Team 5

C.A. No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellee, Cross-Appellee

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

BRIEF FOR JACQUES BONHOMME
Defendant-Appellee, Cross-Appellee

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JURISDICTIONAL STATEMENT

Defendant-Appellee Jacques Bonhomme ("Bonhomme") filed a complaint in the United States District Court for the District of Progress seeking review under 28 U.S.C. § 1331 (2003 & Supp. 2013). On July 23, 2012, the district court dismissed Bonhomme's suit, determining he was not a proper plaintiff. The district court had proper subject matter jurisdiction over the case because the issues arose under the Clean Water Act ("CWA"), a law of the United States. 33 U.S.C. §§ 1251 *et seq*. (2010 & Supp. 2013). The district court's order is final for the consolidated case, and jurisdiction is proper pursuant to 28 U.S.C. § 1291 (2003 & Supp. 2013).

STATEMENT OF THE ISSUES

I. Whether Jacques Bonhomme is the real party in interest under Rule 17 with standing to bring suit against Shifty Maleau for violating section 301(a) of the CWA.

II. Whether Jacques Bonhomme is a "citizen" under courts' interpretation of section 505 of the CWA who can bring suit against Shifty Maleau notwithstanding his status as a foreign national.

III. Whether Shifty Maleau's mining waste piles polluted Ditch C-1 with arsenic through channels are point sources under section 502(12), (14) of the CWA.

IV. Whether Ditch C-1 is a "navigable water/water of the United States" under section 502(7), (12) of the CWA.

V. Whether the Reedy Creek is a "navigable water/water of the United States" under section 502(7), (12) of the CWA.

VI. Whether Jacques Bonhomme violated the CWA by adding arsenic to Reedy Creek through a culvert on his property even if the culvert is only an intermediate conveyance, and Shifty Maleau initially added the arsenic to Ditch C-1.

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of Progress denying Bonhomme's motion to dismiss and granting Shifty Maleau's ("Maleau") motion to dismiss. (R. at 10). Bonhomme brought a civil action under the CWA citizen suit

provision 33 U.S.C. § 1365 requesting all available relief. (R. at 4). Bonhomme alleges Maleau added, and continues to add, arsenic into Ditch C-1 ("the Ditch") by piling his mining waste adjacent to the Ditch in such a way that channels eroded by gravity carry arsenic-laden water into the Ditch. (R. at 4-5). The Ditch, in turn, empties into Reedy Creek ("the Reedy"), an interstate navigable water. (R. at 5). The State of Progress ("Progress") filed a citizen suit pursuant to CWA section 505(a)(1), 33 U.S.C. § 1365(a)(1), against Bonhomme for violating the CWA by discharging a pollutant (arsenic) from a point source (a culvert on his property) to a water of the United States (the Reedy) (R. at 5). Maleau intervened as a matter of right in Progress's action against Bonhomme. *Id.* Progress and Maleau requested the district court consolidate their case with *Bonhomme v. Maleau* because the facts and legal issues overlap. *Id.* Bonhomme did not object, and the district court granted the motion to consolidate. *Id.* The defendants, Bonhomme and Maleau, filed motions to dismiss. *Id.*

On July 23, 2012, the district court, without prejudice, denied Bonhomme's motion to dismiss and granted Maleau's. (R. at 10). The district court held that: (1) Bonhomme is not a real party in interest under the Federal Rules of Civil Procedure ("FRCP 17"); (2) Bonhomme is not entitled to file a citizen suit under CWA § 505 because he is not a citizen of the United States; (3) Maleau's waste piles are not point sources under CWA §§ 502(12), (14); (4) the Ditch is a point source and not a navigable water; (5) the Reedy constitutes waters of the United States under the CWA; and (6) Bonhomme violated the CWA by owning the culvert through which pollutants entered the Reedy. (R. at 1-2).

Bonhomme filed a Notice of Appeal challenging all holdings of the district court except the holding that the Reedy Creek is a "navigable water" under the CWA. (R. at 1-2). Progress appeals only the district court's holding that Ditch C-1 is a point source and not a

"navigable water" under the CWA. *Id*. Maleau filed a Notice of Appeal challenging only the holding that the Reedy Creek is a "navigable water" under the CWA. *Id*.

STATEMENT OF THE FACTS

Maleau operates an open pit gold mining and extraction operation in Lincoln County, Progress from which he trucks overburden and slag to his property in Jefferson County, Progress. (R. at 5). In Jefferson County, he places the waste in piles adjacent to the Ditch. (R. at 5). During periods of rainfall, rainwater runoff flows down the piles and percolates through them before discharging into the Ditch through channels eroded by gravity from the configuration of the piles. (R. at 5). This discharged rainwater leaches and carries arsenic from the piles into the Ditch, which empties into the Reedy, before ultimately ending up in the Marsh. (R. at 5-6). Although there are no notable changes to the flora and fauna in Wildman Marsh ("the Marsh") from the arsenic, the United States Fish and Wildlife Service ("FWS") detected arsenic in three Blue-winged Teal in the Marsh. (R. at 6).

The Ditch, constructed in 1913, is a drainage ditch that drains groundwater from the surrounding saturated soil. (R. at 5). The Ditch contains running water except during periods of annual drought, which last from several weeks to three months. (R. at 5). The Ditch, which begins before Maleau's property, runs through several agricultural properties before crossing Bonhomme's property and discharging through a culvert thereon into the Reedy. (R. at 5). None of the properties are uplands. (R. at 5).

The Reedy maintains water flow throughout the year. It begins in the State of New Union ("New Union") and flows into Progress before emptying into the Marsh. (R. at 5). Although it is not used for waterborne transportation, it is the water supply for a service area in New Union on the federally-funded interstate highway, Interstate 250 ("I-250"). (R. at 5). In both states, farmers

with land adjoining the Reedy divert its water for agricultural purposes and sell the products in interstate commerce. (R. at 5).

The Marsh, which the Reedy empties into, is an extensive wetlands and stopover for millions of ducks and waterfowl during their twice annual migrations. (R. at 5). "Much of the wetlands is contained within the Wildman National Wildlife Refuge ("the Wildlife Refuge"), which is owned and maintained" by the FWS. (R. at 6). Bonhomme's property, including his hunting lodge, fronts part of the wetlands, and he uses it for business and social hunting parties. (R. at 6). Before arsenic from Maleau's waste piles infiltrated the Marsh, Bonhomme held hunting parties eight times a year. (R. at 6). Now, because of the presence of the arsenic, Bonhomme only hunts twice a year. (R. at 6).

As President of PMI, Bonhomme hosts business-related hunting parties in addition to his social-related hunting parties. (R. at 6). Although Maleau alleges that Bonhomme's actions are influenced by a declining economy and profits of PMI, Bonhomme only decreased his hunting parties from eight to two times a year because of the presence of arsenic in the Marsh. (R. 5-6).

Furthermore, after separate press conferences where Progress and Bonhomme aired their grievances, the district court took judicial notice of the statements made at the press conference, including allegations that Bonhomme only filed suit to injure Maleau's company and that Maleau engages in unfair business practices by ignoring environmental protection requirements and artificially lowering the costs of his production. (R. at 6).

STANDARD OF REVIEW

The district court determined Bonhomme is not a proper plaintiff and dismissed this case. Because the issues presented are questions of law, this Court reviews the district court's dismissal *de novo*. *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir. 2006).

SUMMARY OF THE ARGUMENT

Bonhomme is the real party in interest and a proper plaintiff because he suffered a direct injury and there is no risk of another party bringing suit for this issue once resolved. Bonhomme is the real party in interest because: (1) he has Article III standing, (2) he meets the standard for a liberally interpreted real party in interest claim, and (3) he may bring suit as the president and majority shareholder of PMI because the injury suffered is directly by him, not to PMI.

