Team 49

CA. No. 13-0123

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

CONSOLIDATED CASES

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Circuit Court Opinions

District Court Opinions

Constitutional Provisions

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

This case is an appeal from a final judgment of the United States District Court for the District of Progress. The district court had proper subject matter jurisdiction over the case, pursuant to 28 U.S.C. § 1331, because the issues arise out of the Clean Water Act (CWA). On July 23, 2012, the district court granted Shifty Maleau's motion to dismiss and denied Jacques Bonhomme's motion to dismiss. Jurisdiction is proper in this Court under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

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

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

3. Whether Bonhomme violated the Clean Water Act by adding arsenic to Reedy Creek through his culvert point source, even if Maleau is the but-for cause of the pollution.

4. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the Clean Water Act.

5. Whether Bonhomme is a "citizen" under CWA § 505, 33 U.S.C. 1365, who may bring suit against Maleau, even though he is a French national.

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

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress denying Jacques Bonhomme's motion to dismiss and granting Shifty Malueau's motion to dismiss. (R. 1). Jacques Bonhomme (Bonhomme) sued Shifty Maleau (Maleau) under the CWA's citizen suit provision, CWA § 505, 33 U.S.C. § 1365, seeking all available relief. (R. 4). The State of Progress (Progress) then sued Bonhomme under the CWA's citizen suit provision. (R. 5). Maleau intervened in Progress's action against Bonhomme under CWA § 505(b)(1)(B).

Id. Progress and Maleau filed a motion to consolidate their case with *Bonhomme v. Maleau*, and the district court granted this motion. *Id*.

Both Bonhomme and Maleau filed motions to dismiss. *Id*. The district court held that Progress adequately stated a cause of action and denied Bonhomme's motion to dismiss. (R. 10). The court further held that Bonhomme was not the proper plaintiff and dismissed his suit without prejudice. *Id*. The district court stated that even if Bonhomme was the proper plaintiff, it would have held in Maleau's favor on all issues, except that Reedy Creek is a navigable water. *Id*.

Progress filed a Notice of Appeal challenging the district court's holding that Ditch C-1 is not a navigable water, and Maleau filed a Notice of Appeal challenging Reedy Creek's status as a navigable water. (R. 2). In addition, Bonhomme filed a Notice of Appeal challenging the determination that (1) Bonhomme is not a real party in interest, (2) Bonhomme is not a "citizen" entitled to file a citizen suit under the CWA, (3) Maleau's mining waste piles are not "point sources," (4) Ditch C-1 is not a navigable water and (5) Bonhomme violated the CWA. (R. 1-2).

STATEMENT OF THE FACTS

Reedy Creek, Ditch C-1, and Wildman Marsh are waters located within the boundaries of Progress, and Progress seeks to protect those waters. (R. 5, 6). Reedy Creek is an interstate water that begins in New Union and flows into Progress before terminating in Wildman Marsh. (R. 5). In its entirety, Reedy Creek is around fifty miles long and maintains a continuous water flow. *Id*. While Reedy Creek cannot support waterborne transportation, citizens of Progress and other states utilize the water for a number of activities. (R. 9, 5). For example, Reedy Creek provides the water supply to Bounty Plaza, a service station on Interstate 250. (R. 5). Further, farmers in Progress and New Union divert water from Reedy Creek for agricultural purposes, and the resulting agricultural products enter interstate commerce. *Id*.

Ditch C-1 is located exclusively within Progress. *Id*. The water is over three miles long and flows into Reedy Creek via a culvert on Bonhomme's land. *Id*. Like Reedy Creek, Ditch C-1 cannot support waterborne transportation, but it aids several farmers by draining groundwater from the saturated soil on their agricultural properties. *Id*. In fact, a landowners association constructed Ditch C-1 in 1913 for that very purpose, and restrictive covenants require Bonhomme and Maleau to maintain the ditch on their properties. *Id*. Ditch C-1 maintains a constant flow of water and only goes dry during a short drought period that ranges from a few weeks to three months. *Id*.

Wildman Marsh is also located exclusively within Progress and is contained within the Wildman National Wildlife Refuge. (R. 5, 6). The body of water is owned and maintained by the United States Fish and Wildlife Service (USFWS). (R. 6). An extensive wetlands, Wildman Marsh attracts over a million ducks and other waterfowl during their twice annual migrations. (R. 5). Indeed, Wildman is conducive to duck hunting, and hunters from Progress and five neighboring states regularly utilize the wetlands. (R. 6). Further, Wildman attracts hunters from across the nation and from a few foreign countries. *Id*. In all, interstate hunters contribute over $25 million to the local economy. *Id*.

At some point, arsenic from Ditch C-1 began entering Reedy Creek and Wildman Marsh through the culvert on Bonhomme's land. *Id*. The arsenic has had a noticeable effect on at least Wildman Marsh as the USFWS has detected arsenic in several Blue-winged Teal. *Id*. The district court found and Bonhomme did not contest that his culvert is the point source of the arsenic entering Reedy Creek. (R. 9). However, Bonhomme sued Maleau as the but-for cause of the pollution. *Id*. Though Bonhomme is a French national, he has attempted to utilize the citizen suit provision of the CWA. (R. 8).

Bonhomme's alleged injury is that the arsenic in Reedy Creek and Wildman Marsh has forced him to reduce his hunting parties from eight to two per year. (R. 6). However, those hunting parties are primarily for the business clients and associates of Precious Metals Industry, Inc. (PMI). (R. 7-8). Bonhomme uses his hunting lodge beside Wildman Marsh solely for these hunting parties. *Id.* PMI is a gold mining company of which Bonhomme is a three percent shareholder and one of the seven members on the Board of Directors. (R. 7). PMI provided Bonhomme with funds to test Ditch C-1, Reedy Creek, and Wildman Marsh for arsenic concentrations. *Id.* In addition, PMI pays Bonhomme's attorney and expert witness fees in this case. *Id.* It is further noteworthy that PMI's gold mines are in direct competition with Maleau's mining business. *Id.*

Maleau conducts a gold mining operation in Lincoln County, Progress. (R. 5). Maleau removes the overburden and slag piles from that operation and trucks them to his property in Jefferson County, Progress. *Id.* The piles are adjacent to Ditch C-1. *Id.* When it rains, water flows down the piles, and gravity carries the water and the contents of the piles into Ditch C-1. *Id.* Maleau has not constructed a drainage basin or any other instrument to contain or channel the runoff. *See id.* Nevertheless, as arsenic is commonly associated with gold mining, arsenic may enter Ditch C-1 through the rainwater runoff. (R. 6).

Progress seeks to protect it waters and its citizens, but it must do so by utilizing the statute that Congress has provided. Under these facts, it is clear that Reedy Creek and Ditch C-1 are navigable waters and that Bonhomme's culvert is the point source of the arsenic entering Reedy Creek. As explained below, Maleau cannot be liable under the CWA, while Bonhomme is in the best position to prevent the spread of pollution.

STANDARD OF REVIEW

This Court reviews a grant or denial of summary judgment de novo. *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-250 (2d Cir. 2006). Therefore, this Court should give no deference to the lower court's decision and apply the same standard as the district court. *Whatley v. CNA Ins. Co*., 189 F.3d 1310, 1313 (11th Cir. 1999).

