Team 53

C.A. No. 13-01234

In the United States
Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

- v. -

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

- v. -

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

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

BRIEF FOR JACQUES BONHOMME
Plaintiff-Appellant, Cross-Appellee, Defendant-Appellant

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JURISDICTIONAL STATEMENT

Appellant Jacques Bonhomme seeks review of the order of the United States District Court for the District of Progress. Bonhomme filed a complaint against Shifty Maleau for violating the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. §§ 1251 – 1387 (2012), On July 23, 2012, the district court granted Progress' and Maleau's motion to dismiss. Bonhomme filed a timely appeal of the district court's decision on September 14, 2013. The district court's order is final, and therefore jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Is a landowner, directly affected by a polluter, the real party in interest under Federal Rules of Civil Procedure ("FRCP") 17 to bring suit against that polluter for violating § 301(a) of the CWA?
2. Is a foreign national, who owns land in the U.S. and is being directly affected by a polluter, a "citizen" under § 505 of the CWA who may bring suit against that polluter?
3. Are mining waste piles that discharge arsenic through channels eroded by gravity "point sources" under CWA?
4. Is a relatively permanent body of water, which maintains a constant surface connection with an interstate water, a navigable water under CWA?
5. Is an interstate water that contributes flow to a federally protected marsh a navigable water under the CWA?
6. Should a landowner be liable for discharges by another landowner, when he has no control over the source of the pollutants, and thus, no ability to comply with the CWA?

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress granting Maleau's and State of Progress' motion to dismiss and denying Bonhomme's motion to dismiss. R. 10. Bonhomme brought a civil action under the CWA's citizen suit provision, 33 U.S.C. § 1365, seeking civil penalties and injunctive relief to require Maleau to obtain a permit for the discharge of arsenic, a pollutant, into Reedy Creek and Wildman National Wildlife Refuge. R. 4. Following Bonhomme's complaint, Progress filed a separate citizen suit against

Bonhomme under the same provisions, alleging that he violated the CWA by discharging arsenic through a culvert on his property. R. 5. Maleau intervened as a matter of right in that action, pursuant to § 505(b)(1)(B) of the CWA, and Progress and Maleau moved to consolidate both cases, and Bonhomme did not object. Id.

After consolidation, both defendants filed motions to dismiss. Id. The district court held that Bonhomme is not a proper plaintiff, and found for Maleau on all issues, except issue 5, that the Reedy is a navigable water. R. 10. Bonhomme filed a Notice of Appeal challenging all of the lower court's holdings except issue 5. R. 1-2. Maleau filed a Notice of Appeal challenging the lower court's holding that the Reedy is a "navigable water," and Progress filed briefs on each issue, but principally challenged the district court's holding that Ditch C-1 is not a "navigable water" under § 1362(7).

STATEMENT OF THE FACTS

In Progress, Maleau owns an open pit gold mining and extraction operation, which is next to the Buena Vista River, a known navigable water. R. 5, 7. Maleau is suspected of being an "unfair business competitor" who "ignor[es] environmental protection requirements" and "hir[es] undocumented aliens at minimum wage and hous[es] them in abandoned chicken coops." R. 6-7. Maleau's mining operation requires CWA permits, but, rather than comply with those permits, he trucks the overburden, waste rock, and dirt fifty miles from Lincoln County to his property in Jefferson County, Progress, and piles it next to Ditch C-1. R. 4-5, 7. These waste piles contain arsenic, a "well-known poison," and are configured so rainwater erodes channels into the piles, and then discharges into Ditch C-1. R. 4-5, 6.

The arsenic is carried by stormwater and groundwater in the Ditch, then into a culvert on Bonhomme's property, and finally into the Reedy. R. 5. The Ditch was constructed in 1913, as a drainage for agricultural purposes and is, on average, 3 feet across and 1 foot deep. Id. It contains

flowing water, derived from groundwater in the saturated soil and rainwater runoff, except during annual periods of drought. Id. The Ditch begins before Maleau's property line, and runs three miles through several agricultural properties. Id. A restrictive covenant requires landowners to maintain the Ditch. Id. As Bonhomme that the arsenic was coming from Maleau's waste piles, he tested the water in the Ditch, for which his company, Precious Metals International, Inc. ("PMI"), graciously paid for. R. 6-7. No arsenic exists upstream of Maleau's property, but arsenic is present "in high concentrations" downstream from his property. Id. Similarly, there are "significant concentrations" present in the Reedy just below discharge of the Ditch. R. 6.

