §§ 1311(e), 1342(a)(1). Next, the court found that the CWA consistently refers to obligations of "*owners and operators*" of point sources, rather than generators of pollutants. *El Paso*, 421 F.3d at 1143-44 (emphasis added). For example, §1311(g)(2) provides that a "owner or operator" of a point source may apply for a modification of the permit requirements, and § 1318(a)(A) requires that the "owner or operator"

of a point source establish and maintain records and perform other monitoring duties. 33 U.S.C. §§ 1311(g)(2), 1318(a)(A) (2006). Finally, the Tenth Circuit compared the broad language defining "discharge" with that used by the EPA in § 1344, *El Paso*, 421 F.3d at 1145: the EPA may issue permits "for *any category of activities* involving discharges of dredged or fill material." 33 U.S.C. § 1344(e)(1) (2006) (emphasis added). The court noted that § 1344 "emphasizes the 'activity' giving rise to the discharge," whereas § 1311 "focuses on the point source and its ownership." *El Paso*, 421 F.3d at 1145.

Additionally, the Tenth Circuit looked to regulations promulgated by the EPA to provide support for its interpretation that § 1311 focuses on the point source itself and its ownership. *Id*. at 1144. By regulation, the EPA has further defined the phrase "addition of any pollutant" to include "*discharges* through pipes, sewers, or other conveyances *owned by a…person*." 40 C.F.R. § 122.2 (emphasis added).

Given the statutory construction of the CWA, Bonhomme is liable under § 1311(a) simply by *owning* a culvert that *discharges* arsenic into a navigable water, and not acquiring the requisite permit. (R. 5). In *El Paso*, the defendant attempted to argue that as a successor owner of a point source, it was a "passive landowner," and that "addition" seemed to require affirmative conduct. 421 F.3d at 1142. The Tenth Circuit agreed that "addition" implied affirmative conduct, but explained that such a requirement was satisfied simply by the continuous introduction of polluted water to a navigable water from a point source owned and maintained by the defendant. *Id*. at 1144. The only affirmative conduct necessary is responsibility of a functional point source. *Id*. at 1143-44. Thus, simply by owning, without a permit, a culvert that continuously discharges arsenic into Reedy Creek, Bonhomme is in violation of § 1311(a). (R. 4-5). Like *El Paso*, "[t]his is a case where if you own the leaky 'faucet,' you are responsible for its 'drips.'" *Id*. at 1145.

Furthermore, the Ditch on Bonhomme's land was there when he acquired the property, and there is a restrictive covenant in his deed that requires him to maintain the Ditch. (R. 5). In fulfilling his duty to maintain the Ditch, Bonhomme should have known of the culvert's existence and conducted an investigation to determine whether, as an owner of a point source, he required a permit under the CWA. *Id*. Regardless, negligence and intent are not factors that are considered in determining liability under § 1311(a), as the CWA is a strict liability statute. *South Florida*, 541 U.S. at 105. Even if Bonhomme argues that he was unaware that he was discharging a pollutant through a culvert on his property, or that he did not intend to do so (indeed, he argues he is not the "but-for-cause" (R. 9)), he is still liable under the statute. *Earth Sciences*, 599 F.3d at 374. For the reasons stated above, the district court did not err in holding that Bohomme violates § 1311(a), and likewise did not err in denying Bonhomme's motion to dismiss on this issue.

B. Bonhomme is strictly liable, as causation is not a requirement of §1311(a).

Bonhomme's argument that he is not the "but-for-cause" of the discharge and thus should not be found liable, (R. 9), is unavailing because "there is simply no causation requirement in the statute." *West Virginia Highlands Conservancy, Inc., v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010). On its face, § 1311(a) bans "the discharge of any pollutant by any person," 33 U.S.C. § 1311(a), "regardless of whether that 'person' was the root cause or merely the current superintendent of the discharge." *West Virginia*, 625 F.3d at 168.

Moreover, case law has rejected any proposition of a causation requirement. *Id.* at 167. In *United States v. Law*, 979 F.2d 977 (4th Cir. 1992) (*per curiam*), the defendant did not generate the pollution being discharged, but was nevertheless held liable for allowing the pollutants to leach into navigable waters. 979 F.2d at 978-80. The court stated that the origin of the pollutants

was "irrelevant," and that the "proper focus" was on the "discharge from the ponds." *Id*. at 979; *see also El Paso*, 421 F.3d at 1143.

Furthermore, the technology-based standards set by the EPA support the notion that causation plays no part in the enforcement of § 1311. *West Virginia*, 625 F.3d at 168. The standards "limit the overall levels of individual pollutants in the water rather than solely limiting the addition of new pollution[,]…allow[ing] the EPA and the states to regulate overall pollutant levels without regard to who generated the pollution." *Id*. Indeed, a causation approach by Congress might "allow for all manner of gamesmanship among polluters: so long as [a polluter] could argue it was not the root cause of pollution, it too would be free from permit requirements." *Id*.