Additionally, Bonhomme properly brought a citizen suit against Maleau for Maleau's violation of the CWA. First, the citizen suit provision in section 505 of the CWA does not explicitly limit jurisdiction to United States citizens. There *is* a heightened requirement for the CWA compared to other environmental citizen suit provisions: not with respect to United States citizens, however, but rather for citizens with a *direct injury*. Furthermore, limiting jurisdiction to only the citizens of the United States undermines the purpose of the CWA, as all citizens, United States or otherwise, have the right to non-polluted waters.

With regard to Maleau's waste piles, they violate the CWA because they are point sources, the definition of which is broadly interpreted to include more than just "pipes" and "ditches". They also discharge pollutants not composed "entirely of stormwater" from a "fixed industrial activity" without a permit, a well-accepted violation of the CWA.

Furthermore, both the Ditch and Reedy are jurisdictional waters. The Ditch falls within the CWA statutory term "navigable waters" because it is a tributary of an interstate water under both tests proffered in *Rapanos*: (1) it has a relatively permanent flow of water; and (2) there is a significant nexus between it and a jurisdictional water. Furthermore, there is no requirement that the Ditch be navigable-in-fact to constitute "navigable waters" under the Act. Additionally, the Ditch can constitute both a point source" and "navigable waters." The Reedy is also "navigable

waters" because it is an interstate water stretching fifty miles through two states and flows directly into a federally protected and regulated land, Wildman Marsh. Lastly, Maleau is liable for the discharge of pollutants into the Reedy because it is from his point source that the pollutants are initially discharged. Furthermore, holding owners of intermittent conveyances—i.e. owners who do not initially add pollutants or contribute to those pollutants—such as Bonhomme, is contrary to the purpose of the CWA.

ARGUMENT

I. BONHOMME IS THE REAL PARTY IN INTEREST AND THUS A PROPER PLAINTIFF IN THIS CASE.

FCRP requires that all federal actions be "prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). The purpose of this rule "ensures that under governing substantive law, plaintiffs are entitled to enforce the claim at issue" and "protect[s] the defendant against a subsequent action by the party actually entitled to recover" and ensures generally that judgment has proper effect as res judicata. *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1196-97 (3d Cir. 1996) (*citing* Fed.R.Civ.P. 17 Advisory Committee Notes (1966)); *see also Steger v. Gen. Elec. Co.*, 318 F.3d 1066, 1080 (11th Cir. 2003) (citing the 1996 Advisory Committee Notes to similarly analyze for a bankruptcy proceeding). Furthermore, it is established that although there *may* be multiple real parties in interest for a claim, so long as the named party is a real party in interest, the addition of other parties fitting such description is not *required* by Rule 17(a). *Id*. Thus, the addition of PMI as a party to this action is not required because Bonhomme is the real party in interest.

A. There is no Rule 17(a) issue because Bonhomme has Article III standing.

The real party in interest rule in Rule 17(a) is similar to Article III standing because both "are used to designate a plaintiff who possesses a sufficient interest in the action to entitle him to

be heard on the merits." *Weissman v. Weener (Weissman)*, 12 F.3d 84, 86 (7th Cir. 1993) (internal citations omitted); *see also Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992) (explaining the similarity between the concepts when determining a personal interest in the controversy). Article III standing, however, is jurisdictional and the real party in interest requirement is procedural. *See Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 463 n. 9 (1980) (stating a rough symmetry exists between real party in interest and diversity jurisdiction but that real party in interest is procedural); *Airlines Reporting Corp. v. S & N Travel Inc.*, 58 F.3d 857, 862 (2nd Cir. 1995) (holding the plaintiff was the real party in interest for procedural purposes but not jurisdictional purposes because he merely fulfilled contractual obligations). Even if a party is procedurally a real party in interest, without a jurisdictional hook, the party may not bring suit. Bonhomme is both procedurally and jurisdictionally the real party in interest because he has a direct stake in this claim. PMI does not have a direct stake and thus would not bring a subsequent suit.

Because the two concepts serve similar purposes and are often established concurrently, some circuits have held that once a party sufficiently establishes Article III standing, the real party in interest test is satisfied. *See Apter v. Richardson*, 510 F.2d 351, 353 (8th Cir. 1975) (determining Rule 17(a) test was satisfied upon exhibiting standing); *Seckler v. Star Enter.*, 124 F.3d 1399, 1406 (11th Cir. 1997) (holding a plaintiff must establish Article III standing to be the real party in interest).[1] Concurrently, Bonhomme is the real party in interest because he has Article III standing.

[1] Admittedly, some courts have analyzed the concepts separately due to their distinct nature. *See, e.g., Kent v. N. Cal. Reg'l Office of the Am. Friends Serv. Comm.*, 497 F.2d 1325, 1329 (9th Cir. 1974) (stating a real party in interest is different and thus does not confer standing); *Whelan v. Abell*, 953 F.2d 663 (D.C. Cir. 1992) (addressing real party in interest prior to standing even

Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2, cl. 1. The Supreme Court set forth three elements as the "irreducible constitutional minimum" of standing under Article III: (1) the plaintiff must suffer an injury-in-fact; (2) the injury must be fairly traceable to the challenged action of the defendant; and (3) the injury must be redressable. *Lujan v. Defenders of Wildlife (Lujan)*, 504 U.S. 555, 560-61 (1992). An injury may exist from the invasion of legal rights created by federal statutes. *Warth v. Seldin,* 422 U.S. 490, 500 (1975).

Bonhomme suffers an injury-in-fact under both *Warth* and the traditional definition. Under *Warth*, Bonhomme is injured because Maleau violated the CWA by adding arsenic to the Ditch, and subsequently the Reedy, through his waste piles. Maleau invaded Bonhomme's legal rights when he violated the CWA by polluting the Ditch and Reedy, waters of the United States. Furthermore, Bonhomme's use of his land fronting the Marsh is drastically reduced due to the presence of Arsenic. (R. at 6). Where he previously hunted eight time a year, he now only hunts twice. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc. (Laidlaw)*, the Supreme Court determined injury-in-fact is satisfied if the plaintiff has an economic, aesthetic, or recreational interest impaired by the defendant's conduct. 528 U.S. 167, 183 (2000). The Supreme Court in *Lujan* expanded upon this definition, holding the injury must be "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. Furthermore, one suffers an injury-in-fact if his reputation is injured. *Meese v. Keene*, 481 U.S. 465, 473-77 (1987). The Attorney General injured Bonhomme's reputation when he slandered Bonhomme, stating Bonhomme filed suit against Maleau simply to injure Maleau's company's ability to compete in the market. (R. at 6). The record contains no facts alluding to such motive. Thus, Bonhomme is

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though stating an overlap of concepts existed); *Ensley v. Cody Res., Inc.,* 171 F.3d 315 (5th Cir. 1999) (discussing separately real party in interest and standing issues).

injured-in-fact because his recreational and reputational injuries are both concrete and particularized, and actual and imminent.

Furthermore, as required by *Lujan*, Bonhomme's injury is "fairly traceable" to Maleau's actions. 504 U.S. at 560-61 (requiring an injury be fairly traceable to the defendant and not the result of a third party). The arsenic pollutant, detectible in the waterfowl and throughout the Marsh, is fairly traceable to Maleau's waste piles. If Maleau had not trucked his overburden and slag from his gold mining operation, had not arranged it in piles, and had not allowed rainwater to percolate through and carry arsenic from the piles into the Ditch, the waterfowl would not contain arsenic and Bonhomme would still hunt eight times a year. Therefore, the injury is traceable to Maleau and not a third party.

Finally, Bonhomme's injuries are redressable from a favorable verdict granting Bonhomme injunctive relief and/or civil penalties. The Supreme Court requires that the injuries will likely be redressed, as opposed to simply speculatively, by a favorable decision. *Laidlaw*, 528 U.S. at 561. Through injunctive relief, Maleau's arsenic will cease to pollute the waterways of the United States and water quality will improve; and, civil penalties will deter future polluters of such waterways. Because Bonhomme's injuries are redressable by a favorable decision from this Court, Bonhomme more than meets the requirement set forth in *Laidlaw.*

Absent any Article III standing issue, Bonhomme is a real party in interest under Rule 17(a). Furthermore, Bonhomme has a concrete and particularize, actual or imminent injury-in-fact caused by Maleau that is redressable by a favorable decision from this Court.