The Reedy flows from the State of New Union into Progress before reaching Bonhomme's property, and then "flows for several miles" before ending in Wildman Marsh, part of the Wildman National Wildlife Refuge. R. 5. The Reedy is about fifty miles long, and maintains water flow throughout the year, just like the navigable Buena Vista. Id. In New Union, it is used as the water supply for Bounty Plaza, a service area that sells gas and food on a federally-funded, interstate highway. Id. Farmers in both states divert water from the Reedy for irrigation of agricultural products that are sold in interstate commerce. Id.

In addition to Ditch C-1 and the Reedy, arsenic is present throughout the Refuge. R. 6. Bonhomme owns a large hunting lodge adjacent to the Refuge, in Progress. R. 5-7. The Refuge is an "extensive wetland" and is home to "over a million ducks and other waterfowl during their twice annual migrations." R. 5-6. It is a "major destination" for duck hunters from surrounding states and around the nation, including hunters from a few foreign countries, like Bonhomme, a French national. R. 6, 8. Hunting in the Refuge "add[s] over $25 million to the local economy from interstate hunters." R. 6. A significant portion of the wetland is owned and maintained by the United States Fish and Wildlife Services ("FWS"). Id. Thus far, the FWS has detected arsenic in three Blue-winged Teal ducks living in the Refuge. Id.

Due to the "significant concentrations" of arsenic in the Reedy, the Refuge, and the ducks, Bonhomme is afraid to continue using the Refuge for hunting parties. R. 6. Bonhomme uses his lodge and the surrounding marsh area for duck hunting parties, attended by social friends, and business acquaintances from PMI, but he has decreased these parties from eight a year to two a year, due to his fear of the arsenic pollution. Id. Bonhomme is the President, largest shareholder, and on the Board of Directors of PMI. R. 7. PMI owns five gold mines, but only two domestically, and neither of those mines are located in Progress or New Union. Id.

During a press conference, the Attorney General stated that he entered the suit to "protect the waters of the state, including Wildman Marsh" and to protect Maleau. R. 6. Progress accused Bonhomme of filing suit only to prevent Maleau from competing with PMI. Id. However, Bonhomme alleged that the Attorney General is filing suit against Bonhomme in gratitude for Maleau's major contributions to his election campaign. Id.

STANDARD OF REVIEW

On appeal from a motion to dismiss, an appellate court reviews the lower court's decision *de novo*. Ecological Rights Found. v. Pac. Gas & Elec. Co., 713 F.3d 502, 507 (9th Cir. 2013). All facts alleged in the complaint must be accepted as true, and construed in the "light most favorable to the nonmoving party." Id. (internal quotations and citations omitted). To determine whether a complaint states a claim for relief, an appellate court must "draw on its judicial experience and common sense." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). Dismissal is only proper if there is a lack of a plausible claim. Id.

SUMMARY OF THE ARGUMENT

The district court erred in holding that Bonhomme is not the real party in interest, that Bonhomme is not a "citizen" as that term is defined under § 1365 of the CWA, that Maleau's mining waste piles are not "point sources" under § 1362(12), (14) of the CWA, that Ditch C-1 is

not a "navigable water" under § 1362(7), (14) under the CWA, and that Bonhomme is liable under § 1311(a) for discharging arsenic through the culvert on his property into the Reedy. The district court correctly held that the Reedy is a "navigable water" under the CWA.

First, Bonhomme is the real party in interest because he has a separate and personal interest in prosecuting this case, distinct from his business interest in PMI. Bonhomme possess the right to enforce his claim because he is the owner of the hunting lodge adjacent to the Refuge, property that is directly affected by Maleau's actions. Furthermore, Bonhomme has Article III standing to pursue this claim and courts have held that when a party has standing, any real party in interest objections are disposed of. Bonhomme's property interests are diminished because his property is adjacent to a polluted wetland. In addition, his recreational interests in the Refuge are damaged because he is fearful of hunting game contaminated with high levels of arsenic. This economic and recreational deprivation is personal to Bonhomme and enough to satisfy the requirements of real party of interest under Rule 17.