SUMMARY OF THE ARGUMENT

The district court erred in its holding that Ditch C-1 is not a navigable water, but it correctly determined that Reedy Creek is a navigable water, Bonhomme violated the CWA, Bonhomme is not a proper plaintiff, and Maleau did not violate the CWA. Reedy Creek and Ditch C-1 are navigable waters because navigable waters include interstate waters, intrastate waters whose use or degradation would or could affect interstate commerce, and tributaries of these waters. It is important for Progress, and other states, to assert jurisdiction over such waters and ensure their citizens the right to utilize and enjoy safe waterways.

Reedy Creek is navigable because it is an interstate water that flows from New Union to Progress. Further, Reedy Creek and Ditch C-1 are navigable waters because their pollution will substantially affect interstate commerce. EPA interpretations indicate that the CWA regulates waters that could affect interstate commerce, and the *Rapanos* decision did not affect this authority. Reedy Creek is the water supply for Bounty Plaza, a service station on Interstate 250. Also, farmers in Progress and New Union divert water from Reedy Creek for agricultural purposes. Further, farmers utilize Ditch C-1 to drain the saturated soil on their agricultural properties. As such, both Reedy Creek and Ditch C-1 could substantially affect interstate commerce and should be classified as navigable waters.

Even if they are not navigable waters in and of themselves, Reedy Creek and Ditch C-1 are tributaries of other navigable waters. Both waterways are relatively permanent and continuously flowing, with continuous surface connections to Wildman Marsh. Also, both waterways affect the chemical, physical, and biological integrity of Wildman Marsh. Because of the substantial affect these waters have on other navigable waters, the CWA provides Progress the authority to regulate them.

Bonhomme has violated the CWA by discharging arsenic into Reedy Creek through the culvert on his property. An item is a point source if it is the confined and discernible means by which pollutants enter a navigable water. Furthermore, the CWA is a strict liability statute that lacks causation or knowledge requirements. Thus, because the CWA focuses on the discharge of pollutants and not the underlying conduct that led to the discharge, Bonhomme has violated the CWA.

In addition, Bonhomme cannot maintain his citizen suit against Maleau. First, Bonhomme is not the real party in interest under FRCP 17. A plaintiff is the true party in interest only if his claim will preclude similar litigation against the defendant. Bonhomme alleged that the arsenic has reduced his hunting parties, but he is only adversely affected as a shareholder of PMI. The hunting parties were primarily for the benefit of PMI's clients and business associates, and PMI has funded Bonhomme's citizen suit. Thus, as PMI could sue Maleau, Bonhomme is not the real party in interest. Further, Bonhomme cannot substitute PMI as the real party in interest because a reasonable time has passed.

Bonhomme's citizen suit also fails because he is a French national and not a "citizen" under the CWA. The CWA allows citizens to bring suit against any person or entity in the United States that has violated the CWA, but it does not include foreign nationals in the statute's

definition of "citizen: or "person." Silence in the legislative history suggests that congress did not intend the definitions of citizen and person to apply to foreign nationals. Other environmental statutes and other provisions in the CWA expressly address foreign nationals and foreign governments, which further demonstrates Congress' intentional exclusion of foreign nationals in the citizen suit provision. Thus, Bonhomme is not a citizen under the CWA.

Finally, even if Bonhomme could maintain his suit, Maleau did violate the CWA because his slag piles are not point sources. The CWA only regulates the discharge of pollutants from a point source. A point source is defined as any discernible, confined and discrete conveyance. Rainwater flows down Maleau's slag piles, and gravity carries the water and any pollutants in the slag piles into Ditch C-1. Since the rainwater flows over the entirety of the piles and enters Ditch C-1 from various points, the conveyance is not confined. The conveyance is also not discrete because the pollutants do not enter Ditch C-1 at a distinct point. Thus, Maleau's slag piles are not point sources under the CWA.

ARGUMENT

I. Progress Has CWA Jurisdiction Over Reedy Creek And Ditch C-1 Because They Are Navigable Waters.

The State of Progress is concerned about water pollution and seeks to guarantee its citizens the right to utilize and enjoy safe waters. The CWA helps Progress achieve its goal and allows Progress to assert jurisdiction over its waters in most circumstances. 33 U.S.C. § 1344(g)(1). However, the CWA only grants authority over navigable waters. 33 U.S.C. § 1251(a)(1). Thus, in order to effectively enforce the CWA, the State of Progress must establish its waters are navigable and successfully prosecute individuals who pollute those waters. A broad interpretation of navigable waters would provide Progress a greater opportunity to protect the environment and monitor its waterways. Accordingly, this Court should support Progress in

its goal to eradicate water pollution and find that Reedy Creek and Ditch C-1 are navigable waters.

Navigable waters are not limited to waters that are navigable in fact. *Rapanos v. United States*, 547 U.S. 715, 730-31 (2006). In other words, water does not have to support waterborne transportation to be considered a navigable water. *Id*. The CWA defines navigable waters as "the waters of the United States." 33 U.S.C. § 1362(7). The EPA further defines waters of the United States as waters used in interstate commerce, interstate waters, intrastate waters whose use or degradation would or could affect interstate commerce or recreational activities, and tributaries of these waters. 40 C.F.R. § 122.2. Thus, Reedy Creek and Ditch C-1 are navigable waters because A) Reedy Creek is an interstate water, B) Reedy Creek and Ditch C-1 substantially affect interstate commerce, and C) Reedy Creek and Ditch C-1 are tributaries of other navigable waters.

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

Reedy Creek flows from New Union to Progress and is thus an interstate water. Congressional intent and legislative history, Supreme Court precedent, and the plain meaning of waters of the United States establish that navigable waters include interstate waters. Accordingly, Reedy Creek is a navigable water.

1. Congressional intent and legislative history establish that navigable waters include interstate waters.

Where Congressional intent is clear, courts should apply that intention to the statute at issue. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Courts may determine Congressional intent by examining legislative history and the overall legislative scheme. *California v. Sierra Club*, 451 U.S. 287, 297(1981). In this instance, the history of U.S. water statutes, in addition to the legislative history of the CWA, indicate a Congressional desire

to regulate interstate waters.

Prior to the enactment of the CWA, the Water Pollution Control Act (WPCA) and the Federal Water Pollution Control ACT (FWPCA) extended federal authority to regulate water pollution in interstate waters. Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948); Pub. L. No. 84-660, 70 Stat. 498 (1956). Enacted in 1948, the WPCA identified the pollution of interstate waters as a public nuisance. *See* § 2(d)(1),(4),62 Stat. at 1156-1157. In 1956, Congress strengthened the WPCA by requiring the creation of comprehensive programs for eliminating the pollution of interstate waters and their tributaries. *See* Pub. L. No. 84-660, 70 Stat. 498 (1956). Further, in 1967, the FWPCA required every state to create water quality standards for interstate waters within their respective boundaries. Pub. L. No. 89-234, 79 Stat. 908 (1965).