B. If this Court determines Article III standing does not establish a real party in interest, Bonhomme remains the real party in interest.

Absent a determination that a showing of Article III standing suffices to establish a real party in interest, Bonhomme still constitutes the real party in interest. This doctrine enables

courts to look beyond mere form to the essence of the claims and injuries alleged by the plaintiff. *Greer v. O'Dell*, 305 F.3d 1297, 1303 (11th Cir. 2002) (determining the doctrine is "a means to identify the person who possesses the rights sought to be enforced"); *see also Broyles v. Bayless*, 878 F.2d 1400, 1403 (11th Cir. 1989) (stating a real party in interest has a real and substantial stake and exercises substantial control over the litigation). With liberal interpretation and consideration of the facts, Bonhomme is the real party in interest.

1. Bonhomme is a real party in interest under courts' liberal interpretation of the doctrine, thus his claim is appropriate.

Historically, the real party in interest claim was applied restrictively in law but liberally in equity. "Only someone with legal title to the right affected by the defendant's conduct could sue at law; in equity anyone whose equitable or beneficial rights were at issue could sue." J Friedenthal, M. Kane, A. Miller, *Civil Procedure, Hornbook Series*, 340 (4th Ed. 1999). However, modern procedure does not require the ultimate beneficiary from a successful prosecution to bring suit, which allows for a broad interpretation. *Id*. Today, a party must only demonstrate it has "such right as to afford the protection of res judicata when the suit is terminated." *Blau v. Lamb (Blau)*, 314 F.2d 618, 620 (2nd Cir. 1963), *cert. denied,* 375 U.S. 813 (1963); *Lemanik S.A. v. McKinley Allsopp*, 125 F.R.D. 602, 607 (S.D.N.Y. 1989).

Maleau alleges that PMI is the real party in interest, not Bonhomme. Even though PMI paid for the testing of arsenic levels and attorney's fees, Bonhomme has legal title to the land affected and is the beneficiary from this action's successful prosecution. It is Bonhomme's land and recreational use, not PMI's, that is adversely affected and diminished by Maleau's actions.

2. Bonhomme suffered a personal injury as a result of Maleau's actions and PMI has no interest or stake in the outcome.

Generally, if a plaintiff is a mere conduit for a remedy owed to others, and not advancing a specific interest of his own, then he is not a real party in interest. *Airlines Reporting Corp. v. S & N Travel Inc.*, 58 F.3d 857, 862 (2nd Cir. 1995) (citing *McNutt v. Bland*, 43 U.S. 9, 13-14 (1844)). Additionally, a shareholder or president is typically not the real party in interest if the injury is suffered by the corporation.[2] However, a shareholder is the real party in interest, and may bring an action, under the "shareholder standing rule" if (1) he suffered a direct personal injury or (2) a special contractual duty between the wrongdoer and plaintiff existed. *Franchise Tax Board of Cal. v. Alcan Aluminum Ltd*., 493 U.S. 331, 336-37 (1990); *Twohy v. First Nat'l Bank of Chi.*, 758 F.2d 1185, 1194 (7th Cir. 1985). At issue here is the first exception, which allows a shareholder to bring suit if he suffered a direct personal injury. Bonhomme suffered a direct, personal injury because his ability to hunt and enjoy his land diminished due to the increased levels of arsenic. Although PMI paid for this action and related costs, such payment and involvement does not negate the direct injury to Bonhomme's real property, recreational use, and reputation, thus appropriately making Bonhomme the real party in interest.[3]

II. BONHOMME PROPERLY BROUGHT A CITIZEN SUIT AGAINST MALEAU FOR HIS VIOLATION OF THE CWA.

The CWA was enacted to restore and maintain the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). In addition to authorization of the EPA's and the U.S. Army Corps of Engineers' ("Army Corps") ability to enforce CWA violations

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[2] *See, e.g.*, *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1318 (9th Cir. 1989); *Weissman*, 12 F.3d at 86 (holding the corporation was the real party in interest regarding a corporate loan); *Blau*, 314 F.2d at 619-20 (holding the corporation is the real party in interest if recovery is for it).
[3] Courts have held the *corporation* is the real party in interest when paying for fees, but for fee requests under Rule 17(d) and thus are not analogous here. *See, e.g., Unification Church v. Immigration and Naturalization Serv.*, 762 F.2d 1077 (D.C. Cir. 1985) (holding the church was the real party in interest because they paid for attorney's fees in a fee request action); *Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991) (holding the members would only be the real party in interest in a fee litigation if paying the attorney's fees).

through civil, criminal, or administrative means, section 505 of the CWA authorizes citizens to initiate citizen suits against anyone "alleged to be in violation of … an effluent standard or limitation." 33 U.S.C. § 1365(a)(1) (2010 & Supp. 2013). The CWA defines "citizen" as a "person or persons having an interest which is or may be adversely affected." *Id.* at § 1365(g). Bonhomme properly brought a citizen suit because the CWA does not expressly limit jurisdiction to *only* United States citizens and he has an interest adversely affected.

A. The citizen suit provision in section 505 of the CWA does not explicitly limit jurisdiction to only United States citizens and thus extends to foreign citizens.

The CWA citizen suit provision contains neither legislative intent nor clear guidance to confer jurisdiction *only* to United States citizens. Congress' use of the term "any citizen", instead of the use of "any person," allows for a broader interpretation of citizen within this provision, one not limited to the United States.[4] Although Congress imposed a heighted requirement on the CWA citizen suit provision, this requirement does not impose a nationality requirement, but rather that the citizen's interest be adversely affected. A "citizen" is defined as a "person or persons having an interest which is or may be adversely affected." *Id.* at 1365(g). Thus, the only requirements to bring suit under the citizen suit provision of the CWA is that (1) a person (2) have an interest (3) that is or may be adversely affected. Here, Bonhomme, although a French citizen, is (1) a person who (2) has an interest that is (3) currently adversely affected.

The Supreme Court supports this analysis in *Bennett v. Spear (Bennett)*, by exchanging the word "citizen" for the words "[any person]" in discussion of the CWA citizen suit provision. 520 U.S. 154, 164 (1997). Additionally, the Court states that Congress used "more restrictive

[4] A broader interpretation is warranted because Congress specifically chose to use the word "citizen," a word encompassing more people, as opposed to "person," a word limited to a few. *See* 42 U.S.C. §§ 6972 (1997 & Supp. 2013), 7604 (2009 & Supp. 2013), 9659 (2010 & Supp. 2013) (RCRA, CAA, and CERCLA citizen suit provisions, respectively, stating "any person…").

formulas" for several environmental provisions by describing the person allowed to bring a citizen suit in terms of a wrong suffered, not based on citizenship. *Id*. (listing heightened requirements for a wrong suffered as seen in the CWA, Surface Mining Control and Reclamation Act, and Ocean Thermal Energy Conversion Act). Lower courts have also held that the use of "any person," in RCRA, CERCLA, and CAA citizen suit provisions demonstrates that Congress intended to confer standing to the full extent under the CWA. *See, e.g., DMJ Associates, L.L.C. v. Capasso*, 288 F.Supp.2d 262, 267 (E.D.N.Y. 2003).

Finally, although the statute may be ambiguous regarding whether "citizen" mean a domestic citizen, the Supreme Court held that one may use "tools available for the resolution of doubt." *Bhd. of R.R. Trainmen v. Balt. & O.R. Co.,* 331 U.S. 519, 528-29 (1947). In this case, the Supreme Court discussed using headings and titles in relation to the text of an ambiguous provision. The Supreme Court noted that although such headings and titles may shed light on ambiguousness, "the heading of a section cannot limit the plain meaning of the text." *Id.* The title of the section at issue here is "citizen suit." Although one may initially believe that only domestic citizens are allowed to bring suit, a closer reading of this text, and other environmental statutes, provides a broader understanding and likelihood that "citizen" encompasses both domestic and foreign citizens. Additionally, every citizen suit provision contains the following text: "the district courts shall have jurisdiction, without regard to … the citizenship of the parties." *See, e.g.,* 33 U.S.C. § 1365(a). The purpose of this text is to negate diversity jurisdiction issues and allow for *all* individuals to bring suit, regardless of citizenship or amount in controversy. Therefore, Bonhomme is properly a citizen under a broad reading of the citizen suit provision of the CWA.