Second, Bonhomme is a "citizen" under the CWA because Congress defined the terms to allow any "person or persons having an interest which is or may be adversely affected" to have the right to sue under the citizen suit provision. This definition is clear in its broad application, as it contains no limitation to actual United States citizenship. Furthermore, the CWA's legislative history indicates that Congress intended for all persons who demonstrate a personal interest sufficient to prove standing to meet the statutory requirements as well.

Third, Maleau's mining waste piles are "point sources" under the Act because they are a discernible "conveyance," discharging a pollutant. The EPA defines discharge of a pollutant to include surface runoff that is channeled by man. Maleau's mining waste piles fit within this definition because he collected the waste, and pilled it adjacent to Ditch C-1, which then conveys arsenic via channels created by surface water. This is the most straightforward reading of the

statute and the district court clearly erred in holding otherwise.

Fourth, Ditch C-1 is a navigable water, as it is a relatively permanent body of water that flows year round, except for a few weeks to months during the dry season. This is the type of water that Congress contemplated in the CWA in order to prevent pollution at the source. Additionally, even under the plurality's limited construction of the term in Rapanos, Ditch C-1 would also be considered a "navigable water" because it maintains a constant surface connection with the Reedy for most of the year. Conversely, the lower court held that Ditch C-1 is a point source, which still allows Bonhomme to overcome a motion to dismiss, as multiple point sources can satisfy a cause of action.

Fifth, the district court correctly held that the Reedy is a navigable water because it is an interstate water that contributes water to a federally protected marsh. The EPA defined "waters of the United States" to include "interstate waters," and this definition deserves Chevron deference because it is a reasonable rule promulgated by the agency responsible for implementing the CWA. This interpretation is reasonable because regulating activities that cross state lines is the most fundamental aspect of Congress's commerce power, and the statute must have jurisdiction over these types of waters in order to effectuate the purpose of the CWA. Furthermore, the federal government must have authority to regulate pollution that would damage federally owned land or else they would not have the ability to protect federal property under the Property Clause.

Finally, Bonhomme cannot be held liable under the Act for discharging arsenic into the Reedy because he has no control over the water flowing through the culvert from other landowners' properties, and therefore, he has no ability to comply with the Act. The CWA was designed to target pollution at its source, in order to protect and restore the integrity of the Nation's waters. Thus, holding a landowner, who has no control over the point source or its

pollutant liable, would not achieve that virtuous goal, but would be both absurd and futile.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT'S HOLDING THAT BONHOMME IS NOT THE REAL PARTY IN INTEREST AS HE POSSESSES THE RIGHT TO ENFORCE HIS CLAIM THROUGH HIS PROPERTY RIGHTS AND HAS A SIGNIFICANT INTEREST, AS SHOWN THROUGH ARTICLE III STANDING.

This Court should reverse the lower court's holding, and instead find that Bonhomme is the real party in interest because he possesses property interest that are distinct from his corporate interest, and because he possesses a significant interest in this claim as he has suffered a sufficient injury in fact. Rule 17 of the FRCP states that "[e]very action shall be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). In every case, "the action must be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation." Va. Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973).

Real party in interest is one of the judicially imposed limitations on the exercise of federal jurisdiction, otherwise known as prudential standing. Bennett v. Spear, 520 U.S. 154, 162 (1997). The original purpose of Rule 17(a) was "to allow an assignee to sue in his own name," or to allow an executor to sue on behalf of a trustee. Fed. R. Civ. P. 17(a). Since this legal principle is now generally accepted and encoded in law, the modern purpose of the rule has become "simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Fed. R. Civ. P. 17 advisory committee notes. Thus, while this rule allows a party to protect his interests without having to rely on someone else to do so on one's own behalf, this rule will not bar a plaintiff from suit simply to prevent multiple suits when there is more than one party with a significant interest. See Va. Elec., 485 F.2d at 83-84.