In the CWA of 1972, Congress defined navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Congress so defined navigable waters to broaden federal water pollution jurisdiction and respond to previously narrow and severely limited interpretations of navigable waters. *See* S. Rep. No. 414, 92d Cong., 1st Sess. 77. In expanding the scope of federal authority, the CWA retained jurisdiction over interstate waters and traditionally navigable waters. *Id.*

Water pollution statutes have consistently exercised authority over interstate waters. In fact, as the statutes have evolved, interstate waters have become synonymous with navigable waters. When Congress redefined navigable waters in the CWA, it did so to create a broader interpretation, not to eliminate waters already in its purview. In this case, the legislative history is indicative of Congressional intent. To exclude interstate waters from the definition of navigable waters would undermine that intent. Accordingly, as Reedy Creek is an interstate water, it is also a navigable water.

2. Supreme Court precedent establishes that interstate waters are navigable waters.

The Supreme Court has long recognized the importance of federal authority over interstate waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Further, the Supreme Court has never struck interstate waters as an inappropriate interpretation of navigable waters. *See Rapanos*, 547 U.S. at 715; *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Riverside Bayview Homes, Inc.*, 474 U.S. at 122. Thus, to interpret an interstate water as a navigable water is consistent with Supreme Court precedent.

The Court broadly interprets the definition of navigable waters and has determined the definition must include something more than just traditionally navigable waters. *Riverside Bayview Homes, Inc.*, 474 U.S. at 122. In addition, the Court has expressed a need for federal oversight to protect states from water pollution originating outside of their respective boundaries. *Illinois v. Milwaukee*, 406 U.S. 91, 107 (1972). The decision in *Rapanos* is consistent with such goals. *Rapanos*, 547 U.S. at 730-31. The *Rapanos* Court recognized the need for a broad definition of navigable waters, though it expressed a fear of unlimited CWA jurisdiction. *Id.* While the Court struck down certain interpretations of navigable waters, it did not consider whether the inclusion of interstate waters was a reasonable interpretation. *Id.*

The Court has not expressly stated that interstate waters are navigable waters, but the Court's silence demonstrates that such an interpretation is reasonable. Navigable waters must include something more than traditional navigable waters, and the inclusion of interstate waters is a logical candidate. Reedy Creek is the type of water for which the Court has expressed concern. If pollution originates in New Union and flows down Reedy Creek, it will negatively impact the resources and citizens of Progress. Without CWA jurisdiction over Reedy Creek and

other interstate waters, it would be difficult for Progress to prosecute an individual in New Union or elsewhere. The *Rapanos* Court correctly stated that the definition of navigable waters cannot include intermittent and ephemeral waters, but the definition should include bodies of water whose degradation would negatively affect the environment and the United States at large. Accordingly, Reedy Creek is a navigable water.

3. The plain meaning of waters of the United States demonstrates that interstate waters are navigable waters.

Because Congress defined navigable waters as waters of the United States, interstate waters are necessarily included. An interstate water does not belong to any particular state. In fact, it may flow through several states. Because an interstate water affects more than one state, it is by definition a water of the United States.

Reedy Creek affects both Progress and New Union. Indeed, neither state has more of an interest in Reedy Creek than the other. Since Reedy Creek flows through both states, it is a water of the United States. If Reedy Creek and other interstate waters are not waters of the United States, that would mean Congress only reserved jurisdiction over waters on federal lands. This was surely not Congress' intention. If Congress intended that result, then New Union could pollute Reedy Creek, and Progress would have no remedy. Rather, Congress intended for the definition of navigable waters to include interstate waters. Such an interpretation ensures the best results for the environment and the citizens of the U.S. Therefore, since interstate waters are waters of the United States, Reedy Creek is a navigable water.

B. Due to their impact on interstate commerce, Reedy Creek and Ditch C-1 are navigable waters.

Congress has the power to "regulate Commerce . . . among the several states." U.S. Const. art. I,§ 8, cl. 3. Where waters or their tributaries are instruments of interstate commerce,

or where their pollution will substantially affect interstate commerce, Congress has the right to regulate those waters. *United States v. Lopez*, 514 U.S. 549, 558 (1995). Without such an ability, a "gaping hole" would exist in the CWA. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). Also, the EPA interprets navigable waters to include waters whose use or degradation could affect interstate commerce. 40 C.F.R. § 122.2. This interpretation includes waters that foreign travelers use for recreational purposes and further includes tributaries of such waters. *Id*.

Reedy Creek and Ditch C-1 are navigable waters because their use or degradation substantially affects interstate commerce. Further, the *Rapanos* decision did not affect Congress' ability to regulate waters that substantially affect interstate commerce. Accordingly, Progress has CWA jurisdiction over Reedy Creek and Ditch C-1.

1. Reedy Creek and Ditch C-1 are navigable waters because they substantially affect interstate commerce.

Congress should regulate waters other than the actual channels of interstate commerce when such waters may affect interstate commerce. *State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 525 (1941). This power extends to intrastate as well as interstate waters. *United States v. Darby*, 312 U.S. 100, 118 (1941). Further, Congress may regulate a water that does not individually affect interstate commerce if the aggregate effect of similar waters is substantial. *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (a farmer's individual activities had a minimal impact on interstate commerce, but if all farmers engaged in the same activities, the effect could be substantial).

In *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979), the court determined that the stream at issue had an effect on interstate commerce. The stream was not navigable in fact and was not an instrumentality of interstate commerce. *Id*. at 374. However, the stream supported trout and beavers. *Id*. at 375. In addition, the stream supplied agricultural

irrigation, the products of which were sold in interstate commerce. *Id*. The court thus determined that the stream's effect on interstate commerce necessitated the need for CWA jurisdiction. *Id*.

In *United States v. Morrison*, 529 U.S. 598, 617 (2000), gender-based violence did not affect interstate commerce. The federal statute at issue derived its authority from the Commerce Clause, but the Court rejected the statute for four reasons. *Id*. at 613-16. First, gender-based violence was not an economic activity. *Id*. at 613. Second, the statute contained no jurisdictional element and essentially allowed Congress to apply the Commerce Clause to any crime. *Id*. Third, the Congressional findings did not support an effect on interstate commerce. *Id*. at 614. Finally, gender-based violence did not have an attenuated relationship with the negative effects on interstate commerce. *Id*. at 615-16.

Like the stream in *Earth Sciences, Inc.*, Reedy Creek has a discernible effect on interstate commerce. Reedy Creek is the water supply for Bounty Plaza, a service station located in New Union. Interstate travelers on I-250 purchase food and gasoline from Bounty Plaza, and without Reedy Creek, Bounty Plaza could not effectively operate its business. Reedy Creek is further like the steam in *Earth Sciences, Inc.* because farmers divert it waters for irrigation and then sell their products in interstate commerce. Without Reedy Creek's presence, the farmers' crops would fail, or if they could find another water source, their prices would raise accordingly. Either way, Reedy Creek has a substantial effect on interstate commerce.

Unlike the statue in *Morrison*, the CWA regulates an economic activity. The discharge of arsenic provides Bonhomme with an economic benefit. The restrictive covenant in his deed requires Bonhomme to maintain Ditch C-1 and the culvert by extension. This requirement would presumably include activities to ensure compliance with the CWA. However, Bonhomme

has avoided the expense of filtrating the water or otherwise preventing pollution from entering his culvert and flowing into Reedy Creek. While the money Bonhomme has saved may not substantially affect the national economy, the aggregate of such activities could be substantial.