B. Limiting jurisdiction to only United States citizens undermines the purpose of the CWA.

Limiting citizen suit provisions, specifically in environmental cases, inappropriately limits and hinders the purpose of such statutes. The Supreme Court in *Bennett* provided a strong analysis for taking the term "any person" at face value for the following two reasons:

> [T]hat [1] the overall subject matter of [the] legislation is the environment (a matter in which it is common to think all persons have an interest) and that [2] the obvious purpose of the [citizen suit] provision in question is to encourage enforcement by so-called "private attorneys general" - evidenced by its elimination of the usual amount-in-controversy and diversity-of-citizenship requirements, its provision for recovery of the costs of litigation…, and its reservation to the Government of a right of first refusal to pursue the action initially and a right to intervene later.

Bennett, 520 U.S. at 165. Although the facts in *Bennett* did not include a foreign citizen bringing suit under the provision, the policy rationale behind the Court's decision weighs strongly in favor of a broad interpretation of the term "citizen." Bonhomme should not be denied the right to preservation, cleanliness, and restoration of the water simply because he is not a natural born citizen of the United States. Bonhomme owns property adjacent to the Marsh and Reedy, and thus has a significant interest in the quality of both waters. Prohibiting foreign citizens who reside in the United States from experiencing and enjoying the same quality and standards of water as those naturally born in this country is a significant step backwards and negates the purpose of the CWA.

III. MALEAU'S MINING WASTE PILES VIOLATE THE CWA BECAUSE THEY ARE POINT SOURCES AND THEY DISCHARGE POLLUTANTS NOT COMPOSED "ENTIRELY OF STORMWATER" FROM A "FIXED INDUSTRIAL ACTIVITY."

The CWA prohibits the discharge of pollutants, except in compliance with a National Pollutant Discharge Elimination System permit issued pursuant to section 402. *See* 33 U.S.C. §§ 1311(a) (2010 & Supp. 2013), 1342(a) (2010 & Supp. 2013). A "discharge of a pollutant" is (1) any addition of (2) any pollutant (3) to navigable waters (4) from any point source. 33 U.S.C. §

1362(12) (2010 & Supp. 2013). Because Maleau trucked his overburden across the county line and arranged it in piles adjacent to the Ditch, rainwater that comes into contact with those piles percolates through and carries pollutants directly into the Ditch. Therefore, Maleau's actions are the very actions the CWA seeks to prevent (i.e. the discharge of pollutants into waters of the United States).

The parties do not dispute that arsenic is a pollutant. (R. at 8). However, they disagree as to whether the waste piles are point sources, whether the Ditch and Reedy are navigable, and whether Maleau is responsible for discharging arsenic into the Reedy. *Id.* Maleau argues that his waste piles are not point sources because "pile[s] of dirt and stone [are] not 'discernable, confined, and discrete conveyance[s]." (R. at 9). The district court agreed, noting that the "definition [of a point source] lists a dozen examples . . . [but] none of them remotely resemble a pile of dirt and stone." *Id.* Maleau's mining waste piles are point sources for two reasons: (1) the definition of point source is broadly interpreted to include more than the examples listed in 33 U.S.C. § 1362(14); and (2) the waste piles are subject to permitting requirements of the CWA because they qualify as an exception to the Industrial Stormwater Act.

A. The definition of point source is broadly interpreted because a prima facie reading of 33 U.S.C. § 1362(14) expands the definition beyond mere "pipes" and "ditches."

Point source means "any discernible, confined and discrete conveyance, *including but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14) (emphasis added). Congress "purposefully phrased this definition broadly" because of "its contemplated applicability to literally thousands of pollution sources." *Kennecott Copper Corp. v. EPA*, 612 F.2d 1232, 1243 (10th Cir. 1979). Courts interprete this broad definition to include: spoil piles from mining

operations; leachate overflow from reserve sumps; secondary lead smelting plants; dump trucks, drag lines, and bulldozers used in landfill and land clearing operations; and even ships and airplanes dumping ordnance into regulated waters.[5]

In *Sierra Club v. Abston Constr. Co, Inc.,* the Fifth Circuit noted:

> A point source of pollution may . . . be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges . . . by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials.

620 F.2d at 45. Similarly, the rainwater collected by Maleau's waste piles flows down and percolates through the overburden and slag before discharging through channels eroded by gravity from the configuration of the piles. This channeled water leaches and carries arsenic from the piles into the Ditch. Because the configuration of the piles channels the contaminated rainwater into the Ditch, the arsenic-laden rainwater is discharged from a point source. *See N.C. Shellfish Growers Ass'n v. Holly Ridge Associates, LLC*., 278 F.Supp.2d 654, 679 (E.D.N.C. 2003) ("Notwithstanding that it may result from such natural phenomena as rainfall and gravity, the surface run-off of contaminated waters, once channeled or collected, constitutes discharge by a point source.") (citing *O'Leary v. Moyer's Landfill, Inc.*, 523 F.Supp. 642, 655 (E.D.Pa. 1981)). Furthermore, the court in *Abston* noted that "[n]othing in the [CWA] relieves miners from liability simply because the operators did not actually construct [the] conveyances . . . . Conveyances of pollution formed . . . as a result of natural erosion . . . may fit the statutory definition and thereby subject the operators to liability." 620 F.2d at 45. Therefore, because

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[5] *See Sierra Club v. Abston Const. Co., Inc.,* 620 F.2d 41 (5th Cir. 1980); *United States v. Earth Sciences, Inc. (Earth Sciences)*, 599 F.2d 368 (10th Cir. 1979); *RSR Corp. v. Browner*, 924 F.Supp. 504 (S.D.N.Y. 1996); *United States v. Holland*, 373 F.Supp. 665 (M.D. Fla. 1974); *United States v. Weisman*, 489 F.Supp. 1331 (M.D. Fla. 1980); *Romero-Barcelo v. Brown*, 478 F.Supp. 646 (D.P.R. 1979) *aff'd in part, vacated in part*, 643 F.2d 835 (1st Cir. 1981) *rev'd sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

Maleau configured the piles in a way conducive to the formation of channels, he is liable under the CWA regardless of whether he intentionally created the channels or they were created by gravity.

In *Earth Sciences*, the Tenth Circuit held that overflow from primary and reserve pumps during gold leaching processes was a discharge of pollutants under the CWA, in part, because the pumps qualified as point sources. 599 F.2d at 373. The court went on to hold that "mining . . . may involve discharges from both point and nonpoint sources." *Id.* The court distinguished point sources as sources that "emit pollution from an identifiable point," as opposed to nonpoint sources, which do not. *Id.* This distinction stems from the court's understanding that exempting regulation from "*any activity that emits pollution from an identifiable point"* is contrary to the intent and structure of the CWA. *Id.* Here, Maleau's waste piles are identifiable points and thus point sources, not nonpoint sources.

Maleau cites *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) and *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976), in support of his argument that his waste piles are not point sources. Conversely, both of these cases unequivocally support the analysis in *Abston*. *See Abston*, 620 F.2d 41 (finding spoil piles are point sources if the pollutant discharges through a ditch, gully, or similar conveyance). In both cases, the Fourth Circuit refused to overturn point source regulations created by the EPA under the CWA because the definition of point source only "excludes unchanneled and uncollected surface waters." *Consolidated Coal*, 604 F.2d at 249, *Appalachian Power,* 545 F.2d at 1373. Maleau's waste piles discharge pollutants "through channels eroded by gravity" because of "the configuration" of those piles. (R. at 5). Thus, Maleau's waste piles fall neatly within *Consolidated Coal* and *Appalachian Power*'s interpretation of point source.

