Team 52

C.A. No. 13-01234

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Jacques Bonhomme,

Plaintiff-Appellant, Cross-Appellee

vs.

D.C. No. 155-CV-2012

Shifty Maleau,

Defendant-Appellant, Cross-Appellee

State of Progress,

Plaintiff-Appellant, Cross-Appellee

and

Shifty Maleau **D.C. No. 165-CV-2012**

Intervernor-Plaintiff-Appellant, Cross-Appellee

vs.

Jacques Bonhomme,

***Defendant-Appellant, Cross-Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGRESS
THE HONORABLE ROMULUS N. REMUS, DISTRICT JUDGE

BRIEF OF PLAINTIFF-APPELLANT, DEFENDANT-APPELLANT, CROSS-APPELLEE JACUES BONHOMME.

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STATEMENT OF JURISDICTION

Cross-Appellee Jacques Bonhomme ("Bonhomme") filed a complaint in the United States District Court for the District of Progress (the "District Court") seeking review under the Clean Water Act (the "CWA"), § 505, 33 U.S.C. § 1365 (2012) (the "First Action"). Cross-Appellee State of Progress ("Progress") filed a complaint in the District Court seeking review under CWA § 505 (the "Second Action"). Cross-Appellee Shifty Maleau ("Maleau") intervened in the Second Action as a matter of right. Upon uncontested motion by Progress and Maleau, the District Court consolidated the First Action and the Second Action in *Bonhomme v. Maleau.* On July 23, 2012, the District Court granted Maleau's motion to dismiss and denied Bonhomme's motion to dismiss. The District Court's order is a final decision, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Whether Bonhomme—a foreign national—is a "citizen" under CWA § 505, 33 U.S.C. § 1365.

2. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

3. 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).

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

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

6. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

This case arose after Bonhomme became aware that water quality testing showed arsenic present in significant quantities in Ditch C-1, Reedy Creek, and Wildman Marsh downstream from piles of mining waste located on Maleau's property. (R. *5). After giving proper notice, Bonhomme brought a citizen suit under § 505 of the CWA against Maleau for the addition of arsenic to Ditch C-1 and Reedy Creek without a permit. (R. *4-5).

After Bonhomme had filed suit against Maleau, a citizen of the State of Progress and one of the State's largest employer's, Progress filed suit against Bonhomme, alleging Bonhomme, not Maleau, was liable for the addition of arsenic into Reedy Creek. (R. *5). The cases were consolidated and the parties filed cross-motions to dismiss. (R. *5).

On July 23, 2012, the District Court issued an Opinion and Order finding: (1) PMI, not Bonhomme, is the real party in interest in this case; (2) Bonhomme is not a "person" entitled to bring suit under § 505 of the CWA; (3) Reedy Creek is a water of the United States under § 502; (4) Ditch C-1 is not a water of the United States; (5) Maleau's mining waste is not a "point source" under § 502; and (6) Ditch C-1 is a point source. Accordingly, the District Court dismissed Bonhomme's case. (R. *7-10). All three parties filed a Notice of Appeal to this Court. (R. *1).

STATEMENT OF FACTS

This case is about alleged arsenic pollution of the waters flowing through an agricultural drainage ditch ("Ditch C-1"), an interstate waterway ("Reedy Creek" or "the Reedy"), and a wetland ("Wildman Marsh"). Rain water falls on farms and other properties adjacent to Ditch C-1, drains into Ditch C-1, which flows into Reedy Creek and, eventually, into Willdman Marsh. (R. *5). Water flows continuously through Ditch C-1, excepting periods of drought, and the ditch

has served the area's farms for over 100 years through collaboration between property owners to maintain the drainage function that is crucial to agriculture there. (R. *5).

Enter Shifty Maleau. The owner of a gold mining operation, Maleau transfers mining overburden and slag from his mine adjacent to the navigable Buena Vista River to his property next to Ditch C-1. (R. *4-5). Rain water now drains through piles of mining waste, leaching arsenic into channels formed in the waste piles and into the ditch along the way. (R. *4-5). According to water quality testing, which is uncontroverted in the Record, water downstream from Maleau's piles is contaminated with arsenic, while water upstream from Maleau runs clean. (R. *6). Arsenic has been detected in significant quantities in the water of Reedy Creak, and in the water and wildlife of Wildman Marsh. (R. *6).

Ditch C-1 discharges into Reedy Creek, which is an interstate water originating in New Union before flowing into Progress. (R. *5). Jacques Bonhomme owns the property from which Ditch C-1 flows into Reedy Creek. (R. *5). Restrictive covenants prevent him from stopping that flow. (R. *5). Bonhomme has a hunting lodge on the edge of his property, which he uses for hunting excursions in Wildman Marsh with friends. (R. *6). Bonhomme has severely decreased the number of these trips since discovering the arsenic levels present in Ditch C-1, Reedy Creek, and Wildman Marsh. (R. *6).

STANDARD OF REVIEW

The District Court dismissed Bonhomme's claims against Maleau, while declining to dismiss the claims of Progress and Maleau against Bonhomme. This Court reviews *de novo* a lower court's ruling on a motion to dismiss. *Bounds v. Pine Belt Mental Health Care Res.*, 593 F.3d 209, 214-15 (2d Cir. 2010).

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing Bonhomme's suit because: (1) Bonhomme is a "citizen" under CWA § 505; (2) Bonhomme is the real party in interest under FRCP 17; (3) Ditch C-1 is a "navigable water/water of the United States" under CWA § 502(7), (12); and (4) Maleau's mining waste piles are "point sources" under CWA § 502(12), (14). The District Court did not err in its determination that Reedy Creek is a "water of the United States" under CWA § 502(7), (12). Accordingly, this Court should reverse the District Court's dismissal of Bonhomme's suit against Maleau and dismiss Progess' suit against Bonhomme because Ditch C-1 is not a "point source" under CWA § 502(12), (14).

Bonhomme is a "citizen' entitled to bring suit under the CWA's citizen suit provision. Reading "citizen" to exclude foreign nationals defies the plain language of the statute because "citizen" is clearly defined to mean all persons. The title "citizen" suit connotes nothing more than non-governmental enforcement of a statute. The inclusion of entities incapable of having citizenship as permissible plaintiffs further evinces the fact that reading "citizen" to mean "American citizen," in the face of clear language to the contrary, is absurd.

Additionally, Bonhomme is the real party in interest. FRCP 17 requires only that the party have the right to bring suit under the substantive law. Because Bonhomme alleges an impairment of his interests, caused by Maleau's addition of pollutants to waters of the United States, he is the real party in interest.

Reedy Creek and Ditch C-1 are both waters of the United States, which is the definition of navigable waters under the CWA. The Corps' was charged with defining waters of the United States, and the inclusion of interstate waters and tributaries to interstate waters is entitled to deference, unlike the intrastate wetlands under consideration in *Rapanos v. United States.* Reedy Creek is a water of the United States under the Corps' definitions because it travels interstate,

and Ditch C-1 is a water of the United States because it satisfies both *Rapanos* tests to qualify as a tributary of another water of the United States. CWA § 301 prohibitions do not apply to discharges from one water of the United States to another. Neither Bonhomme nor Maleau may be liable if there is no CWA jurisdiction for either waterway, while only Maleau may be liable if Reedy Creek and Ditch C-1 are waters of the United States.