In addition, the CWA contains a jurisdictional element and limits federal authority to waters of the United States. The CWA also granted EPA the authority to interpret navigable waters, and the EPA included waters that affect interstate commerce. This is unlike *Morrison*, where Congress did not limit its authority and attempted a wholesale application of the Commerce Clause. Further, unlike in *Morrison*, Congressional findings demonstrate that water pollution affects interstate commerce. *See United States v. Ashland Oil & Transp. Co.*, 364 F. Supp. 349, 351 (W.D. Ky. 1973) ("the legislative history of the [CWA] is laden with reports, references and statements supporting the widely accepted conclusion that water pollution is a national problem severely affecting the health of our people, the welfare of the nation and the efficient conduct of interstate commerce"). Finally, unlike gender-based violence, polluting Reedy Creek has a but-for connection to every attenuated effect on interstate commerce. First, the unfettered pollution bestows a direct economic benefit on Bonhomme. Next, Reedy Creek, the water Congress and Progress is seeking to protect, has a direct economic impact on Bounty Plaza and the farmers of Progress and New Union.

The use or degradation of Reedy Creek substantially affects interstate commerce. Without Reedy Creek and other utilitarian waters, the national economy would suffer. Not only do such waters affect the prices of agricultural products, but they also affect a number of businesses and residences that depend on their water supply. People like Bonhomme who avoid compliance with the CWA also impact the economy. Just as an aggregate of wheat-hoarding farmers will affect agricultural prices, CWA violators affect the collection of permit fees and the

value of remedial efforts. Accordingly, since it complies with the *Morrison* factors and substantially affects interstate commerce, Reedy Creek is a navigable water.

Ditch C-1 is also a navigable water because it affects interstate commerce. Several property owners use Ditch C-1 to drain the saturated soil on their agricultural properties. It also helps disperse groundwater and rainwater runoff after rain events. Without Ditch C-1, the excess water could negatively affect the agricultural products and the prices of such products. While Ditch C-1 may not individually affect the national economy, the aggregate effect of such waters could be substantial. Like Reedy Creek, Ditch C-1 is analogous to the stream in *Earth Sciences, Inc.* and satisfies the *Morrison* factors. As such, the use or degradation of Ditch C-1 substantially affects interstate commerce. Thus, Ditch C-1 is a navigable water.

2. The *Rapanos* decision did not affect Congress' ability to regulate waters that substantially affect interstate commerce.

The district court incorrectly determined that the *Rapanos* decision limited Congress' interstate commerce jurisdiction. The plurality in *Rapanos* applied the canon of constitutional avoidance, but the canon of constitutional avoidance is not applicable to CWA jurisdiction. In fact, constitutional avoidance only applies where there are concerns about a statute's constitutionality. *Harris v. United States*, 536 U.S. 545, 555 (2002).

In *Rapanos*, the plurality opinion of four justices believed that CWA jurisdiction was subject to the canon of constitutional avoidance, requiring the Court to choose a different interpretation of the statute. *Rapanos*, 547 U.S. at 738; *See also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). The plurality was concerned that broad commerce clause jurisdiction would lead to a constitutionally questionable impingement of the states' traditional power over land and water use. *Rapanos*, 547 U.S. at 738. Also, the plurality found that the term "waters of

the United States" did not clearly define Congress' intended scope for commerce clause jurisdiction. *Id*.

However, when five or more justices support a legal principle, the result is precedential, *Marks v. United States*, 430 U.S. 188, 193-94 (1977), and in *Rapanos*, five justices found constitutional avoidance was unnecessary. *Id*. at 802. Fundamentally protected waters used in interstate commerce do not raise constitutional issues. *Id*. at 760. Further, Congress' jurisdiction over other waters is constitutional if those waters have a significant connection to fundamentally protected waters. *Id*. at 782. Indeed, absent a significant connection, the other waters will not be jurisdictional. *Id*. In addition, where a general regulatory statute has a substantial relation to commerce among the states, insignificant instances of questionable jurisdiction are of no consequence. *Id*. The mere possibility that federal commerce power concerns may be raised does not mandate an interpretation of the CWA that is contrary to the Act's plain meaning and intent. *Id*. at 783.

Additionally, states must share their interests in regulating natural resources with the federal government when Congress exercises one of its enumerated constitutional powers. *United States v. Deaton*, 332 F.3d 698, 708 (4th Cir. 2003). A national solution for the protection of the Nation's waterways is necessary. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Further, federal regulation of waters with a significant connection to navigable waters does not significantly change the federal-state balance of power. *Deaton*, 332 F.3d at 708. Therefore, the canon of constitutional avoidance is not applicable to CWA jurisdiction under the federal commerce power, and the *Rapanos* decision does not limit Congress' ability to regulate Reedy Creek and Ditch C-1.

C. Reedy Creek and Ditch C-1 are navigable because they are tributaries of other navigable waters.

Tributaries that are otherwise non-navigable become navigable waters when then have a certain nexus to other navigable waters. *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003). Indeed, according to EPA regulations, navigable waters include the tributaries of traditional navigable waters, interstate waters, and waters that substantially affect interstate commerce. 40 C.F.R. § 122.2. In *Rapanos*, five or more justices supported each of two tests to determine if a tributary of a navigable water is itself navigable. 547 U.S. at 742, 759, 810. Where five or more justices support a legal principle, the result is precedential. *Marks*, 430 U.S. at 193-94. Thus, if Reedy Creek and Ditch C-1 satisfy either test, they are navigable waters. *See Rapanos*, 547 U.S. at 810.

The first test asks whether the water is relatively permanent and continuously flowing. *Id*. at 739. Waters that are ordinarily dry channels with only occasional or intermittent flow are not navigable and thus not subject to CWA jurisdiction. *Id*. at 733. However, the Court distinguished between intermittent waters and seasonal waters that have continuous flow during some months of the year. *Id*. at 33. Next, the test asks whether there is a continuous surface connection between the tributary and other navigable waters. *Id*. at 742. Consequently, waters that are isolated with no discernible and observable surface connection to other waters are not navigable and not subject to CWA jurisdiction. *Id.* The second test asks whether the tributary has a significant nexus to a navigable water. *Id*. at 767-68. A significant nexus exists where the tributaries affect the chemical, physical, and biological integrity of other navigable waters. *Id*. at 780. Where a water merely has a speculative or insubstantial affect on other jurisdictional waters, it is not a navigable. *Id*. The waters of Reedy Creek and Ditch C-1 flow into Wildman Marsh, which is a navigable water, and Ditch C-1 flows into Reedy Creek. Further, both Reedy

Creek and Ditch C-1 satisfy each of the *Rapanos* tests. Accordingly, Reedy Creek and Ditch C-1 are navigable waters.

1. Wildman Marsh is a navigable water.

If Reedy Creek and Ditch C-1 are tributaries of a navigable water, then they are also navigable waters. Thus, as a preliminary matter, Wildman Marsh is a navigable water. Navigable waters are waters of the United States. 33 U.S.C. § 1362(7). Further, a water is a navigable water if it substantially affects interstate commerce. *Supra* § I(B). In addition, EPA regulations define navigable waters as including intrastate wetlands that interstate travelers use for recreational purposes. 40 C.F.R. § 122.2.