B. Maleau's waste piles are not excluded under the Industrial Stormwater Act because they discharge pollutants not "composed entirely of stormwater" and are associated with a fixed industrial activity.

Although the discharge of pollutants from Maleau's waste piles may contain some rainwater runoff, this runoff is not stormwater discharge. Generally, stormwater discharge does not require a permit if it is *composed entirely of* stormwater. 33 U.S.C. § 1342(p)(1) (emphasis added). Stormwater "means storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13) (2013).[6] This definition unambiguously excludes any runoff that percolates through waste.[7] The rainwater runoff from Maleau's waste piles percolates through the waste piles in addition to flowing over them and therefore is not stormwater discharge.

Additionally, stormwater discharge associated with industrial activity is an exception to the stormwater exemption, which requires a permit. 33 U.S.C. §1342(p)(2)(B). "Storm water discharge associated with industrial activity means the discharge from any conveyance that is used for collecting and conveying storm water . . . that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). Mineral industries, including active mining operations, "are considered to be engag[ed] in 'industrial activity.'" *Id*. Stormwater discharge includes discharges from waste material, refuse

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[6] The EPA and Army Corps are delegated rulemaking authority and afforded deference in interpreting the statute they are entrusted to administer. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–845, (1984). Here, the agencies definition of "stormwater" (and "waters of the United States," *see infra* Part IV.) is entitled to deference.

[7] The EPA defines "stormwater discharge" as precipitation that only "flows over land or impervious surfaces and does not percolate into the ground." *National Pollutant Discharge Elimination System (NPDES) Home, Stormwater Program,* EPA (Feb. 16, 2012, 12:05pm), http://cfpub.epa.gov/npdes/home.cfm?program_id=6.

sites, and sites used for disposal. *Id.* at § 122.26(b)(14).[8] Maleau's waste piles result directly from his mining operations, an industrial activity, and the discharges are from waste material on a site used for disposal; thus the rainwater runoff is not exempted as stormwater discharge.

In *Decker v. Northwest Environmental Defense Center* the Supreme Court held that the EPA reasonably interpreted its own regulation when it exempted discharges of channeled stormwater logging-road runoff from permitting requirements. 133 S.Ct. 1326, 1333 (2013). The Supreme Court noted that although stormwater discharges associated with industrial activities are an exception to the stormwater discharge exemption, the EPA's interpretation is reasonable because the term industrial activities applies to "industrial sites more fixed and permanent than outdoor timber harvesting operations." *Id.* at 1337. Logging activities are reasonably differentiated from other outdoor economic activities that require permits, such as mining, because those activities are more fixed and permanent. *Id.* Here, Maleau's mining activities are fixed and permanent. He mines from a single tract of land in Lincoln County before trucking his waste to land in Jefferson County. (R. at 5). Nothing in the record indicates that Maleau plans to move his mining operation presently or in the future. Thus, the discharges from Maleau's waste piles are not exempt under the definition of stormwater discharge because they are associated with a fixed industrial activity.

Maleau's waste piles are point sources because point source is broadly interpreted to include more than "pipes" and "ditches," and the rainwater discharge is not stormwater discharge because it percolates through the waste piles and is associated with a fixed industrial activity.

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[8] Although stormwater discharge "excludes areas located on plant lands separate from the plant's industrial activities, such as office buildings and accompanying parking lots . . .", this exclusion is not applicable because Maleau (1) uses his land in Jefferson County as a site used for disposal, a specifically included example of a place directly related to industrial activity, and (2) the land in Jefferson County is *not located on* the land in Lincoln County. *See* 40 C.F.R. § 122.26(b)(14).

IV. DITCH C-1 IS A TRIBUTARY OF THE REEDY CREEK CONSTITUTING "WATERS OF THE UNITED STATES" UNDER THE CWA.

As previously stated, the CWA prohibits (1) the addition (2) of any pollutant (3) to navigable waters (4) from a point source without a permit. 33 U.S.C. §§ 1311(a), 1342(a)(1). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), which are defined by regulation to include, among other things, "[a]ll interstate waters" and the "[t]ributaries of [such] waters." 40 C.F.R. § 122.2 (2013); 33 C.F.R. § 328.3(a)(5) (2013). In *Rapanos v. United States*, the entire Supreme Court agreed that the term "navigable waters" in the CWA is broader than the traditional interpretation of the term. 547 U.S. 715, 730 (2006) (plurality opinion); *id.* at 767-78 (Kennedy, J., concurring); *id*. at 792 (Stevens, J., dissenting). If certain criteria are met, the jurisdictional reach of the CWA can extend to ditches as tributaries of interstate waters. The Ditch is a drainage ditch, dug into saturated soils to enable agricultural use, flowing most of the calendar year directly into a larger body of water, the Reedy, which is an interstate, navigable water. (R. at 5). As a tributary of an interstate water, the Ditch constitutes "waters of the United States" under the jurisdiction of the CWA. *See United States v. Copper*, 482 F.3d 658, 660 (4th Cir. 2007) (holding a tributary of an interstate water, a small creek, constituted "waters of the United States").

Moreover, the Ditch is not precluded from constituting "waters of the United States" simply because the CWA definition of point source includes a ditch as an example. And, in *Rapanos*, Justice Kennedy expressly recognized the possibility that "certain-water bodies could conceivably constitute both a point source and a water." 547 U.S. at 772 (Kennedy, J. concurring). Thus, the Ditch is a tributary of the Reedy regardless of whether it is also a point source, and the district court erred by holding otherwise.

A. Ditch C-1 is a tributary of an interstate water and satisfies both tests proffered in *Rapanos* qualifying as protected "waters of the United States."

The EPA issued a Guidance Memorandum in 2011 to assist in determining the jurisdictional reach of the CWA. In order for the Ditch to qualify as a tributary and thus "waters of the United States," the EPA asserts it must satisfy one of the two tests in *Rapanos* and have characteristics of a tributary. *Draft Guidance on Identifying Waters Protected by the Clean Water Act (EPA Guidance Memorandum)*, April 2011, available at http://water.epa.gov/lawsregs/guidance/wetlands/upload/wous_guidance_4_2011.pdf (hereinafter Guidance Memorandum). In *Rapanos,* the Court consolidated two cases regarding pollutant discharges into wetlands adjacent to non-navigable tributaries of traditionally navigable waters. 547 U.S. at 729 (plurality opinion). The Court issued a split opinion addressing the jurisdictional reach of "navigable waters" subject to the Army Corps' regulations. *Rapanos*, 547 U.S. 715.[9]

Although the EPA Guidance Memorandum is not binding on this Court, its guidance is consistent with many courts employing *Rapanos* to determine if a waterway constitutes a tributary within the meaning of "waters of the United States." The Ninth Circuit explained that *Rapanos* "directly dealt with the reach of the CWA over wetlands, but in so doing it addressed the question of what could be a tributary." *United States v. Moses (Moses)*, 496 F.3d 984 (9th Cir. 2007) (citing *Rapanos*, 547 U.S. at 739); *see also United States v. Vierstra (Viestra)*, 803 F.Supp.2d 1166, 1169 (D. Idaho 2011), *aff'd*, 492 Fed. Appx. 738 (9th Cir. 2012) (unpublished) (interpreting "navigable waters" and tests proffered in *Rapanos* applicable to the CWA

[9] Circuits are split regarding which *Rapanos* opinion controls. The First, Second, Third, Fourth, Fifth, Sixth, and Eight Circuits have utilized either test to establish jurisdiction. The Seventh and Ninth Circuits have applied Justice Kennedy's test, but explained the plurality's test may apply in certain circumstances. The Eleventh Circuit has only applied Justice Kennedy's test. *See* Richard E. Glaze Jr., *Rapanos Guidance III: "Waters" Revisited*, 42 Envtl. L. Rep. News & Analysis 10118, 10130 (2012). This Court, however, need not determine which test applies, because the Ditch can satisfy both tests proffered in *Rapanos*.

generally, even though the analysis was conducted in the context of wetlands). Not all courts, however, have applied *Rapanos* beyond wetlands jurisdiction. *See Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1215 n.2 (D.Or. 2009) (holding "Justice Kennedy's significant nexus test is inapplicable to determining the jurisdictionality of tributaries to waters of the United States."); *but see United States v. Robison*, 505 F.3d 1208 (11th Cir. 2007) (employing the significant nexus test to analyze CWA jurisdiction over a non-navigable tributary);" *Evntl. Prot. Info. Ctr. v. Pac. Lumber Co*., 469 F.Supp.2d 803, 823 (N.D.Cal. 2007) (same).