Furthermore, Maleau's overburden piles are the point sources responsible for the discharge of pollutants into Ditch C-1 and Reedy Creek. The term "point source" has been persuasively interpreted to cover pollution resulting from mining operations. Classifying Maleau's overburden piles as point sources is consistent with courts' broad construction of the term point source. Such a classification makes sense from policy perspectives because it makes Maleau responsible for the addition of arsenic into Reedy Creek. Thus, the District Court erred in classifying Ditch C-1 as the point source.

Maleau's responsibility for adding arsenic to Reedy Creek also demonstrates he is liable for violating the CWA. Ditch C-1 cannot be a point source under the CWA because it is a tributary of a water of the United States. The only point source discharging pollutants into the Reedy is Maleau's overburden piles, making him ultimately liable under the CWA. Moreover, even if Ditch C-1 was classified as a point source, alongside Maleau's overburden piles, it is absurd to hold Bonhomme liable for a CWA violation.

ARGUMENT

I. BONHOMME IS A "CITIZEN" ENTITLED TO BRING A CWA CITIZEN SUIT.

Under the CWA, "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of [] an effluent standard or limitation." 33 U.S.C. § 1365(a)(1). The CWA defines "citizen" as "a person" and 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. § 1365(g), 1362(5) (2012). Thus, the text of the CWA clearly provides Bonhomme standing to sue. The District Court incorrectly concluded that foreign nationals, such as Bonhomme, are not entitled to bring suit under the CWA because they are not citizens of the United States. The plain language of the CWA allows any person to bring a citizen suit. The District Court erred when it read into the statute restrictions on who may bring a citizen suit in the face of clear congressional intent.

The CWA permits "any citizen," defined as any "person," to enforce the provisions of the CWA. True, Congress did not explicitly include foreign nationals as potential plaintiffs, but there is no reason it should have had to explain that any "person" includes foreign nationals. If statutory text is plain and unambiguous, then the statute must be interpreted according to its terms. *See Carcieri v. Salazar*, 555 U.S. 379, 387 (2009). It might be argued that if "citizen" means anything, it must mean "American citizen," but this conclusion would ignore two facts: (1) § 505 of the CWA is a citizen suit provision; and (2) the CWA permits many entities that are not capable of having citizenship to bring suit under the citizen suit provision.

Citizen suit provisions permit non-governmental parties to enforce statutes as private attorney generals. *See* Citizen Suit Definition, *Black's Law Dictionary* (9th ed. 2009), *available at* WestlawNext. This type of provision is particularly common in environmental legislation. *See, e.g.*, Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2012); Clean Air Act, 42 U.S.C. § 7604 (2012); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (2012); Endangered Species Act of 1973, 16 U.S.C. § 1540 (2012). Who may bring a citizen suit is entirely up to Congress. Under the CWA, "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body" may bring a

citizen suit. 33 U.S.C. §§ 1362(5), 1365. The title "citizen" suit connotes a particular type of enforcement, not a particular class of plaintiffs. Persons have citizenship, commissions do not, but both are equally entitled to bring a citizen suit. It is unnecessary to speculate about what Congress might or might not have meant by "citizen" because Congress said what it meant: "citizen" includes any "individual." To conclude that "citizen" means any individual, except a foreign national, would impose a requirement not found in the statute's text.

The District Court reasoned that because the CWA defines "citizen" as "person," 33 U.S.C. § 1362(5), "citizen" and its definition "person" should be interpreted in the same way as "navigable waters" and its definition, "waters of the United States," 33 U.S.C. § 1362(7). Specifically, the District Court relied on the Supreme Court's reasoning in *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers* ("*SWANCC*"), that "navigable waters" must have some meaning independent of its definition—"waters of the United States." 531 U.S. 159, 171-72 (2001). Therefore, the District Court assumed, "citizen" must have some meaning beyond its definition—"person." Taken out of context, the relationship between "citizen" and "person" may appear synonymous with "navigable waters" and "waters of the United States." In context, the relationships are so different that concluding "citizen" excludes foreign nationals—in defiance of clear statutory language—becomes absurd.

In *SWANCC*, the Supreme Court was dealing with ambiguous statutory terms and an expansive Corps' interpretation of CWA jurisdiction that approached the outer limits of congressional authority. *See SWANNC*, 531 U.S. at 172 (noting that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result"). Here, unlike in *SWANCC*, (1) the statutory

language is clear, (2) no federal agency is tasked with interpreting jurisdiction, and (3) congressional authority to allow foreign nationals to bring a citizen suit is not in question.

"Waters of the United States" is an unusually ambiguous term. It does not have one or two possible interpretations; it might mean anything from only navigable-in-fact waterways to any body of water in the United States, regardless of its volume or permanency. *Cf.* 40 C.F.R. § 122.2 (2013) (defining sandflats, prairie potholes, and wet meadows as potential "waters of the United States"). As the Supreme Court reiterated in *SWANCC*, it is clear that "navigable waters" includes waters "'that would not be deemed 'navigable' under the classical understanding of that term,'" but "§ 404(g) gives no intimation of what those waters might be." 531 U.S. at 171 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). This is why it is necessary for the Corps to issue its own interpretation of what waters of the United States means. *See* 40 C.F.R. § 122.2. Because "person" and its sub-definition are clear and unambiguous, they require no administrative interpretation.

Moreover, the balance between federal and state power is not implicated in this case. In *SWANCC*, the Supreme Court was very conscious that "[p]ermitting . . . federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in a significant impingement of the States' traditional and primary power over land and water use." 531 U.S. at 174. It was in this context, where an administrative interpretation of ambiguous statutory language pushed the limits of Congress' Commerce Clause power, that the Supreme Court looked to "navigable waters," a term with a longstanding connotation for the balance between federal and state power over waterways, for some guidance on what "waters of the United States" means. *See id.* at 172.

In this case, the traditional meaning of "citizen" might have some significance for the term "person," if "person" were not already defined in clear terms and if we were not talking about citizen suits. As the CWA itself evinces, many entities that may bring citizen suits—corporations, municipalities, interstate bodies—have no citizenship. If "citizen" does have some independent meaning from its clear definition, it is that a "citizen" is "a person or persons *having an interest which is or may be adversely affected*." 33 U.S.C. § 1365(g) (emphasis added).

Having defined "citizen" as "person," there is no reason for Congress to clarify that foreign nationals are people. It is one thing to look to all the words of ambiguous text to determine congressional intent, it is another to look at the text and decide that it does not mean what it says. Therefore, this Court should reverse the lower court's ruling that Bonhomme is not a citizen because it frustrates congressional intent as expressed in the plain language of the CWA.

II. BONHOMME IS THE REAL PARTY IN INTEREST UNDER FRCP 17.

Rule 17(a)(1) mandates that "an action . . . be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17. The purpose behind the rule is to ensure "that the action . . . be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation." *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973). All that is required to establish Bonhomme as the real party in interest under the CWA is an allegation that his interests are impaired. Because Maleau's addition of pollutants to waters of the United States harms Bonhomme's interests, the District Court erred in granting Maleau's motion to dismiss. (R. *7-8).