First, Wildman Marsh satisfies the plain meaning of waters of the United States. Most of Wildman Marsh is within the Wildman National Wildlife Refuge, which is owned and maintained by the United States Fish and Wildlife Service (USFWS). Because Wildman Marsh is owned by the federal government, it is a water of the United States. Also, Wildman Marsh substantially affects interstate commerce, and interstate travelers utilize it for recreational purposes. Wildman Marsh attracts over a million ducks and other waterfowl during their twice annual migrations. As such, the area is a major destination for duck hunters from Progress, New Union, and five neighboring states. Wildman Marsh also attracts hunters from around the nation and even from a few foreign countries. In fact, interstate hunters add over $25 million to the local economy. Without Wildman Marsh, the local economy would suffer, and the aggregate effects of losing similarly situated waters could be substantial. Moreover, Wildman Marsh triggers traditional interstate commerce. Interstate travelers would have to purchase hunting licenses from Progress, and they would likely purchase food, gasoline, and lodging from the

citizens of Progress. Accordingly, Wildman Marsh has a substantial affect on interstate commerce.

Because it is a water of the United States, provides recreational activities to interstate travelers, and substantially affects interstate commerce, Wildman Marsh is a navigable water.

2. Reedy Creek is a tributary of Wildman Marsh and satisfies the *Rapanos* tests.

Reedy Creek begins in New Union and flows into Progress before emptying into Wildman Marsh. Thus, Reedy Creek is a tributary of Wildman Marsh. Further, Reedy Creek satisfies both *Rapanos* tests. First, Reedy Creek is a relatively permanent and continuously flowing body of water. Reedy Creek is approximately fifty miles long and maintains its water flow throughout the year. Furthermore, Reedy Creek has a continuous surface connection with Wildman Marsh. There are no barriers between Reedy Creek and Wildman Marsh. Also, there is a discernible surface connection because Reedy Creek ends in Wildman Marsh.

Second, Reedy Creek has a significant nexus to Wildman Marsh because it affects the chemical and biological integrity of the marsh. The arsenic found in Reedy Creek is also detectable in Wildman Marsh. In addition to the chemical disturbance of the water, the arsenic from Reedy Creek is also affecting the wildlife of Wildman Marsh. The USFWS has detected arsenic in at least three Blue-winged Teal, and the arsenic levels have likely affected other waterfowl and fish.

Not only has the pollution from Reedy Creek impacted the environment surrounding Wildman Marsh, it has also impacted the recreational activities that Wildman Marsh supports. For example, Bonhomme has testified that PMI's hunting parties have decreased as a result of the pollution. Indeed, if many of the ducks contain arsenic levels, few interstate travelers will want to hunt them. As the pollution from Reedy Creek is creating these problems, it is likely that

Congress intended the CWA to regulate such waters. Therefore, since it is a tributary of Wildman Marsh and satisfies the *Rapanos* tests, Reedy Creek is a navigable water.

3. Ditch C-1 is a tributary of Reedy Creek and Wildman Marsh and satisfies the *Rapanaos* tests.

Ditch C-1 flows into Reedy Creek, and the pollutants from Ditch C-1 eventually flow into Wildman Marsh. Thus, Ditch C-1 is a tributary of Reedy Creek and Wildman Marsh. Since Wildman Marsh and Reedy Creek are navigable waters and because Ditch C-1 satisfies the *Rapanos* tests, Ditch C-1 is a navigable water.

First, Ditch C-1 is a relatively permanent and continuously flowing body of water. Ditch C-1 contains running water except during a short drought period. Indeed, it is precisely the type of seasonal water that the *Rapanos* Court distinguished from intermittent waters. Further, Ditch C-1 is unlike the intermittent ponds and puddles discussed in *Rapanos* because it is a substantial body of water that flows for over three miles. Additionally, there is a continuous surface connection between Ditch C-1, Reedy Creek, and Wildman Marsh. The water from Ditch C-1 flows through Bonhomme's culvert and into Reedy Creek. From there, it makes its way to Wildman Marsh. No barriers interrupt this continuous flow. Second, there is a significant nexus between the waters because the arsenic in Ditch C-1 substantially affects the chemical and biological integrity of Reedy Creek and Wildman Marsh. Indeed, the arsenic detected in Ditch C-1 has also been detected in the downstream waters and their respective wildlife. As such, it is likely that Congress intended the CWA to regulate waters like Ditch C-1.

II. Bonhomme Violated The CWA Because His Culvert Is The Point Source Of The Pollutants And The CWA Is A Strict Liability Statute.

The arsenic in Ditch C-1 flows through Bonhomme's culvert and into Reedy Creek and Wildman Marsh. Bonhomme does not contest that his culvert is a point source and that it

conveys arsenic into navigable waters, but he maintains that Maleau is the but-for cause of the arsenic's presence. However, because the CWA is a strict liability statute, causation is irrelevant. Therefore, Bonhomme has violated the CWA.

Under the CWA, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). The statute contains no causation or knowledge requirements. *See id*. Indeed, courts have recognized that the CWA is a strict liability statute that does not entertain a defendant's excuses. *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 174-75 (3d Cir. 2004); *United States v. Winchester Mun. Utils.*, 944 F.2d 301, 304 (6th Cir. 1991); *see also W. Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010) ("there is simply no causation requirement in the [CWA] . . . [W]ater is indifferent about who initially polluted it so long as pollution continues to occur"). Thus, the CWA focuses on the discharge of pollutants and "not the underlying conduct that led to the discharge." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005).

In *Huffman*, the West Virginia Department of Environmental Protection (WVDEP) violated the CWA even though it did not generate the pollutants or create the discharges. 625 F.3d at 170. When mining companies failed to meet bond requirements to ensure compliance with the CWA, the WVDEP engaged in reclamation efforts. *Id*. at 163-64. While the WVDEP controlled the mining sites, the plaintiff found several CWA violations at those sites and brought a citizen suit. *Id*. at 164. Though the mining companies had generated the pollutants and created the discharges, and though the WVDEP was seeking to rectify such discharges, the court adhered to the strict liability statute and found WVDEP liable. *Id*. at 166-68.

To support his causation argument, Bonhomme relies on the following cases: *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) and *Nat'l Wildlife Fed'n*

v. Gorsuch, 693 F.2d 156 (D.C. 1982). In both cases, the defendant dams were not liable because they had not added pollutants to the waters in question. *Consumers Power Co.*, 862 F.2d at 587-89; *Gorsuch*, 693 F.2d at 183. However, unlike Bonhomme, the defendant dams did not argue that someone else was the source of the pollution. *See id*. Rather, in *Consumers Power Co.*, the dam diverted water through turbines, killing fish in the process. 862 F.2d at 582. While the dead fish that reentered the navigable waters were pollution, the dam had not added the pollution from the outside world. *Id*. at 583-84. Similarly, in *Gorsuch*, the water became oxygen depleted while in storage at the dam, and thus the dam had not added pollutants to the water it released. *Gorsuch*, 693 F.2d at 161, 183.

While Bonhomme may not have generated the arsenic in Ditch C-1, his culvert added the pollutants to Reedy Creek. This is unlike *Consumers Power Co.* and *Gorsuch* because the arsenic did not derive from the water itself. The arsenic is a pollutant from the outside world, and Bonhomme's culvert is the point source that transports it. As the court in *Huffman*, this Court should not concern itself with the underlying source of the pollutants. The CWA does not require courts to employ detective work and ascertain the pollution's source. Such requirements would inhibit the statute's purpose and stonewall environmental protection.