The Ditch meets the standards set forth in each test in *Rapanos*, and its characteristics are consistent with the definition of a tributary utilized by the Ninth Circuit. *See Vierstra*, 803 F.Supp.2d at 1168 (A "tributary" is a "stream which contributes its flow to a larger stream or other body of water.") (citing Random House College Dictionary 1402 (rev. ed. 1980)).

1. Ditch C-1 is a tributary of Reedy Creek under the Rapanos plurality standard because of its relatively permanent flow.

The plurality opinion in *Rapanos*, authored by Justice Scalia, interpreted the term "waters of the United States" as covering waters "containing relatively permanent, standing or continuous flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection" to such relatively permanent waters. 547 U.S. at 739, 742 (plurality opinion). The plurality opinion emphasized that "relatively permanent" waters do not include ephemeral tributaries flowing only in response to precipitation and intermittent streams without a continuous, seasonal flow. *Id.* at 739. The plurality discussed circumstances where ditches were held to be jurisdictional tributaries and asserted this application of the CWA was too broad. *Id*. at 726-29. The Ditch's relatively permanent flow distinguishes it from the ditches discussed by the plurality, and is the key factor bringing it within the meaning of a tributary under the plurality's test. (R. at 5). Because it "contains running water except during annual

periods of drought lasting from several weeks to three months" (R. at 5), the Ditch is analogous to the plurality's example of a jurisdictional stream with a continuous flow in a permanent channel. 547 U.S. at 733. Furthermore, the plurality did not "exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id*. at 732 n.5.

Administering the plurality's test, the court in *Vierstra* held that a canal constituted "waters of the United States" despite the fact that the canal lacked an interstate connection, was manmade, and only had water flowing six to eight months a year. 803 F.Supp.2d at 1167. The court noted, however, that the canal had recurring and perennial flow and an ordinary high water mark with a defined bed and bank. *Id*. at 1170. These characteristics supported the finding that the canal was a "relatively permanent" non-navigable tributary falling within the definition of "waters of the United States." *Id*. at 1168.

It is irrelevant that the Ditch was constructed in 1913 and is maintained by landowners (R. at 5) because courts consistently hold that artificially created channels or manmade irrigation ditches may be subject to the CWA. *See Rapanos,* 547 U.S. at 757 (plurality opinion) (finding manmade ditches and drains may constitute "waters of the United States"); *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) ("[I]t does not make a difference whether the channel by which water flows … was manmade or formed naturally.").

In *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc., v. U.S. Army Corps of Eng'rs, Charleston District*, the court upheld the Army Corps' distinction between non-jurisdictional ditches and jurisdictional tributaries. 801 F.Supp.2d 446, 455-57 (D.S.C., 2011), *aff'd*, 501 Fed. Appx. 268, 271 (4th Cir. 2012) (unpublished). The non-jurisdictional ditches are excavated wholly in uplands and do not have a relatively permanent flow. Whereas the

jurisdictional tributaries have a clearly defined channel and a regular "influx of groundwater" which are strong indicators of relatively permanent flow. *Id*. The Ditch shares the most important characteristics of the jurisdictional tributaries because the water is "derived primarily from draining groundwater from the saturated soil with some rainwater runoff after rain events." (R. at 5). Additionally, the Ditch is not located uplands. *Id.* For these reasons, the Ditch is a jurisdictional tributary of the Reedy and falls within the meaning of the "waters of the United States."

The Ditch's manmade construction makes it no less capable of carrying pollution downstream, and its relatively permanent water flow into the Reedy supports the finding that it is a tributary of the Reedy and therefore subject to federal regulation under the CWA.

2. Ditch C-1 significantly effects the physical, chemical, and biological integrity of downstream waters, including Reedy Creek and Wildman Marsh, constituting a significant nexus to jurisdictional waters.

According to Justice Kennedy, the applicable test for determining whether or not a "water or wetland" is "navigable" is the significant nexus test. *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring) (quoting *SWANCC*, 531 U.S. at 167, 172). Justice Kennedy explained a significant nexus exists when wetlands "either alone or in combination with similarly situation lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 759 (Kennedy, J., concurring). The Guidance Memorandum also employs Justice Kennedy's significant nexus test to determine jurisdiction over tributaries of traditionally navigable or interstate waters. *See* Guidance Memorandum. The EPA analyzes jurisdiction by directing field staff to identify indicators of the effect on the chemical, physical or biological integrity of downstream waters. *Id*. at 9.

The presence of an ordinary high mark may be a rough measure of the regularity and volume of the flow in the tributary. *Rapanos*, 547 U.S. at 781 (Kennedy, J., concurring). The record is silent on the presence of an ordinary high mark in the Ditch, however it demonstrates that the Ditch flows directly into an interstate water, the Reedy. (R. at 5). A direct, open surface water connection exists for nine to eleven months of the year between the Ditch and Reedy. Additionally, the evidence demonstrates that arsenic is present in the Ditch at high concentrations and is present along the Reedy and in three waterfowl found in the Marsh. (R. at 6). As Congress and the Supreme Court have recognized, "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *United States v. Riverside Bayview Homes, Inc. (Riverside Bayview Homes, Inc.)*, 474 U.S. 121, 133 (1985) (quoting S.Rep.No. 414, 92d. Cong., 1st Sess., at 77 (1972)). The water quality and presence of pollutants in the Ditch have significant effects on the physical, chemical, and biological integrity of downstream waters. A significant nexus exists between the Ditch and Reedy because there is a direct flow of water and pollutant discharge, and thus it constitutes "waters of the United States."

3. Precedent forecloses the requirement that Ditch C-1 must be navigable-in-fact, or susceptible of being rendered so, to qualify as "navigable waters."

Protecting waterways that lead to interstate waters, even if not traditionally navigable, is fundamentally consistent with the CWA. The Ditch functions as a natural tributary providing water to the Reedy most months of the year. Maleau contends the Ditch "is not [a] 'navigable water' because it has never floated a boat and is too small to do so in the future." (R at 9) (quotations added). Maleau's understanding of navigability is misplaced. "Navigable waters" in the CWA are not limited to the "traditional definition of *The Daniel Ball*, which required that the 'waters' be navigable-in-fact or susceptible of being rendered so." *Rapanos*, 547 U.S. at 730 (plurality opinion) (citing *The Daniel Ball*, 10 Wall., 557, 563). A non-navigable tributary may

be covered by the CWA if it falls within the meaning of "waters of the United States," and there is no requirement that it float a boat or must do so in the future.

B. Ditch C-1 is not excluded as a "navigable water" because "ditches" are included in the definition of a point source and Ditch C-1 can constitute both a point source and "waters of the United States."

Ditches and point sources are not mutually exclusive. The district court relied upon the broad definition of a point source in CWA § 502(14) that defines point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel … from which pollutants are or may be discharged. 33 U.S.C. § 1362(14). The Ditch contains aquatic features that could be characterized as a point source, but these characteristics do not exclude it from constituting "waters of the United States." In certain circumstances, a ditch or a canal can fall within the definition of "waters of the United States." *In Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 292 (4th Cir. 2011) (affirming the Army Corps' determination that some ditches are tributaries and therefore "waters of the United States"); *See also ORNC Action v. U.S. Bureau of Reclamation*, No. 97-3090-CL, 2012 WL 3526833, at *23 (D. Or. Jan. 17, 2012) (finding a drainage canal connecting to a river that is a "water of the United States" is itself a "water of the United States" even though it satisfies the Act's definition of a point source).