Rule 17 "requires that the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United HealthCare Corp. v. Am. Trade Ins. Co.*, 88 F.3d 563, 569 (8th Cir. 1996); *Virginia Elec.*, 485 F.2d at 83 ("Whether a plaintiff is

entitled to enforce the asserted right is determined according to the substantive law.") Under the CWA, any "person[] having an interest which is or may be adversely affected" may bring an action against any person "who is alleged to be in violation of . . . an effluent standard or limitation." 33 U.S.C. § 1365(a)(1), (g). Bonhomme has alleged that his interest in hosting hunting parties at his property was, and continues to be, adversely affected by Maleau's unpermitted addition of arsenic into a water of the United States. Therefore, Bonhomme is a real party in interest entitled to bring a civil action against Maleau.

The District Court erred by considering extraneous factors—PMI's payment for arsenic testing and other litigation costs—which are irrelevant to determining whether Bonhomme has alleged an injury covered by the CWA. The District Court decided that because PMI paid for arsenic testing, as well as attorney and expert witness fees, PMI is the real party in interest. (R. *7-8). Payment of attorney's fees and litigation costs does not make PMI the real party in interest. PMI may, in its business judgment, choose to compensate one of its executives through payment of litigation costs; this additional compensation does not vitiate Bonhomme's injury or make Bonhomme's attorneys at all responsible to PMI.

Bonhomme's attorneys' first obligation is to their client. *See* Model Rules of Prof'l Conduct R. 1.2(a) (1983) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation"). It is the attorneys' duty not to be influenced by third party interests, even if the third party pays the attorneys. *See* Model Rules of Prof'l Conduct R. 5.4(c) (1983) ("A lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). Moreover, it would be unethical for Bonhomme's attorneys to accept payment from PMI if it would interfere "with the lawyer's independence of professional judgment or with the

client-lawyer relationship." Model Rules of Prof'l Conduct R. 1.8(f)(2) (1983). As such, the fact that PMI has paid litigation costs in this case is irrelevant because such payments do not turn Bonhomme or his attorneys into PMI's puppets. Furthermore, any lingering suspicion about PMI should be dispelled by the fact that Bonhomme is the President of PMI, the largest shareholder, and on the Board of Directors—he is not a low-level employee subject to coercive pressure to bring suits on behalf of the company. *See* (R. *7).

The fact that PMI's interests might align with Bonhomme's in this case is similarly irrelevant. Bonhomme is not attempting to prosecute Maleau on behalf of PMI, but to protect his interest in preserving his land to use for hunting parties. PMI did not buy Bonhomme a hunting lodge in order to establish a cause of action against a competitor; Bonhomme bought a hunting lodge in order to entertain friends and associates. When Maleau trucked arsenic-leaching waste across state to avoid the requirements of the CWA, Bonhomme was entitled to protect his interests through the citizen suit provision of the CWA. These actions are entirely consistent with the primary purpose of the citizen suit provision. *See N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991) ("The primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act."). In this case, the State of Progress filed suit under the CWA against Bonhomme after Bonhomme had brought an enforcement suit against Maleau. (R. *5). Maleau is a citizen of Progress and one of the state's largest employers, and he made substantial campaign contributions to the Attorney General of Progress' election campaign. (R. *6). This is precisely the type of case—where the Attorney General of the State has incentives to shift liability from the actual polluter to a competitor's officer—where a citizen suit brought by a

private person may be the only way to protect the waters of the United States as the CWA intended.

Moreover, the purpose of having the action be brought in the name of the real party in interest is "for the benefit of the defendant." *United HealthCare*, 88 F.3d at 569. Rule 17 "protect[s] the defendant against a subsequent action by the party actually entitled to recover." Fed. R. Civ. P. 17 advisory committee's note (1966); *see, e.g.*, *Virginia Elec.*, 485 F.2d at 83 (explaining that "where an insurer-subrogee has paid an *entire* loss suffered by the insured . . . [it] is the only real party in interest who must sue in his own name," but, in cases of partial subrogation, there are two real parties in interest) (quoting *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 380-81 (1949). PMI cannot be the party "actually entitled to recover" in this case because PMI has no interest in this case.

The District Court improperly considered extraneous factors that have nothing to do with whether or not Bonhomme has properly alleged that his interests are impaired by Maleau's addition of pollutants to a water of the United States. Accordingly, Bonhomme respectfully requests that this Court reverse the District Court's ruling that Bonhomme is not the real party in interest.

III. REEDY CREEK IS A NAVIGABLE WATER UNDER THE CWA BECAUSE IT IS AN INTERSTATE WATERWAY.

The CWA prohibits unpermitted discharge of pollutants from a point source into "navigable waters," a term defined by Congress as "waters of the United States, including the territorial seas." 33 U.S.C. §§ 1311(a), 1362(7) (2012). Congress authorized the Corps to issue regulations necessary to carry out the functions of the CWA. 33 U.S.C. § 1361(a) (2012). Pursuant to that authority, the Corps has defined "waters of the United States" to include "all interstate waterways, including interstate wetlands." 40 C.F.R. § 122.2. For the Corps'

construction to be valid, it must survive two levels of scrutiny: (1) an evaluation of whether Commerce Clause authority is present and clear enough to justify deference; and (2) a two-part *Chevron* deference analysis to determine whether the Corps' definition is reasonable and not contrary to the express intent of Congress. *See SWANCC*, 531 U.S. at 172-74; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-39 (1985). Reedy Creek is an interstate waterway and is undisputedly a water of the United States under the Corps' definitions. The Reedy is not capable of navigation for commercial shipping in the traditional sense. However, *all* interstate waterways are included in the Corps' definitions of "waters of the United States," which is a reasonable construction of the statute in light of prior regulation of all interstate waters under the Federal Water Pollution Control Act ("FWPCA"), federalism concerns, and clean water policy goals that led to the CWA's adoption in 1972. Because pollution control regulation of an interstate waterway is well within the bounds of Congress' authority under the Commerce Clause, the Court owes the Corps deference regarding this definition of the statutory term "waters of the United States."

A. Congress Has Clear Authority Under the Commerce Clause to Regulate Water Pollution in Non-Navigable, Interstate Waters.

The Corps' authority to define waters of the United States is derived from Congress, whose own authority to regulate waters of the United States is derived from the Commerce Clause. The Supreme Court has recognized three categories of activities that Congress may regulate pursuant to the Commerce Clause: (1) use of the channels of interstate commerce; (2) operation of instrumentalities of interstate commerce, or persons or things in interstate commerce; and (3) those activities having a substantial effect on interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). The Corps' regulation of waterways not only must be consistent with the Commerce Powers, but also must not stretch the outer limits of those

powers without a clear expression of intent from Congress. *See SWANCC*, 531 U.S. at 172. Pollution control for interstate waterways implicates the third *Lopez* category regarding activities having a substantial effect on commerce. This particular application of CWA jurisdiction is entitled to deference because direct regulation of waterways crossing state lines does not "stretch the outer limits" of Commerce Powers. If this Court were to determine that those limits were indeed stretched, Congress has nonetheless expressed a clear intent to regulate all interstate waters.