Nor should this Court consider Bonhomme's knowledge or intent. As a strict liability statute, the CWA does not punish Bonhomme for having a guilty mind or for participating in activities that are inherently wrong. Rather, Congress enacted the CWA because certain individuals are in a better position to prevent pollution, and these individuals should bear the burden over other innocent citizens. Bonhomme may not have intended to pollute Reedy Creek, but as he owns the culvert that conveys the arsenic, this Court should hold him liable.

III. Shifty Maleau Is Not Liable Under The CWA Because Bonhomme Is Not A Proper Plaintiff And Maleau's Slag Piles Are Not Point Sources.

While Progress seeks to protect its waters, it also seeks to protect its citizens from errant lawsuits. Bonhomme's law against Maleau must fail for the following reasons: A) Bonhomme is not the proper plaintiff to bring a citizen suit and B) Maleau's slag piles are not point sources under the CWA. Accordingly, this Court should dismiss the claim against Maleau.

A. Bonhomme is not a proper plaintiff because Bonhomme is not the real party in interest, he cannot substitute PMI as the real party in interest, and he is a foreign national.

Because Bonhomme is not a proper plaintiff, this Court should dismiss his claim against Maleau. First, Bonhomme is not the real party in interest. Second, Bonhomme cannot now substitute PMI as the proper plaintiff. Finally, Bonhomme is a foreign national and cannot utilize the citizen suit provision of the CWA.

1. Bonhomme is not the real party in interest.

The pollution in Wildman Marsh affects PMI's hunting parties, and PMI has expended resources to find the source of the pollution. Other than through his association with PMI, Bonhomme is not directly affected by the pollution and is not the real party in interest. Accordingly, this Court should dismiss his claim.

Under the federal rules, "an action must be prosecuted in the name of the real party in interest." Fed. R. Civ. Pro. 17(a)(1). The real party in interest is the person or entity with the substantive right to sue and a significant interest in the litigation. *Wieburg v. GTE Southwest, Inc.*, 272 F.3d 302, 306 (5th Cir. 2001). A party who will merely benefit from the litigation is not the real party in interest. *Id.* The purpose of the real party in interest rule is to protect the defendant from a later lawsuit by the true owner of the claim. *Dubuque Stone Prod. Co. v. Fred L. Gray Co.*, 356 F.2d 718, 723 (8th Cir. 1966). Indeed, if a plaintiff's claim will preclude

similar litigation against the defendant, the plaintiff is the true party in interest. *Celanese Corp. of America v. John Clark Indus., Inc.*, 214 F.2d. 551, 555 (5th Cir. 1954).

In *Weissman v. Weener*, 12 F.3d 84, 86 (7th Cir. 1993), the plaintiff was not the real party in interest when the defendant attorney did not secure the loan he had promised the plaintiff. The plaintiff sought the loan to pay the debts of his corporation. *Id*. at 85. The plaintiff owned a fifty percent interest in the corporation and had personally guaranteed its debts. *Id*. Nevertheless, the plaintiff had only suffered damages indirectly as shareholder and guarantor, and the corporation was the real party in interest. *Id*. at 86; *see also Delor v. Intercosmos Media Group, Inc.*, 232 F.R.D. 562, 566 (E.D. La. 2005) (plaintiff could not sue to protect a domain name when his corporation owned the domain name).

In *Virginia Electric & Power Co. v. Westinghouse Electric Corp.*, 485 F.2d 78, 85 (4th Cir. 1973), the plaintiff was the real party in interest even though the insurance company was entitled to the majority of any recovery. Since there was only a partial subrogation, the plaintiff retained a significant interest in the claim. *Id*. at 83-84. Further, the insurance company was entitled to its portion of any recovery so there was no risk of subsequent litigation against the defendant. *Id*. at 84. Thus, the plaintiff could proceed as the real party in interest. *Id*. at 85.

Bonhomme does not have a significant interest in the pollution in Wildman Marsh. He may duck hunt occasionally, but the duck hunting activities are primarily for the benefit of business clients and associates of PMI. The hunting parties have decreased from eight a year to two a year, which is consistent with PMI's declining profits. Further, PMI's interest in this litigation is apparent from its willingness to supply Bonhomme with the resources to test Ditch C-1 and Reedy Creek. PMI is even paying for Bonhomme's attorney and expert witness fees.

Bonhomme does own a hunting lodge that is adjacent to Wildman Marsh, but he does not live in the lodge. In fact, he primarily uses the lodge for the PMI hunting parties.

Bonhomme is a shareholder and president of PMI, but like the plaintiff in *Weissman*, any injury he has suffered was indirect. Indeed, if Bonhomme can maintain this suit, then PMI can later sue Maleau on behalf of its other employees and collective interests. This would subject Maleau to the very thing Rule 17 is designed to prevent: multiple suits for the same issue. This is not a partial subrogation case that prevents subsequent litigation, nor does Bonhomme possess an interest that is distinct from PMI's. The reduced number of hunting parties is the only adverse affect Bonhomme has demonstrated in the record, but he is only adversely affected as a shareholder of PMI. Thus, PMI is the real party in interest, and Bonhomme cannot maintain this lawsuit. This Court should dismiss his claim.

2. Bonhomme cannot substitute PMI as the real party in interest.

Though Progress and Maleau have raised an objection that Bonhomme is not the real party in interest, Bonhomme has made no effort to substitute PMI. Further, a significant amount of time has passed since the original objections. As such, if this Court finds Bonhomme is not the real party in interest, he can no longer substitute the proper party. Accordingly, this Court should dismiss his claim.

When a litigant is not the real party in interest, a court may dismiss the claim "after an objection, [and if] a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. Pro. 17(a)(3). The rule does not permit courts to blindly allow substitution without good cause. *Feist v. Consol. Freightways Corp.*, 100 F. Supp. 2d 273, 276 (E.D. Pa. 1999), aff'd 216 F.3d 1075 (3d Cir. 2000), cert. denied, 532 U.S. 920 (2001). In fact, courts should examine the following factors when determining if a substitution is

appropriate: whether the plaintiff sought substitution within a reasonable time after the defendant's objection or whether the plaintiff made an understandable mistake. *Wieburg*, 272 F.3d at 308.

Some courts have determined a reasonable time to substitute is less than two months. *See W. Colorado Fruit Growers Ass'n v. Marshall*, 473 F. Supp. 693, 699 (D. Col. 1979) (no substitution allowed when a formal object had been made two months prior). Further, when an action has been appealed, the plaintiff can no longer substitute the real party in interest. *See Triple Tee Golf, Inc. v. Nike, Inc.*, 511 F. Supp. 2d 676, 701 (N.D. Tex. 2007) (discussing the court's refusal to substitute the real party in interest on remand from the Fifth Circuit). Mistaking the real party in interest is only understandable when it is difficult to ascertain the correct party. *Wieburg*, 272 F.3d at 308.