Bonhomme is attempting to pass the responsibility and cost of obtaining a permit to Maleau in arguing that because he has not generated the pollutant, he should not be held liable under § 1311(a). (R. 9). Causation, however, is not recognized as a requirement of the CWA, which is a strict liability statute, and thus, Bonhomme's argument fails. *West Virginia*, 625 F.3d at 167. The district court therefore did not err in holding that Bonhomme is in violation of § 1311(a), or in denying his motion to dismiss on this issue.

VI. MALEAU IS NOT IN VIOLATION OF § 1311(a) BECAUSE HIS MINING WASTE PILES ARE NONPOINT SOURCES.

Bonhomme submits that Maleau's piles are "point sources." (R. 4-5). This argument is unavailing because Maleau's waste piles are nonpoint sources for the purposes of the CWA.

A. Maleau's mining waste piles do not constitute a "discernible, confined and discrete conveyance," and thus are nonpoint sources.

Maleau's mining waste piles do not qualify as point sources, and thus are not regulated by § 1311(a). *Cordiano,* 575 F.3d at 224. Section 1311(a) only prohibits the discharge of

pollutants, *through point sources*, into navigable waters. 33 U.S.C. §§ 1311(a), 1362(12). To be a point source, something must be a "discernible, confined and discrete *conveyance*." 33 U.S.C. § 1362(14) (emphasis added). Furthermore, a point source cannot just be any "tangible, identifiable thing." *Ecological Rights Found. v. Pacific Gas and Electric Co.*, 713 F.3d 502, 509-10 (9th Cir. 2013) (citing cases). Instead, it must be something that *transports* pollutants. *South Florida*, 541 U.S. at 105. If something is not found to be a point source, it is necessarily a "nonpoint source." *See Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cr. 1999) (relying on "the familiar principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other").

"Nonpoint source" is not defined in the CWA, but the EPA has published guidelines explaining that nonpoint source pollution "does not result from a discharge at a specific, single location (such as a single pipe) but generally results from land runoff, precipitation, atmospheric deposition, or percolation." EPA Office of Water, *Nonpoint Source Guidance 3* (1987); *see also Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (explaining that "nonpoint source pollution [i]s runoff caused by rainfall around activities that employ or create pollutants").

Stormwater runoff is considered a nonpoint source when it is not discharged from a point source, but "rather runs off and dissipates in a natural and unimpeded manner." *Northwest Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070 (9th Cir. 2011), *rev'd on other grounds sub nom., Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 22 (2012). For example, in *Ecological Rights*, the Ninth Circuit found that utility poles are not "discernible, confined and discrete conveyances." 713 F.3d at 510. The plaintiffs alleged that rain fell on and around the defendants' utility poles and became contaminated with wood preservative that resulted in the preservative being "carried by storm water runoff discharged from the [p]oles" to navigable waters.

Ecological Rights, 713 F.3d at 508-09. The court found that "[s]uch allegations of generalized stormwater runoff do not establish a 'point source' discharge absent an allegation that the stormwater is discretely collected and conveyed to the waters of the United States." *Id*. at 509. In rejecting the plaintiffs' argument that the utility poles were themselves "conveyances," the court looked to case law to determine what physical things were considered conveyances in the past, and found that courts had only recognized as point sources things that: (1) the CWA specifically lists as point sources in § 1362(14); (2) "were constructed for the express purpose of storing pollutants or moving them from one place to another" (*e.g.*, aerial pesticide sprayers, manure spreader, sluice box, etc.); and (3) were undisputed point sources (pump station and pipes from which water is released). *Id*. at 509-10 (citing cases).

Maleau's mining waste piles are not point sources because they do not fall into any of the three categories recognized by the Ninth Circuit. *Id*. at 509-10. First, the piles are not specifically listed as point sources in § 1362(14). *Id*. at 509. The definition in § 1362(14) includes a dozen examples of point sources but none of them resemble a pile of dirt and stone. 33 U.S.C. § 1362(14). Second, Maleau's piles were not constructed for the express purpose of storing pollutants or moving them from place to place. *Id*. at 509. They do not hold pollutants like aerial pesticide sprayers, and they do not collect and move material like bulldozers and backhoes. *Id*. at 509 n. 4 (citing cases). Third, the piles are not undisputed point sources. *Id*. at 509-10. They are not pipes or culverts that are unquestionably conveyances. *Id*. Although piled debris, *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004), and human-made spoil piles, *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980), have been found by courts to be point sources, as explained below, those cases focused on the specific actions used to create the piles, rather than the physical object of a "pile" as a point source. Thus, Maleau's piles

cannot be considered a point source for the purposes of the CWA because they do not constitute a "discernible, confined and discreet conveyance." 33 U.S.C. § 1362(14). The district court therefore did not err in determining that Maleau's waste piles are not point sources and in granting Progress and Maleau's motion to dismiss on that issue.