1. Pollution in Reedy Creek Substantially Affects Interstate Commerce.

That Congress has authority under the Commerce Clause to regulate interstate water pollution is beyond dispute. The "power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Virginia Surface Min. and Reclamation Ass'n Inc.*, 452 U.S. 264, 282 (1981). Water itself is an article in interstate commerce. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 954 (1982); *United States v. King*, 660 F.3d 1071, 1080 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2740. Pollution discharged into interstate waters like Reedy Creek may directly affect commerce in more than one state: interstate waterways transport an article of commerce across state lines, causing a substantial effect on commerce when contaminated. *See United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974) ("water pollution . . . endangers our agriculture by rendering water unfit for irrigation").

2. The *Rapanos* Tests Do Not Apply Here Because CWA Regulation of Interstate Waters Is Entitled to *Chevron* Deference.

The Supreme Court has declined to extend *Chevron* deference to agency interpretations "when an administrative interpretation of a statute invokes the outer limits of Congress' power." *See SWANCC*, 531 U.S. at 172. Without clear congressional assent to a problematic extension of

constitutional authority, "the Court will construe the statute to avoid such problems." *Id*. at 173. This exception has been applied to the Corps' asserted jurisdiction for isolated ponds in *SWANCC*, *id.*, and to intrastate wetlands in *Rapanos v. United States*, 547 U.S. 715, 729-32 (2006). The Supreme Court's tests for determining CWA jurisdiction in constitutionally problematic cases should not apply to the present case because: (1) competing tests from the fractured *Rapanos* decision provide inconsistent outcomes and should therefore only be applied to waters that are factually similar to the wetlands at issue in that case; and (2) federal regulation of interstate waters does not raise the constitutional problems associated with regulation of isolated, intrastate wetlands and ponds. If *Rapanos* were used to determine jurisdiction for all types of non-navigable waters regulated by the Corps, the decision would represent a complete judicial rewriting of the statute's jurisdictional provisions, rather than an exercise of a narrow exception to deference recognized by the Supreme Court in *SWANCC*. *See* 531 U.S. at 170-73.

The last time the Supreme Court considered the Corps' construction of navigable waters was in *Rapanos*, 547 U.S. 715, which does not provide a standard applicable to interstate waters like the Reedy Creek. The *Rapanos* Court issued a fractured 4-1-4 plurality decision, which provided two different standards for determining the degree of connection with navigable waters required for intrastate wetlands to be included as "waters of the United States." *See id.* First, the Scalia plurality, joined by four justices, would require a continuous surface connection between wetlands and bodies that are "waters of the United States" in their own right, while Kennedy's concurrence requires wetlands to have a "significant nexus" to navigable-in-fact waters. 547 U.S. at 742, 767. There has been disagreement between the circuits regarding which of these standards provides the controlling rule of law. *See United States v. Robison*, 505 F.3d 1208, 1220-21 (11th Cir. 2007) (following the Seventh and Ninth Circuits in applying the Kennedy

"significant nexus" test while noting that the First Circuit had applied both tests). When a majority of the Supreme Court agrees only in the result of a case, lower courts "are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." *Marks v. United States*, 430 U.S. 188, 193 (1977). As noted by the Eleventh Circuit in *Robison*, in some factual circumstances, the continuous surface connection is less restrictive, while in others the significant nexus test is the less stringent. 505 F.3d at 1222-24. Because of the absence of a standard based on the truly narrowest grounds, *Rapanos* should not be applied to factually dissimilar circumstances in which a court will be required to guess at which standard the majority of Justices would assent to if forced to choose.

There are significant factual differences between interstate waters like the Reedy Creek and isolated, intrastate waters; these distinctions illustrate why inclusion of the Reedy within waters of the United States does not push the boundaries of the Commerce Powers far enough to permit a bypass of deference for the Corps's definitions. In *SWANCC*, the Corps' application of CWA § 404 to "nonnavigable, isolated, intrastate waters" was not granted deference. 531 U.S. at 172-74. The Supreme Court noted that jurisdiction of intrastate, isolated waters based on their usefulness as habitat for birdwatching, a commercial activity, raised significant constitutional problems and placed the regulations at the boundaries of the Commerce Powers. *Id.* at 174. The exercise of Commerce Powers over interstate waters which are not navigable-in-fact does not raise constitutional problems like the intrastate ponds in *SWANCC*. First, interstate waters actually transport water, an article of commerce, across state lines, invoking the language of the Commerce Clause itself. *See* U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power … to regulate Commerce … among the several states"). Secondly, isolated ponds do not themselves transport the effects of pollution between waters. Reedy Creek, on the other hand, transports

arsenic from mining piles adjacent to an agricultural drainage ditch through a creek and into a wildlife refuge that brings $25 million in tourist spending to the local economy. (R. *6).

Moreover, the District Court's assertion that *Rapanos* permits CWA regulation only for activities under the first prong of *Lopez* is not supported by the Supreme Court's decision. Rather, the constitutional and federalism problems cited as reasons for bypassing *Chevron* deference are allayed by waters that flow interstate. In *Rapanos*, Justice Scalia's plurality opinion disputes the dissent's assertion that administrative deference is appropriate due to the ambiguity of the phrase "waters of the United States" by pointing out that "the *scope* of that ambiguity . . . does not conceivably extend to whether storm drains and dry ditches are 'waters.'" 547 U.S. at 751. Reedy Creek is more plainly a "water" than are wetlands. *See Riverside,* 474 U.S. at 462 ("it is one thing to assert that Congress intended to allow regulation of waters that might not satisfy traditional tests of navigability; it is another to assert that Congress intended to abandon traditional notions of "waters" and include in that term "wetlands" as well"). Justice Kennedy's concurrence from *Rapanos* cites federalism concerns caused by regulating intrastate waters, which may run contrary to congressional intent because the CWA states that "[it] is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 547 U.S. at 776 (*citing* 33 U.S.C. § 1251(b) (2012)). Justice Kennedy then proceeds to find "noteworthy that [thirty-three] States plus the District of Columbia have filed an *amici* brief in this litigation . . . note[ing], among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate." 547 U.S. at 777. According to those cited principles of federalism, an interstate water like Reedy Creek would more appropriately be regulated federally to control pollution that is transferred across state lines.

Even if interstate waters which are not navigable-in-fact were to lie at the margin of the Commerce Powers, Congress expressed a clear intent to include them in the CWA's jurisdiction. As discussed in more detail below with regards to the reasonability of the Corps' construction of waters of the United States, Congress intended to "repudiate limits that had been placed on federal regulation by earlier water pollution control statutes" when enacting the CWA. *Riverside*, 474 U.S. at 133. There are numerous quotations from the Congressional Record indicating that Congress intended "the term navigable waters be given the broadest possible constitutional interpretation." *See, e.g.*, S. Conf. Rep. No. 92-1236 (1972), *complied in* 1972 U.S.C.C.A.N.3776, 3822; H. R. Rep. No. 92-911, at 131 (1971). While Congress may not have clearly stated an intention to "reach an abandoned sand and gravel pit," *SWANCC*, 531 U.S. at 174, the legislature could hardly have been repudiating limits on prior federal regulation by eliminating categories of waters that had already been subject to federal regulation. *See* Pub. L. No. 80-845 § 10(e), 62 Stat. 1155, 1161 (1948) (establishing jurisdiction for the first iteration of the FWPCA over "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries").