Bonhomme is not the real party in interest, and Rule 17 cannot afford him relief to substitute because a significant time has passed since the original objection, and it was not difficult to ascertain that PMI was the real party in interest. The district court entered its opinion on July 23, 2013, and Progress and Maleau objected to Bonhomme as the real party in interest some time prior to that decision. At the very least, sixteen months have passed since the original objection. Bonhomme had a reasonable time to amend his complaint and failed to do so. Further, this is not an instance where Bonhomme understandably mistook the real party in interest. There is not a large number of potential parties to confuse, and Bonhomme could easily link any injury to PMI. After all, the pollution has reduced the number of hunting parties for PMI's clients and business associates, and PMI has funded Bonhomme's lawsuit. Since Bonhomme cannot substitute the correct party, this Court should dismiss his claim with prejudice.

3. Bonhomme is a foreign national and not a citizen under the CWA.

By statute, citizens can bring suit against any person or entity in the United States that has violated the Clean Water Act. 33 U.S.C. § 1365(a). The statute defines a citizen as "a person or persons having an interest which is or may be adversely affected." *Id*. at ¶ (d). The statute further defines a person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). Neither definition includes foreign nationals. Since Bonhomme is a foreign national, he cannot file a citizen suit in the United States. Thus, this Court should dismiss his claim.

Where Congressional intent is absent, courts should not assume a statute or definition refers to foreign nationals or foreign conditions. *Small v. United States*, 544 U.S. 385, 388-89 (2005). Rather, courts should look beyond a definition and consider the circumstances surrounding that definition. *Id*. at 388. The circumstances a court may consider include the following: the construction of the definition, the legislative history and academic commentary, other provisions in the statute, and similarly constructed statutes and definitions. *Arc Ecology v. United States Dep't of the Air Force*, 411 F.3d 1092, 1097-1101 (9th Cir. 2005).

a. The construction of the definitions, citizen and person, indicate Congress' exclusion of foreign nationals

Just because Congress includes "person" or "persons" in a statute does not mean Congress intended to include foreign nationals. *United States v. Palmer*, 16 U.S. 610, 631 (1818); *Small*, 544 U.S. at 388. Indeed, Congress enacts statutes and defines their terms "with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 (1993). Thus, without an express statement that a definition applies to foreign nationals, courts should not presume their inclusion. *See Small*, 544 U.S. at 388-89; *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (while the phrase "any person" could refer to any human being, it is limited to individuals within

the jurisdiction). For example, the Supreme Court recently held that absent Congressional intent, the statutory phrase "any court" does not apply to foreign courts. *Small,* 544 U.S. at 387.

When Congress defined citizen and person, it did so with regard to United States citizens and domestic entities. The definitions do not specifically include foreign nationals, and this Court should not presume Congress intended their inclusion. Bonhomme only considers the plain meaning of the definitions. According to Bonhomme, because a citizen is any person that is adversely affected and person includes individuals, then any individual who is adversely affected can bring a citizen suit without regard to nationality. This is an incorrect assumption. First, if this Court considers the plain meaning of the definitions, it should consider the plain meaning of a citizen suit provision in a United States statute. When Congress enacted a citizen suit provision, it did so to provide a remedy to United States citizens.

Second, the plain meaning of words may not always demonstrate the intended result. Consider a couple making dinner plans. When asked where she would like to eat, the wife may respond, "Any restaurant is fine." However, in this situation, it is unlikely that she means a restaurant thousands of miles away or an expensive restaurant outside of the couple's budget. The phrase is dependent upon context. Similarly, on their face, the CWA definitions may implicate any person of any nationality, but in context, that interpretation is absurd. Foreign nationals cannot typically utilize United States statutes. In fact, Congress has enacted legislation like the Alien Tort Statute to provide foreign nationals remedies that are otherwise unavailable. If foreign nationals can sue under U.S. statutes, it will bring millions of additional claims to an already overburdened court system. The U.S. cannot afford this result.

When Congress enacted the CWA, it intended to protect U.S. waters, but only through the avenues it prescribed. If Bonhomme wants to file a citizen suit, he should take the

citizenship test and become a U.S. citizen. Otherwise, he has not complied with the CWA. Accordingly, this Court should dismiss his claim.

b. The legislative history and academic commentary suggest that Congress intentionally excluded foreign nationals.

In the legislative history of the Clean Water Act, Congress did not consider whether foreign nationals could sue under the citizen suit provision. *See* Clean Water Act of 1977, Pub. L. 95-217. Therefore, Congress did not intend the definitions of citizen and person to apply to foreign nationals, and this court should dismiss Bonhomme's claim.

Silence in the legislative history suggests Congress did not consider a particular issue and did not intend a change in existing law. *Edmonds v. Compaqnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). In *Arc Ecology*, the Ninth Circuit found CERCLA did not apply extraterritorially and foreign nationals could not file a claim under CERCLA's citizen suit provision. 411 F.3d at 1101. The foreign national appellants could not cite to any portion of CERCLA's legislative history that discussed CERCLA's application outside of the United States. *Id*. The Ninth Circuit concluded that since the congressional record was silent about extraterritoriality, it was unlikely that Congress intended relief for foreign nationals. *Id*.

In *Arc Ecology*, the court further considered the academic commentary relating to extraterritoriality and foreign national claimants. *Id*. According to the court, academia is in unanimous agreement that CERCLA does not apply extraterritorially and foreign nationals cannot sue under the statute. *Id*. Indeed, one commentator acknowledged "citizen suits by aliens [under any environmental statute] rest on a slim foundation." *Id*.

Like CERCLA, the Clean Water Act does not expressly include foreign nationals in its citizen suit provision, and the legislative history is silent about the possibility. Though Congress enacted the Clean Water Act over three decades ago, there is no indication that Congress ever

considered allowing foreign nationals to sue under the Act. Academic commentary expresses doubt that aliens could file citizen suits and further demonstrates the unlikelihood that Congress intended such a result. Congress' silence should be given great weight, especially when Congress has the ability to amend the Clean Water Act and make its intentions known. To find that foreign nationals can utilize a citizen suit despite Congress' silence sets a precedent for liberally construing statutes to achieve a desired result. Therefore, this Court should adhere to Congressional intent and dismiss Bonhomme's citizen suit.

c. Other provisions in the CWA indicate Congress' intentional exclusion of foreign nationals.

Since another Clean Water Act provision expressly addresses the concerns of foreign nationals, Congress did not intend the definitions of citizen and person to include foreign nationals. Further, Congress enacted a provision to ensure that Indian tribes were included in the CWA, but did not take such measures with foreign nationals. Therefore, Bonhomme is not a citizen under the Clean Water Act, and this Court should dismiss his citizen suit.

This Court has long recognized the doctrine of *expression unius est exclusio alterius*, which means the expression of one thing is the exclusion of another. *Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 80-81 (2002). Under this doctrine, courts must presume "when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991). Thus, if a statute provides a remedy in one provision but does not specifically provide the remedy in another, courts must presume Congress intended that result. *Id*.

The CWA specifically addresses remedies for foreign nationals or governments when pollution occurs on foreign soil. 33 U.S.C. § 1320. The foreign government may contact the Administrator of the EPA to conduct a public hearing and discuss remedial measures. *Id*.

Further, Congress drafted a provision to clarify that Indian tribes are states for purposes of the CWA. *Id*. Thus, as the equivalent of states, Indian tribes satisfy the definitions of citizen and person. *See id*. at (a), (e).