The district court relied upon the plurality opinion in *Rapanos* that distinguished the separate classifications of "navigable waters" and point sources in the CWA. 547 U.S. at 736 (plurality opinion) (explaining the distinct category of ditches, channels and conduits that are "terms ordinarily used to describe the watercourses through which intermittent waters typically flow – shows that these are, by and large, *not* 'waters of the United States'"). The plurality's opinion suggests ditches should generally be treated as point sources, however, it does not

foreclose the possibility that a ditch could qualify as a "water of the United States" in the appropriate circumstances. In response to the plurality's distinction between point source and "navigable waters," Justice Kennedy responded to this distinction between point source and "navigable waters," and explicitly recognized the possibility that "certain-water bodies could conceivably constitute both a point source and a water." *Id*. at 772 (Kennedy, J. concurring). For example, the Erie Canal falls within the dictionary definition of a channel despite the regular presence of maritime traffic.[10] Certainly, the title of "canal" should not prevent it from being treated as "waters of the United States."

The exclusion of ditches or channels from the CWA protection creates the possibility of harming innocent landowners.[11] Treating the Ditch as a point source instead of a "waters of the United States" creates the risk that Bonhomme, an innocent property owner, could be held responsible for discharges or pollutants that originated on upstream properties simply because he owns the land where the Ditch empties into the Reedy. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004). The district court's holding that the Ditch is a point source creates unfair competition and unjust results. Such a holding allows Maleau to discharge into a non-navigable tributary (the Ditch) upstream from jurisdictional waters without obtaining a proper permit, thereby making Bonhomme, an innocent person, liable.

V. REEDY CREEK STRETCHES FIFTY MILES THROUGH BOTH NEW UNION AND PROGRESS AND BY ITS INTERSTATE NATURE FALLS WITHIN THE JURISDICTIONAL TERM "NAVIGABLE WATERS."

[10] A "channel" is defined as "the hollow bed where a natural body or stream of water runs or may run," as "the deeper part of a moving body of water … where the main current flows or which affords the best passage …" Webster's Third International Dictionary at 374 (2002).
[11] The district court took judicial notice that Bonhomme alleges Maleau artificially lowers his production costs by trucking the overburden from his open pit gold mining and extraction operation in order to avoid CWA permitting requirements. (R. at 5-6).

The Reedy is an interstate, shared water falling within the meaning of the "waters of the United States." The plain language of the CWA illustrates Congressional intent to protect waters even if they are not navigable-in-fact,[12] as the CWA excludes the term "navigable" from the definition of "navigable waters." 33 U.S.C. § 1362(7) (defining "navigable waters" as "the waters of the United States, including the territorial seas"). Additionally, section 303(a)(1) of the CWA directs States to establish water quality standards for navigable waters including "interstate waters." 33 U.S.C. § 1313(a)(1) (2010 & Supp. 2013). Furthermore, the regulations promulgated by the EPA and Army Corps define "waters of the United States" to include interstate waters. 40 C.F.R. § 122.2; 33 C.F.R. §328.3(a)(5) (2013). These regulations are consistent with the legislative history of the CWA that demonstrates Congress intended protection beyond navigable-in-fact waters. *See Earth Sciences*, 599 F.2d at 375 (examining the legislative history of the CWA and the elimination of the word "navigable" from preceding "waters in the United States" in its final version and explaining the term should "be given the broadest possible constitutional interpretation") (citations omitted). The Supreme Court has yet to address the CWA's coverage of waters that are not navigable-in-fact but interstate, and the Supreme Court's issued decisions have not questioned the jurisdictional status of interstate waters.

As the district court stated "[t]he interstate nature of water pollution is the reason why Congress enacted water pollution control legislation in the first place." (R. at 10) (citing Act of Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903 (1965) (addressing water pollution only in interstate waters). The Reedy begins in the State of New Union where it flows for several miles through

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[12] Whether a body of water is navigable-in-fact is "determined by whether it is used or susceptible of being used in its natural and ordinary condition as a highway for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water." *United States v. Lucas*, 516 F.3d 316, 323 (5th Cir. 2008). The Reedy is not navigable-in-fact, because it has not been used for waterborne transportation and could not be used for waterborne transportation even with reasonable improvements. (R. at 9).

the State of Progress and ends in the Marsh. (R. at 5). The Reedy is not navigable-in-fact, but it is a protected water of the CWA because of its interstate nature. *See Moses*, 496 F.3d at 988 (A "body of water need not, itself, be navigable in order to be one of the waters of the United States. Even wetlands can come within that concept."). Therefore, the district court's holding that the Reedy is a "navigable water" protected under the CWA was appropriate.

A. The Commerce Clause grants Congress the authority to regulate interstate waters, and it intended "navigable waters" to be broadly interpreted to ensure waters similar to Reedy Creek are protected.

The federal government has a significant and necessary role in regulating the nation's waters, including protecting water quality. "It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kasier Aetna v. United States*, 444 U.S. 164, 173 (1979). The Commerce Clause empowers Congress to regulate commerce among the states. U.S. Const. art. I, § 8, cl. 3. Courts have interpreted this power to include the authority to regulate waters to "limit pollution, prevent obstructions to navigation, reduce flooding, and control watershed development." *United States v. Hubenka*, 438 F.3d 1026 (10th Cir. 2006) (citing *Riverside Bayview Homes Inc.*, 474 U.S. at 132-133; *United States v. Republic Steel Corp*., 362 U.S. 482, 489-90 (1960); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404-05 (1940)).

Although Congress' power to regulate interstate activities under the Commerce Clause is broad, it is not unlimited. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 192-93 (2001) ("identifying 'three broad categories of activity that Congress may regulate under its commerce power': (1) channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) activities that 'substantially affect' interstate commerce) (citing *United States v. Lopez,* 514 U.S.

549, 558-59 (1995)).

Although, *Lopez* did not directly address environmental regulations, the Supreme Court addressed the boundaries of Commerce Clause and the CWA in *SWANCC*. In *SWANCC*, the Supreme Court addressed an Army Corps' regulation that included a Migratory Bird Rule asserting jurisdiction over intrastate waters that might be used as a habitat for migratory birds. 531 U.S. at 162. The Supreme Court found the Army Corps' interpretation beyond the scope of Congress' Commerce Clause powers over navigation. *Id*. at 181. The Supreme Court reaffirmed, however, Congress' Commerce Clause authority to regulate "activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 196 (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc*., 452 U.S. 264, 282 (1981)).

This case is different from *SWANCC*, because assertion of federal jurisdiction over the Reedy does not extend Congress' authority to the broadest interpretation. The Reedy is an interstate water, not an isolated, intrastate pond. The Reedy falls within the scope of Congress' Commerce Clause authority subject to jurisdiction under the CWA for three reasons: (1) the pollution that enters the Reedy effects both the State of Progress and the State of New Union; (2) the Reedy supplies water to Bounty Plaza that services interstate commerce on I-250, a federally-funded highway; and (3) farmers with land adjacent to the Reedy divert the water and use it for agricultural and irrigation purposes in order to sell their products in interstate commerce. (R. at 5, 9). The water from the Reedy is necessary for interstate commerce to supply the Plaza and farmers, and pollution entering that water could have a substantial affect on interstate commerce. *See Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 953 (1982) (holding water itself to be an "article of commerce").

Moreover, the district court mischaracterized the types of activities that fall within

acceptable Commerce Clause parameters. (R. at 9) (finding rivers must be "highways of interstate commerce to fall within the definition of 'navigable waters' under the CWA"). This is contrary to legislative history of the CWA. *See SWANCC*, 531 U.S. at 181 (asserting the deletion of "navigable" from its definition indicates "the goals of the 1972 statute have nothing to do with *navigation* at all" and considering the CWA post-*Lopez*). The Reedy, although non-navigable, is interstate and is the type of water that Congress intended to regulate. *See Riverside Bayview Homes Inc.*, 474 U.S. at 139 (upholding the Army Corps regulation interpreting the "waters of the United States" wetlands adjacent to navigable or *interstate* waters and their tributaries).