B. CWA Regulation of All Interstate Waters Is a Reasonable Construction of an Issue Not Clearly Addressed by Congress.

When evaluating an agency's construction of a statute, courts apply a two-part test commonly referred to as *Chevron* deference: (1) whether Congress has spoken directly to the precise question at issue; and (2) whether the agency's interpretation is reasonable. *Riverside*, 474 U.S. at 131; *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). Under the first prong, "if the intent of Congress is clear. . . [the court and the agency] must give effect to the unambiguous meaning." *Chevron*, 467 U.S. at 842-43. If the statute is silent or ambiguous regarding the specific issue, the second question for the court is

whether the agency's answer is based on a permissible construction of the statute. *Id.* If the agency's construction is reasonable, then the court will grant deference to the agency's interpretation, rather than "impos[ing] its own construction of the statute." *Id.*

1. Congress Did Not Clearly Identify Whether Interstate Waters Would Be Included in Waters of the United States.

The first prong of a *Chevron* analysis is satisfied if Congress left ambiguous the specific issue under scrutiny. *Chevron*, 467 U.S. at 843. The specific issue here, whether non-navigable, interstate waters are included under the CWA's jurisdiction, was not clearly addressed by Congress when it defined navigable waters as "waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). The use of the term "navigable waters," may appear restrictive, but Congress may choose any term within a statute and provide an apparently contradictory definition. The Solid Waste Disposal Act ("SWDA"), for example, defines "solid waste" to include "discarded material, including solid, liquid, semisolid, or containing gaseous material resulting from . . . commercial activities." 42 U.S.C. § 6903(27) (2012). Moreover, the Supreme Court has recognized that the Corps faced a "problem" in defining its jurisdiction under the CWA when Congress had expanded the scope of federal water pollution regulation without clarifying the extent of that expansion. *Riverside* 474 U.S. at 132-34. The *Riverside* Court proceeded to find "waters of the United States" to be ambiguous with regards to intrastate wetlands. *Id.* The waters at issue here, which flow interstate while not navigable-in-fact, are closer to the meaning of "waters of the United States" than wetlands, which are less clearly waters and do not cross state borders. However, in light of debate regarding the significance of the term navigable for delimiting the term waters of the United States, we submit that Congress has not spoken clearly on the issue at hand and judicial review of the Corp's definition should proceed to the reasonableness of that construction.

2. It was Reasonable for the Corps to Include "Interstate Waters" in its Construction of Waters of the United States.

When Congress leaves a matter unclear or ambiguous, an agency's construction will survive judicial review so long as that construction is reasonable. *Chevron*, 467 U.S. at 843. When a regulatory agency is faced with an ambiguous statute, it may look to "legislative history and underlying policies of its statutory grants of authority" to determine a reasonable scope for its regulatory authority. *Riverside*, 474 U.S. at132. The Corps' inclusion of all interstate waterways within the definition of waters of the United States is reasonable because: (1) Congress clearly intended to include more waterways under the CWA than had been included under the common law definition of navigability-in-fact; (2) all interstate waterways had been included under the jurisdiction of the CWA's predecessor, the FWPCA; and (3) regulation of all waterways crossing state lines is consistent with federalism concerns that informed Congress's jurisdiction for the CWA.

The Corps' construction should include legislative history and policy goals behind the CWA, as the Corps was faced with a "problem in defining the scope of its regulatory authority." *Riverside*, 474 U.S. at 132. CWA jurisdiction was defined "broadly," "intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes," and to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of the term." *Id.* at 133. If the Corps had restricted from CWA jurisdiction any interstate waterways that were not navigable-in-fact or capable of being made so, it would have excluded waters that had been regulated under the CWA's predecessor, the FWPCA. The first iteration of the FWPCA, adopted in 1948, defined its subject as "interstate waters," which were in turn defined as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." Pub. L. No. 80-845 § 10(e), 62 Stat. 1155, 1161 (1948). In 1961, the FWPCA was

amended and the subject was expanded to "all interstate and navigable waters," including intrastate navigable waters in addition to all waters crossing state lines. Pub. L. No. 87-88, § 7, 75 Stat. 204, 208 (1961). The Corps has thus reasonably interpreted "waters of the United States" in a manner consistent with prior statutory language regarding the same subject matter by Congress.

The policy objectives behind the CWA provide further support for including all interstate waters in the Act's jurisdiction. Congress recognized that protection of aquatic ecosystems demanded "broad federal authority to control pollution." *Riverside* 474 U.S. at 132-33. Accordingly, reasons for protecting those waters are not couched in terms of navigability or shipping, but rather the "objective of the [CWA] is to restore the chemical, physical, biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). The Corps has included all interstate waterways in its definition, regardless of navigability, reflecting both the policies behind the act and congressional desire to expand a federal water pollution control scheme that had already regulated all interstate waters. Consequently, this Court should affirm the District Court's ruling that Reedy Creek fall under the jurisdiction of the CWA.

IV. DITCH C-1 IS A WATER OF THE UNITED STATES BECAUSE IT IS A TRIBUTARY OF THE REEDY CREEK.

The "waters of the United States" include tributaries to other waters covered by the CWA according to the Corps' definitions, a designation that should be afforded deference. Ditch C-1 must be considered a tributary because there is a significant nexus and continuous flow between it and Reedy Creek. The absence of a connection between Ditch C-1 and a navigable-in-fact water does not preclude CWA jurisdiction for the same reasons described above regarding clear constitutional authority to regulate interstate waters. Accordingly, the District Court's conclusion that Ditch C-1 was not a navigable water under the CWA should be reversed.

A. Tributaries to Waters of the United States Are Themselves Waters of the United States.

Tributaries are included in the Corps' definition of waters of the United States. *See* 40 C.F.R. § 122.2. Under the Corps' definition, the tributaries of "all interstate waters" are themselves waters of the United States. *Id. Chevron* deference should be applied to the specific issue of whether tributaries of non-navigable, interstate waters are reasonably included in the Corps' jurisdiction, as the constitutional authority for regulating such waters is squarely within bounds of the Commerce Powers. The stated goals and policies associated with the CWA support the Corps' interpretation, which should be upheld.

1. The Corps Jurisdiction of Tributaries to Non-Navigable, Interstate Waters Is Entitled to *Chevron* Deference.

Pollution deposited in tributaries of interstate waters invokes the Commerce Clause in the same manner as water pollution discharged directly into waters that cross state lines. Regulation regarding the interstate transport of water pollution plainly lies within the Commerce Powers. *See Hodel v. Virginia Surface Min. and Reclamation Ass'n Inc.*, 452 U.S. 264, 282 (1981) (authorizing water pollution control regulation under the Commerce Clause when that pollution "may have effects in more than one state"). As discussed above, the exercise of Commerce Powers to regulate interstate transfers of pollution does not create the constitutional problems that arise when regulating isolated, intrastate waters. *See SWANCC*, 531 U.S. at 173-74.The crucial elements that distinguished interstate waters from intrastate wetlands and ponds from *SWANCC* and *Rapanos* also apply to tributaries of interstate waters; the effects of water pollution are transferred to other commercial actors and may actually flow across state lines. Deference, then, should be granted to the specific issue of whether tributaries to interstate waters which are not navigable-in-fact may be included within the waters of the United States.