B. Maleau's conduct does not amount to "collecting" or "channeling," and thus his piles are nonpoint sources.

For surface runoff to be considered a discharge from a point source, it must have been collected or channeled by man. 40 C.F.R. § 122.2. Because Maleau has not collected or channeled stormwater runoff, his waste piles do not amount to point sources for the purposes of the CWA.

Under § 1314(f)(2)(B) of the CWA, "mining activities" are listed as nonpoint sources and therefore not subject to NPDES permitting requirements. 33 U.S.C. § 1314(f)(2)(B) (2006); *see Trustees for Alaska*, 749 F.2d at 557-58. In *Earth Sciences*, however, the Tenth Circuit established that regardless of § 1314, when mining activities release pollutants from a discernible conveyance, they are subject to NPDES permit regulation, as are all point sources. 599 F.2d at 373. Additionally, the court concluded that point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance. *Id*. Thus, applying *Earth Sciences*, Maleau's waste piles are a nonpoint source because they are not a discernible, confined and discrete conveyance, as explained above.

However, regardless of *Earth Sciences*, courts continue to examine "defendants' activities" in determining whether a pollutant has been discharged from a point source. *See, e.g.*, *Abston*, 620 F.2d at 43. Indeed, the EPA has issued a regulation stating that surface runoff is not discharged from a point source unless it is *collected or channeled by man*, 40 C.F.R. § 122.2

(emphasis added), causing courts to consider the defendant's actions when determining point versus nonpoint source pollution.

Both *Parker* and *Abston* involved piles of material found by the court to be point sources. *Parker*, 386 F.3d at 1009 (piled debris that collected stormwater and channeled it into a nearby stream); *Abston*, 620 F.2d at 43 (defendants constructed "sediment basins" for their human-made spoil piles to limit rainwater runoff). In *Parker*, the Eleventh Circuit looked not only to the construction of the piles themselves but also to backhoes and other earth-moving equipment, , tangible items that are themselves point sources, that were found on the defendant property. 386 F.3d at 1009 ("We hold that this debris *and construction equipment* qualifies as a point source under the CWA."); *see also Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (finding that "bulldozers" and "backhoes" can be point sources). In *Abston*, the court noted that "natural rainfall" is excluded from the definition of "discharge," 620 F.2d at 44, and relied on the defendants' activities—constructing sediment basins to limit surface runoff—in determining whether the spoil piles constituted a point source. *Id*. at 47. Because the defendants' actions ultimately proved unsuccessful, the court found that the defendants' activities amounted to the "collecting" or "channeling" of stormwater runoff. *Id.*; *compare with Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010) (holding that because the defendants' actions—developing a cover system for their mining pits to limit surface runoff—were "designed to divert water away from the pits," and those actions were successful, their mining activities amounted to a nonpoint source).

Unlike the defendants in *Parker* and *Abston*, none of Maleau's activities amount to the "collecting" or "channeling" of surface runoff. For example, there is no evidence, as there was in *Parker*, that Maleau has used earth-moving equipment in order to manipulate his piles.

Additionally, there is no evidence, as there was in *Abston*, that Maleau (1) was aware of any pollution caused by rainwater runoff seeping through his piles and (2) tried to stop the runoff in any way. Therefore, there is no evidence that Maleau has collected or channeled the stormwater runoff. *See supra* Statement of Facts; *see also Cordiano*, 575 F.3d at 223 (finding "insufficient evidence that surface water runoff from [a] berm constitutes a discharge from a point source").

Furthermore, the Eighth Circuit, in noting that a "discharge of a pollutant requires an 'addition' of a pollutant from a 'point source,'" has held that neither term applies to "soil erosion." *Missouri ex rel. Ashcroft v. Dep't of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982). Rainwater runoff enters the Ditch from Maleau's piles through soil eroded by gravity, and not by any "collection" or "channeling" on the part of Maleau. (R. 5). Without evidence of any action taken by Maleau to collect or channel the rainwater runoff that pollutes the Ditch, this Court cannot find that Maleau's piles are a point source under § 1311(a). *See Cordiano*, 575 F.3d at 223. Thus, Maleau's piles are a nonpoint source and the district court did not err in granting Progress and Maleau's motion to dismiss on this issue. [8]

CONCLUSION

For these reasons, Progress respectfully requests that this Court reverse the district court's holding that the Ditch is not a "water of the United States," and subsequently, the district court's grant of Maleau's motion to dismiss on this issue. Additionally, for these reasons, Progress respectfully requests that this Court affirm the district court's holding, and its order on the motions to dismiss, for the remaining issues on appeal. *See supra* Statement of the Issues.

[8] Progress acknowledges that it may become necessary to manage Maleau's mining waste piles as a nonpoint source. 33 U.S.C. § 1329 (2006); *see Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) ("Section 1329…requires states to adopt nonpoint source management programs and similarly provides for grants to encourage a reduction in nonpoint source pollution."). Regardless, for the purposes of this appeal, Maleau's waste piles are nonpoint sources and thus not subject to the CWA's permitting requirements.