Lastly, the district court wrongly compared the Reedy to the Rito Seco Creek in *Earth Sciences*. (R. at 10). In *Earth Sciences*, the Rito Seco was not navigable-in-fact and was located completely within Colorado. 599 F.2d at 374. Although the uses of the creeks may be similar, the Reedy is located in two states. Any activity that harms the water quality of the Reedy has a significant affect on interstate commerce subjecting the Reedy to federal jurisdiction under the CWA as a "navigable water."

B. Reedy Creek flows directly into Wildman Marsh, a part of Wildman National Wildlife Refuge, a federally protected and regulated land.

The Reedy flows directly into the Marsh, which contains extensive wetlands located in the Wildlife Refuge. (R. at 5-6). The FWS owns and maintains most of the wetlands located in the Marsh. (R. at 6). The United States can assert federal jurisdiction over its property, including the wetlands contained within the Wildlife Refuge. *See* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States …").

The National Wildlife Refuge System Improvement Act ("NWRSIA") exists to conserve, manage and restore, where appropriate, resources and habitats for fish, wildlife and plants within

the United States. 16 U.S.C. § 668dd(a)(2) (2009 & Supp. 2013). The statute directs the Secretary to maintain the "biological integrity, diversity and environmental health" of the wildlife system. 16 U.S.C. § 668dd(a)(4)(B). If the EPA or Army Corps could not assert jurisdiction to regulate pollutants discharged by the Reedy into the wetlands of the Marsh, protection of the Marsh would be significantly hampered. *See United States v. Vesterso*, 828 F.2d 1234, 1244 (8th Cir. 1987) (prosecuting destruction to federal property containing waterfowl protection easements within a National Wildlife Refuge System).

The district court found the Reedy subject to federal jurisdiction under the CWA because it is a "tributary" to a federal preserve that contains "waters of the United States." (R. at 10). This interpretation is consistent with both tests in *Rapanos*. According to *Rapanos*, the Reedy constitutes a tributary under both tests because it is 1) permanent water with a direct surface connection to the wetland and 2) it shares a significant nexus with the wetlands of the Marsh, a federally protected land, because there is a direct hydrological connection between the Reedy and the wetlands. *See Rapanos*, 547 U.S. 715; *see supra* Part IV.A.

Additionally, the NWRISA directs "no person [to] injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System." 16 U.S.C. § 668dd. Here, arsenic is detectable throughout the Marsh (R. at 6). Certainly, this is the type of activity and damage the NWRISA and the CWA are designed to prevent. Because the Reedy is an interstate water and a tributary of wetland located in federally protected lands, the district court was correct in holding the Reedy is a "navigable water" subject to CWA jurisdiction.

VI. MALEAU IS LIABLE FOR THE DISCHARGE OF POLLUTANTS INTO REEDY CREEK BECAUSE HE INITIALLY DISCHARGED THE POLLUTANTS.

Maleau is responsible for the discharge of arsenic into the Reedy regardless of whether the Ditch is a tributary or a point source, because "[l]iability must lie with the person or persons causing the 'addition of any pollutant to navigable waters.'" *Friends of the Sakonnet v. Dutra*, 738 F.Supp. 623, 630 (D.R.I. 1990). The district court misinterpreted the guidance of the Supreme Court when it broadly interpreted *Miccosukee* to hold "that the owners of point sources do not have to initially add pollutants to water to be liable under the CWA as long as their point sources convey the pollutants to navigable waters." (R. at 9) (citing *Miccosukee, 541 U.S. at 105*). This broad interpretation is contrary to both the purpose of the CWA and the Supreme Court's own interpretation of *Miccosukee* in *Rapanos*.

In *Rapanos*, the Supreme Court noted the enforcement mechanisms of the CWA are aimed at traditional water polluters because the CWA does not forbid the "addition of any pollutant *directly* to navigable waters from any point source," but rather the "addition of any pollutant *to* navigable waters." 547 U.S. at 743 (plurality opinion) (citing §§ 33 U.S.C. 1362(12)(A), 1311(a)) (emphasis in original)). "Thus, from the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant *that naturally washes downstream* likely violates § 1311(a), even if the pollutants discharged from a point source do not emit 'directly into' covered waters, but pass 'through conveyances' in between." *Id.* "We have held that the Act 'makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters.'" *Id*. at 743 (citing *Miccosukee*, 541 U.S. at 105).

Here, the Supreme Court clearly states that it does not intend to hold an owner of a point source liable under the CWA just because their point source acts as a conveyance. Instead, the intent is to hold those who are responsible for the initial discharge of the pollutant liable, even if

that initial discharge does not flow directly into a navigable water. Thus, it is Maleau who is liable under the CWA for a discharge of a pollutant, not Bonhomme, because it is Maleau whose pollutant naturally washes downstream, through conveyances, into a navigable water.

In support of its holding in *Rapanos*, the Court additionally cites to two lower court cases, *United States v. Velsicol Chem. Corp.* and *Sierra Club v. El Paso Gold Mines, Inc.* 547 U.S. at 743 (plurality opinion). In both of these cases the discharged pollutant washed downstream into a navigable water instead of directly into the water. 438 F. Supp. 945 (W.D. Tenn. 1976), 421 F.3d 1133 (10th Cir. 2005). In *Velsicol*, the defendant argued that because "its alleged discharges [were] into the city sewer system, which, in turn, emptie[d] into the Mississippi, and not directly into the Mississippi River, that it [was] not discharging into a 'navigable water.'" 438 F. Supp. at 947. The court disagreed noting that "Congress intended to make the 1972 Act apply to its broadest limits . . .. The fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from the scope of this Act. Defendant knows or should have known that the city sewers lead directly into the Mississippi River and this is sufficient to satisfy the requirements of discharging into 'water of the United States.'" *Id.* (citing 33 U.S.C. §§ 1311(a), § 1362(7)).

Similarly, in *El Paso Gold Mines, Inc.* the pollutant in question was first discharged into a shaft, which then emptied into a tunnel and traveled two-and-a-half miles before discharging into a navigable water. 421 F.3d at 1136. The Tenth Circuit concluded that the owner of the shaft from which the discharge originally occurred was the person responsible under the CWA, not the successor landowners whose property the pollutant flowed over before reaching the navigable water. *Id*. In addition to the Supreme Court's ruling in *Rapanos, Velsicol* and *El Paso Gold Mines* demonstrate that Maleau's contention is incorrect. Bonhomme does not violate the CWA

just because he owns the point source from which the pollutant directly discharges into a navigable water; instead, it is Maleau who violates the CWA because it is from his point source that the pollutant discharges into the Reedy through another's intermediate conveyance. Furthermore, Maleau knew or should have known that discharging pollutants into the Ditch would result in the discharge of pollutants into the Reedy. Holding Maleau responsible under the CWA promotes the purpose of the CWA. *See infra* Part. IV.B. See also *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) (Finding an industrial polluter who dumps waste, which travels through intermediate conveyances, liable because innocent owners of the conveyances should not be liable). Because Maleau is the person who actually discharges the arsenic into the Reedy, not Bonhomme, and because Maleau knew or should have known that his discharge would result in a discharge of a pollutant into a navigable water, Maleau violated the CWA.

CONCLUSION

Bonhomme has standing and is the real party in interest under FRCP 17. Bonhomme is also a citizen under CWA § 505 and thus appropriately brought suit against Maleau. Maleau's overburden and slag waste piles are furthermore point sources under the Clean Water Act. Moreover, both the Ditch and Reedy are navigable waters of the United States. Finally, because Maleau initially discharged the arsenic into the Ditch, Bonhomme did not violate the CWA, Maleau did. Therefore, this Court should reverse the district court's decision to dismiss this case.

Respectfully submitted,

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Counsel for Jacques Bonhomme