2. It is Reasonable for the Corps to Include Tributaries to Interstate Waters Within its CWA Jurisdiction.

The Court must uphold the Corps' asserted jurisdiction over tributaries if Congress did not clearly speak to the specific question at issue and the agency's interpretation is reasonable. *Riverside*, 474 U.S. at 131; *Chevron*, 467 at 842-45. Congress defined navigable waters as "waters of the United States, including the territorial seas," 33 U.S.C. § 1362(7), which does not speak to whether tributaries to waters of the United States should also be governed by the CWA. Following that ambiguous grant of authority, the Corps reasonably included tributaries to non-navigable, interstate waters within its jurisdiction, in light of the legislative history and policies behind the CWA. *See Riverside*, 474 U.S. at 132 (an agency may look to legislative history and underlying policies to determine its jurisdiction).

When discussing in the House the proposed definition of "navigable waters" as "the waters of the United States," Representative Dingell explained that the conference bill definition "clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes." House Consideration of the Report of the Conference Committee, Oct. 4, 1972, *compiled in* A Legislative History of the Clean Water Act. The stated goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251, and the House Report stated that "integrity . . . refers to a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. No. 92-911 at 76 (1972). The legislature's desire to include tributaries to "main streams" was important to the goal of protecting those aquatic ecosystems because "[water] moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414 at 77 (1971), *reprinted in* 28 U.S.C.C.A.N. 3668, 3742. The aquatic ecosystem of a non-navigable water includes tributaries as much as the ecosystems of navigable waters do. Hydrological cycles

are not dependent upon the water's navigability for shipping purposes. When evaluating the legislative history and policies behind the CWA, it is clear that, so long as non-navigable, interstate waters are reasonably included within CWA jurisdiction, tributaries to all interstate waters must also be included.

B. Ditch C-1 is a Tributary of the Reedy Creek Because Both *Rapanos* Tests are Satisfied by the Connection Between Waters.

Various circuits have applied the significant nexus or continuous flow tests from *Rapanos* to determine jurisdiction for tributaries. *See, e.g. United States v. Robison*, 505 F.3d. 1208, 1220 (11th Cir. 2007) (applying the significant nexus test); *United States. v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008) (applying both tests). According to these tests, jurisdiction is proper for waters that have either a "significant nexus" or a continuous flow connection to navigable-in-fact waters. *Rapanos*, 547 U.S. at 742, 767. A majority of Supreme Court justices may believe that Congress intended to tie jurisdiction only to navigable-in-fact waters, but Congress authorized the Corps, not the judiciary, to issue regulations defining its jurisdiction. *See* 33 U.S.C. § 1361(a). The *Rapanos* tests need not be entirely scrapped because the Corps has not defined the connection required for a water to be classified as a tributary and has even found the standards useful in showing jurisdiction for tributaries. *See Deerfield Plantation Phase II-B Property Owners Ass'n v. U.S. Army Corps of Engineers*, 801 F. Supp. 2d 446, 460-64 (D.S.C. 2011) (reviewing the Corps' application of both tests to ditches and other tributaries).The appropriate balance between deference to the agency's definitions and respect for judicial interpretations may be struck by applying the significant nexus and continuous flow tests to tributaries connected to navigable *or* interstate waters.

Ditch C-1 has a sufficient connection with the Reedy Creek to satisfy both the continuous surface connection and significant nexus test. Factors relevant to the significant nexus test

include: the presence of a hydrological connection, the quantity and regularity of flow, and the effect on the physical, biological, and chemical integrity of the downstream water. *Rapanos,* 547 U.S. at 784-86; *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007). The connection between Ditch C-1 and the Reedy satisfies each of these elements. First, the ditch flows into the Reedy, establishing a hydrological connection. Second, the ditch contains running water at least nine months a year. Third, testing has established that arsenic is present in the Reedy below, but not above, the discharge from Ditch C-1, establishing an effect on the Reedy's chemical integrity. Ditch C-1 thus has a significant nexus to an interstate water, and may itself be included within the "waters of the United States."

The continuous flow test also qualifies Ditch C-1 as a tributary of Reedy Creek. According to the plurality, waters of the United States refers to "relatively permanent, standing or continuously flowing bodies of water." *Rapanos,* 547 U.S. at 739. While the test requires a surface water connection to confer jurisdiction for wetlands, that requirement does not apply to tributaries. *See id.* at 742; *Deerfield Plantation,* 801 F. Supp. 2d at 463-64 ("the Corps will assert jurisdiction over non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries flow year-round or at least seasonally, as well as over those adjacent wetlands that have a continuous surface connection to such tributaries"). Finally, the continuous flow requirement is satisfied if a tributary flows seasonally but is dry for part of the year. *See United States v. Cundiff*, 555 F.3d 200, 211-12 (6th Cir. 2009). Ditch C-1 satisfies the test due to its permanence and relatively continuous flow. The Ditch has drained water from the adjacent farms for 100 years. (R.*5). Running water flows through Ditch C-1 continuously, except for periods of drought, and the flow is discharged directly into Reedy Creek. *Id.*

Accordingly, the District Court's ruling that Ditch C-1 is not a navigable water under the CWA must be reversed because it is a tributary of Reedy Creek.

V. THE COURT OF APPEALS SHOULD REVERSE THE DISTRICT COURT'S FINDING THAT DITCH C-1 IS A POINT SOURCE.

The term "point source" is an integral part of achieving the purpose of the CWA, which "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by preventing the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a). The term "point source" refers to "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Maleau's overburden piles are clearly the point source for the pollution entering Reedy Creek. Designating the mining piles as point sources is also consistent with the purpose of the CWA and principles of equity because Maleau's activities are clearly the cause of the pollution at issue. Moreover, Ditch C-1 cannot be both a point source and a tributary of Reedy Creek. Accordingly, this Court should reverse theDistrict Court's finding that Ditch C-1 is a point source and find that Maleau's overburden piles constitute the point source in need of regulation.

A. The Term "Point Source" Has Been Broadly Construed to Achieve the CWA's Purpose.

Clearly distinguishing between "point sources" and "nonpoint sources" is crucial for determining whether a particular activity will fall under the CWA's jurisdiction. For instance, CWA's Section 404 prohibitions regarding pollutant discharges do not apply to nonpoint sources. *See* 33 U.S.C. §§ 1311(a), 1362(12). Because Congress provided certain penalties for point source discharges that do not apply to nonpoint sources, the distinction between the two can exemplify the types of sources the legislature intended to regulate.

Courts have broadly construed the term "point source" to give proper effect to the congressional purpose behind the CWA. *See Kennecott Copper Corp. v. E.P.A.*, 612 F.2d 1232,

1243 (10th Cir. 1979) ("Congress has purposefully phrased this definition [of point source] broadly. This is as it should be given its contemplated applicability to literally thousands of pollution sources."); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("We believe it contravenes the intent of FWPCA and the structure of the statute to exempt from regulation any activity that emits pollution from an identifiable point."). Accordingly, while the term "point source" is defined as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," courts have read this language broadly. *See also Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001) *aff'd*, 537 U.S. 99 (2002) ("The statutory definition of point source is extremely broad.") (internal quotations omitted).