Congress considered the affects of water pollution on foreign nationals and foreign governments when it enacted 33 U.S.C. § 1320. That Congress specifically included this remedy for foreign entities suggests it did not intend foreign nationals or foreign governments to utilize the citizen suit provision. While 33 U.S.C. § 1320 may focus on issues of extraterritoriality, the fact that Congress considered foreign nationals in this provision indicates an exclusion of foreign nationals in the definitions of citizen and person. Indeed, after considering foreign nationals, Congress could have provided them with a remedy for issues on domestic soil. However, Congress determined such an action was unnecessary.

In addition, Congress was compelled to further define who the CWA included. It took special lengths to include Indian tribes, presumably in fear that courts would otherwise interpret their exclusion. Congress did not express a similar fear for foreign nationals and did not enact a provision to ensure their inclusion. Accordingly, the provisions demonstrate Congress' intentions to exclude people or groups not expressly included. Since Congress did not list foreign nationals under the definition of citizen or person, this Court should not presume otherwise.

d. Other environmental statutes and their definitions suggest that Congress intentionally excluded foreign nationals from the CWA.

Congress has passed a number of environmental statutes, and each statute has a different definition of person. Since some of those statutes include foreign governments in their definition of person, it suggests that Congress considered foreign entities and made a conscious decision to exclude them from the CWA definitions.

The definition of person varies among the following environmental statutes: Clean Air Act, Resource Conservation and Recovery Act, Emergency Planning and Community Right-To-Know Act, Comprehensive Environmental Response, Compensation, and Liability Act, Atomic Energy Act (AEA), and Endangered Species Act (ESA). *See* 42 U.S.C. § 7602(e), 6903(15), 11049(7), 9601(21), 2014(s); 16 U.S.C. § 1532(13). The AEA's definition of person includes any foreign government or foreign entity. 42 U.S.C. § 2014(s). The ESA's definition of person includes "any officer, employee agent, department, or instrumentality of . . . any foreign government." 16 U.S.C. § 1532(13).

Congress has tailored the definition of person depending on the circumstances of each statute. To be effective, the ESA needs broad authority, and Congress included foreign entities in the definition of person to ensure that endangered species receive protection all over the world. Similarly, atomic energy has the potential to impact the world at large, and the ASE requires an equally broad definition of person. On the other hand, Congress enacted the CWA to protect domestic waters and to allow U.S. citizens redress from violators. The CWA does not apply extraterritorially, and the effects of violations on U.S. waters do not impact the world as would an endangered species or atomic energy issue.

The ESA and ASE demonstrate that Congress has considered the circumstances in which it should include foreign nationals or foreign governments in the definition of person. The CWA did not present such circumstances. Congress determined that limiting the definition of person to domestic entities, and thereby limiting the definition of citizen, was sufficient to achieve its desired objective. At some point, water pollution may present serious threats to foreign nationals on domestic soil, and Congress may decide to amend the CWA. Until that time, courts should

give deference to the statute Congress created. Therefore, this Court should dismiss Bonhomme's citizen suit.

B. Maleau's slag piles are not point sources because they do not constitute a "discernible, confined and discrete conveyance."

Though Maleau's slag piles may contain the arsenic that polluted downstream waters, it is not a point source under the CWA. When Congress enacted the CWA, it recognized that pollutants enter waterways through both point sources and nonpoint sources. S. Rep. No. 92-414, at 77 (1972). However, the CWA only regulates the discharge of pollutants from point sources. 33 U.S.C. § 1362(12). Maleau did not violate the CWA because his slag piles are nonpoint sources that do not satisfy the requirements of point sources.

A point source is "any discernible, confined and discrete conveyance." *Id*. at § 1362(14). The CWA includes the following examples: "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." *Id*. The definition of point source "excludes unchanneled and uncollected surface waters." *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979). The CWA also lists the following examples of nonpoint sources: runoff from agricultural or silvicultural activities, runoff from mining activities, and runoff from construction activities. *Id*. at § 1314(f)(2)(A)-(C). Further, the legislative history indicates that nonpoint sources include runoff where rain events carry pollutants over the soil and into navigable waters. *See* S. Rep. No. 92-414, at 52 (1972).

In *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) runoff from an area used to store construction material was not a point source because the defendants did not collect the runoff and channel it into a navigable water. As the runoff occurred from a natural process, it was instead a nonpoint source. *Id*. The EPA argued that "to exempt uncollected

runoff from regulation would be to permit pollution by indirection which would otherwise be barred." However, as Congress limited point sources to "any discernible, confined and discrete conveyance," the court disagreed. *Id*.

Bonhomme incorrectly relies on *Sierra Club v. Abston Const. Co.*, 620 F.2d 41 (5th Cir. 1980) to establish that Maleau's slag piles are point sources. In *Abston*, it was not only rainwater runoff that carried the pollutants to navigable waters, but also drainage basins that the defendant constructed. *Id*. at 45-46. Indeed, the court found that the combination of the drainage basins and spoil piles constituted a "discernible, confined and discrete conveyance" of pollutants. *Id*. at 45. The court indicated that a natural runoff without man-made interference could not satisfy the requirements of a point source. *See id*. at 44-45. In fact, the court noted that "simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge." *Id*.

Maleau utilizes his property in Jefferson County to store the slag piles from his gold mining operation. He has not constructed or used any container to confine the slag piles. Further, he has not constructed drainage basins or any other instrument to channel the runoff associated with these slag piles. Rather, Maleau has left these slag piles in their natural state, and any pollution that has entered Ditch C-1 did so as part of a natural process. Indeed, rainwater flows down the piles, and gravity carries the water and any pollutants in the slag piles into Ditch C-1. As this is a wholly natural process, it does not constitute a point source discharge.

The slag piles do not represent a discernible, confined, and discrete conveyance. While the presence of arsenic in the slag piles may be discernible, the piles are neither confined nor discrete. Since the rainwater flows over the entirety of the piles and enters Ditch C-1 from various points, the conveyance is not confined. The conveyance is not discrete because the

pollutants do not enter Ditch C-1 at a distinct point. The slag piles are unlike any of the examples of point sources that Congress included in the CWA. Pipes, channels, and tunnels collect water and pollutants and direct them to a specific point. The slag piles are incapable of collecting water and directing the water and pollutants through a specific channel. Rather, the slag piles are more consistent with the examples of nonpoint sources. Runoff from agricultural or mining activities is not collected or channeled, and the pollution does not derive from a single point. Such is the case with Maleau's slag piles. Accordingly, Maleau has not violated the CWA.

CONCLUSION

Progress must have the ability to effectively protect its waters. Because of their substantial affect on interstate commerce and on other navigable waters, this Court should determine that Reedy Creek and Ditch C-1 are navigable waters. Further, because Bonhomme's culvert conveys pollutants into Reedy Creek, this Court should find that he has violated the CWA. Finally, this Court should dismiss Bonhomme's citizen suit because he is not a proper plaintiff and Maleau's slag piles are not point sources. In short, this Court should affirm the district court's ruling on all but the determination that Ditch C-1 is not a navigable water. To rule otherwise would contradict Congressional intent.

Respectfully submitted,

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Counsel for the State of Progress