Despite this broad definition, there is some consensus about what the definition of "point source" is supposed to encompass. Judicial interpretations have noted that the CWA's definition of "point source" "evoke[s] images of physical structures and instrumentalities" that convey "pollutants from an industrial source to navigable waterways." *United States v. Plaza Laboratories, Inc.*, 3 F.3d 643, 646 (2d Cir. 1993). Similarly, the Seventh Circuit has commented that "point source" connotes "an artificial mechanism" that introduces a pollutant into navigable waterways. *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000). The *Froebel* court noted that if an industrial facility "dumped waste into a pond that feeds a tributary to a river that flows to the ocean, the facility would be the point source." *Id.* This conclusion was justifiable because, otherwise, "any point at which one waterway empties into another could be construed as a point source, subjecting unsuspecting owners of these confluences to liability when pollutants flow downstream." *Id.* (internal quotations omitted).

B. Ditch C-1 Is Not Both a Point Source and Part of a Water of United States Under the CWA.

The language of the CWA has been read to distinguish between point sources and waters of the United States. Ditch C-1 is a tributary of Reedy Creek, which is a water of the United States. Thus, Ditch C-1 is a water of the United States under the CWA. Therefore, it cannot also be a point source under the statute.

In *Rapanos*, the CWA was interpreted as contemplating distinct definitions of point sources and navigable waters. 547 U.S. at 735-36. *Rapanos* recognized that ditches acting as tributaries to waters of the United States are under the jurisdiction of the CWA. *Id.* at 727-28. Consequently, the CWA also prohibits unpermitted pollution into tributaries to waters of the United States. Logically, tributaries of waters of the United States must be distinct from point sources. *See Froebel*, 217 F.3d at 937 (finding that the most natural reading of the CWA is to clearly distinguish between point sources and navigable waters.)

As established above, Ditch C-1 is clearly a tributary of Reedy Creek, which is classified as a water of the United States under the CWA. It falls under the jurisdiction of the CWA based on its connection to Reedy Creek, making it indistinguishable from Reedy Creek for regulatory purposes. Because Ditch C-1 is a tributary to Reedy Creek and protected under the Corps' construction of the CWA, it cannot also be a point source. Thus, the District Court erred in designating Ditch C-1 as such and this Court has clear authority to reverse that finding.

C. Maleau's Overburden Piles Are Point Sources Under the Text of the CWA.

The piles of mining overburden deposited on Maleau's property in Jefferson County and polluting Reedy Creek are point sources under the plain language of the CWA. During periods of precipitation, rainwater causes the pollutants contained in the piles to runoff into Ditch C-1 through gravity-created channels in the piles. Thus, the piles are discrete conveyances consistent with CWA section 502(14) and constitute point sources under the CWA. *See* 33 U.S.C. §

1362(14). This, and other equitable reasons, should persuade this Court to reverse the District Court's finding that Ditch C-1 is the point source for pollution found in Reedy Creek.

Piles of debris or other pollutants from which polluted water runs off can be point sources under the CWA. The Fifth Circuit, for instance, determined that mining spoil piles can be point sources. *Sierra Club v. Abston Const. Co.*, 620 F.2d 41, 45 (5th Cir. 1980). The piles were considered point sources because during rain events erosion of the piles resulted in discharges through ditches and gullies that developed in the piles, "even if the miners have done nothing beyond the mere collection of rock and other materials." *Id.* Similarly, piles of dredged sand and gravel that storm water carried into protected waters were classified as point sources under the CWA. *Ctr. for Biological Diversity v. Marina Point Dev. Assocs.*, 434 F. Supp. 2d 789, 797 (C.D. Cal. 2006). The court in that case noted that the defendants had an "inadequate system for managing erosion," contributing to the creation of gullies, discharged pollutants into protected waters. *Id.*; *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004) (finding that piles of debris that collected water and then flowed into stream were point sources under the CWA).

Similar to the above cases, the District Court here found that "rainwater runoff flows down the piles and percolates through them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying arsenic from the piles into the water in the Ditch." (R. *5). These channels are properly characterized as "discrete conveyances" consistent with the definition of point source under the CWA. *See* 33 U.S.C. 1362(14). Moreover, similar to both *Abston* and *Marina Point*, here gravity has eroded the piles causing pollution to travel through the piles via channels into a protected waterway.

Accordingly, there is a clear textual basis in the CWA and support in case law for this Court to find that Maleau's overburden piles themselves are point sources.

D. The Purpose of the CWA Supports Defining Maleau's Overburden Piles as Point Sources.

Maleau's actions, transporting and depositing the overburden, are aimed at circumventing the CWA regulations and externalizing the costs of obtaining a CWA permit. This Court should not reward Maleau's behavior because it would subvert the purpose of the CWA, be fundamentally unfair, and encourage other businesses to behave in similar ways. Thus, the District Court erred in concluding that Ditch C-1 was a point source and should be reversed.

The CWA's predecessor statute has been interpreted as aiming to prohibit unpermitted pollution from any "identifiable point." *Earth Sciences*, 599 F.2d at 373. Maleau's transport of his mining overburden to his property adjacent to Ditch C-1 is merely an attempt to externalize the cost of a CWA permit to a competitor. The District Court noted that Maleau's mining operation is next to the Buena Vista River, a navigable-in-fact water under the CWA. (R. *5). If Maleau were to leave his overburden piles at the mine site, he would need to obtain a permit because mining sites have been found to be point sources. *See Abston*, 620 F.2d at 45 (mining spoil piles can be point sources).

Maleau's piling of the pollutants at another site, therefore, is a clear attempt to avoid having to purchase a CWA permit. Even worse, Maleau is trying to externalize the cost of the permitting to Bonhomme, the president of a competitor company. Maleau's actions represent an attempt to make an end-run around the regulations of the CWA. This Court should apply the unambiguous text of the CWA and designate Maleau's piles as the point sources polluting Reedy Creek and not permit Maleau to take advantage of a loophole in the CWA.

VI. IT WAS CLEAR ERROR TO FIND BONHOMME LIABLE FOR DISCHARGING POLLUTANTS INTO REEDY CREEK.

Maleau's actions create the point source responsible for the pollution in Reedy Creek. Because Ditch C-1 cannot be a point source under the language of the CWA, Maleau's point source is solely responsible for the discharge of pollutants into Reedy Creek. It is irrelevant whether the discharge is deliberate because the CWA holds polluters strictly liable. Even if Maleau is not solely responsible for the discharge of pollutants into Ditch C-1, Bonhomme cannot stop the ditch from flowing into Reedy Creek because of restrictive covenants on the land. Thus, Maleau is the party that is liable for adding pollutants to Reedy Creek.

A. Maleau Is in Control of the Point Source of Pollution and Liable for Violating the CWA.

The language of the CWA provides that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311. A plaintiff alleging a CWA violation must establish the following elements: (1) a discharged pollutant; (2) into navigable waters; (3) from a point source; (4) without a permit. *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993). The phrase "discharge of any pollutant" is defined "as any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Courts construing the term "addition" have deferred to the EPA's definition, which defines the term to mean an introduction of pollutants "into navigable water from the outside world" from a point source. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165, 170, 183 (D.C. Cir. 1982). The Second Circuit added that the phrase "outside world" means "any place outside the particular body of water to which pollutants are introduced." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001).

Congress, in order to give effect to the CWA's purpose, "has placed liability with those in control of the pollutants being discharged." *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 629 (D.R.I. 1990). The CWA holds polluters strictly liable. *See Kelly v. EPA*, 203 F.3d 519, 522

(7th Cir. 2000) (finding that negligence or knowledge is not required for civil or administrative penalties under the CWA) (internal citations omitted); *Earth Sciences, Inc.*, 599 F.2d at 374 (finding Congress intended strong regulatory enforcement of the CWA and the statute would be "severely weakened . . . if only intentional acts were proscribed.").

The District Court found it likely that Maleau is the but-for cause of the arsenic entering Ditch C-1 and, therefore, Reedy Creek. (R. *6). Immediately above Maleau's property, arsenic is undetectable in Ditch C-1; immediately below, arsenic concentrations are high. *Id.* Similarly, the level of arsenic where Ditch C-1 enters Reedy Creek is significant. *Id.* Thus, it is clear that Maleau is the but-for cause of the pollution entering Reedy Creek. The levels of arsenic in both Ditch C-1 and Reedy Creek do not naturally exist within either body of water. Similar to *Catskill Mountains*, the pollutants in this case were added from the "outside world." *Catskill Mountains*, 273 F.3d at 491. Because Maleau's addition of arsenic is without a permit, he is strictly liable for violating the CWA.

Moreover, Reedy Creek is a water of the United States. Ditch C-1 is a tributary of Reedy Creek, and, therefore, is a waterway that is covered under the CWA. Maleau's addition of pollutants into Ditch C-1, which is effectively Reedy Creek, constitutes a discharge of pollutants into a navigable waterway, satisfying the second element of a cause of action under the CWA.

Finally, Maleau's discharges of pollutants into Ditch C-1 come from a point source. As discussed in section V, Maleau's overburden piles constitute a point source under the CWA. Appellants incorporate all of those arguments here to show that this element of a CWA cause of action is satisfied. The last element, the lack of a permit, is not contested. It is clear from the findings of the District Court that Maleau does not have the requisite permit for discharging pollutants into Ditch C-1.

Additionally, Maleau is solely liable for the addition of pollutants into Reedy Creek for two reasons. The CWA prohibits the discharge of pollutants from a point source into a water of the United States or the tributaries of such waters. Here, Maleau is the sole party adding pollutants into Ditch C-1 without a permit and in violation of the CWA. In contrast, Bonhomme, is not "adding" pollutants into Ditch C-1 or any other navigable water in any sense of the term because Ditch C-1 is a tributary of Reedy Creek and not a point source. This Court should reverse the District Court's conclusion that Bonhomme is liable under the CWA for the addition of pollutants into Reedy Creek and either find Maleau solely liable for the CWA violations.

B. Holding Bonhomme Liable for Violating the CWA Produces Absurd Results.

Even if this Court finds that Ditch C-1 is a point source, holding Bonhomme partially liable for violating the CWA would produce absurd results. The CWA is intended to prevent the discharge of pollutants from point sources into the waters of the United States. Accordingly, the CWA requires the owners of point sources to either not discharge such pollutants from the point source, or, obtain the necessary permit to discharge the pollutants. In order to not discharge pollutants from a point source, an individual must first be in control of the point source. Bonhomme, however, does not have control over Ditch C-1 and, therefore, cannot be liable for any pollutants it discharges into Reedy Creek.

The statutory scheme of the CWA contemplates that an owner or operator of a point source has actual control over the point source. The CWA requires an "owner or operator" of a point source to obtain a permit for the discharge of pollutants from that point source and to eventually cease such discharge of pollutants. *See, e.g.*, 33 U.S.C. §§ 1311(a), 1311(g)(2), 1318(a) (2012) (requiring owners and operators of point sources to obtain proper permitting for effluent discharges). The CWA also provides for permit modifications "upon a showing by the owner or operator of such point source . . . will result in in reasonable further progress toward the

elimination of the discharge of pollutants." 33 U.S.C. § 1311(c) Similarly, in *Sierra Club v. El Paso Gold Mines, Inc.*, the court noted that owners of point sources are responsible for discharges from that point source. 421 F.3d 1133, 1145 (10th Cir. 2005). The permitting structure of the CWA and cases such as *El Paso Gold Mines* highlight that the CWA presupposes that the owner or operator of a point source will have *control* over that point source because of such ownership. If control is not presupposed, the requirements of the CWA would become unduly burdensome on the owners of point sources because such owners would be saddled with costs of the pollution with no recourse to fix the problem. Moreover, § 1311(c), described above, shows that the CWA expects that owners or operators of point sources have adequate control over the point source so as to ultimately eliminate effluent discharges.

Here, assuming *arguendo* that Ditch C-1 is a point source and Bonhomme is liable for its discharges, he has no effective control to prevent discharges. Ditch C-1 has been in existence since 1913. (R. *5). Over the years, owners of property Ditch C-1 runs through placed restrictive covenants on such properties, requiring proper maintenance of the ditch to ensure it continues running. *Id.* Because Bonhomme is not responsible for the addition of arsenic into Ditch C-1 he would have to stop the flow of the ditch in order to prevent discharge of the pollutants into Reedy Creek. Bonhomme cannot do this without violating the restrictive covenants on his property. Furthermore, such an extreme measure would have negative consequences for individuals in the area who rely on agriculture for their livelihood because Ditch C-1 is essential to draining the surrounding farmlands. Consequently, it is absurd to require Bonhomme to prevent the discharge of pollutants into Reedy Creek. Maleau is better able to prevent the addition of pollutants into Ditch C-1. Placing the burden on Maleau also eliminates the drastic,

uneconomical and illegal option of forcing Bonhomme to stop the flow of Ditch C-1. Thus, Bonhomme should not be liable for violating the CWA.

This Court should reverse the District Court's finding that Bonhomme is liable for violating the CWA. Moreover, this Court should also reverse the District Court's denial of Bonhomme's motion to dismiss the claims against him for violation of the CWA because he is not liable for any violations of the CWA.

CONCLUSION

For the reasons stated above, Bonhomme has demonstrated that he has standing to sue under the CWA's "citizen suit" provision and is a real party in interest. Ditch C-1 is properly classified as a tributary of Reedy Creek and not as a point source. Rather, Maleau's overburden piles are the point sources responsible for discharging pollutants into Reedy Creek. Because Maleau is responsible for adding arsenic into Reedy Creek, he, not Bonhomme, should be held liable for violating the CWA. Thus, Bonhomme, cross-appellee, respectfully requests this Court to reverse the District Court's rulings that: (1) he does not have standing to sue under the CWA; (2) he is not a real party in interest; (3) Ditch C-1 is a point source; and,(4) he is liable for violating the CWA.