This rule is similar, but not identical, to Article III standing. Article III provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States." U.S. Const. art. III, § 2. Therefore, Article III limits federal judicial power to "cases" and "controversies" as authorized by the Constitution or federal statute, and the doctrine of standing ensures that only true cases and controversies are adjudicated. Thus, Rule 17 and Article III standing serve different interests. Rule 17 states that only those with a significant interest in the outcome may sue in federal court. Fed. R. Civ. P. 17. While one may prove that he is a real party in interest in his own right, a party that has sufficient Article III standing will have satisfied the real party in interest test. Apter v. Richardson, 510 F.2d 351, 353 (7th Cir. 1975).

A. Bonhomme Possesses The Right To Enforce The Claim Because He Has A Right Independent Of PMI.

Bonhomme possesses the right to enforce the claim in this case because he is the owner of property that is directly affected by Maleau's actions. A party is entitled to bring a claim when he possesses authority over the claim or when substantive law gives him the authority to enforce that right. See Rawoof v. Texor Petroleum Co., Inc., 521 F.3d 750, 756 (7th Cir. 2008); Oscar Gruss & Son, Inc. v. Hollander, 337 F.3d 186, 193 (2nd Cir. 2003). Generally, a shareholder may not sue for an indirect harm suffered as a result of injury to his corporation. See Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd., 493 U.S. 331, 336 (1990); Rawoof, 521 F.3d 750 at 757. However, there is an exception to this rule, allowing "a shareholder to pursue an action originating from an injury to the corporation if he has suffered a direct, personal injury independent of the derivative injury common to all shareholders." Alcan Aluminum, 493 U.S. at 336; see Rawoof, 521 F.3d 750 at 757.

A plaintiff "must assert his own legal rights and interests, and cannot rest his claim to

relief on the legal rights or interests of third parties." Alcan Aluminum, 493 U.S. at 336. The shareholder standing rule generally bars shareholders from bringing a claim to enforce the rights of the corporation. Id. However, an exception allows shareholders "with a direct, personal interest" that is "independent of the derivative injury common to all shareholders" to bring their own claim. Id.; Rawoof, 521 F.3d 750 at 757. A shareholder had prudential standing when its corporation leased them a portion of the corporation's land and this land was trespassed on, infringing on his property interests and enjoyment of the land. Grubbs v. Balles, 445 F.3d 1275, 1276, 1280-81 (10th Cir. 2006). In contrast, had the plaintiff's only connection with the property at issue been his ownership of the company's stock, he would not have met the requirements for prudential standing. Id. at 1280.

Here, Bonhomme has suffered an injury independent of all other shareholders. See Alcan Aluminum, 493 U.S. 331, 336 (1990); Rawoof, 521 F.3d 750 at 757. PMI has not alleged any harm from Maleau's actions, nor is PMI located within the geographic area in question, so it cannot be added as a party in this suit. R. 7-8. Therefore, it seems unlikely that PMI could sue directly for this harm, or for any shareholder to sue derivatively based on Maleau's actions. Even PMI did suffer economic harm because it is unable to have hunting parties at Bonhomme's property for its business clients and associates, Bonhomme still has a distinct injury, beyond his stock ownership in the company. See R. 7-8; Grubbs, 445 F.3d at 1280. Neither Bonhomme nor PMI will gain from the penalties in this suit, because under the CWA all penalties must be given directly to the U.S. Treasury. § 1365(1). In addition, PMI is aware, and has given Bonhomme the authority to bring this suit, as exhibited through its economic support in this case. R. 7.

Bonhomme does not merely lease property as the plaintiff in Grubbs, but he actually owns the property and Maleau's actions are preventing his enjoyment of his property. See R. 7-8; 445 F.3d at 1280. Bonhomme is "afraid" to use the marsh for his hunting parties, which include

"his business and social friends and acquaintances," and he has had to decrease these parties significantly, from eight a year to two a year. R. 6. As does not have parties solely for PMI's benefit, but also has parties for his own friends, and thus, Maleau's actions are a direct infringement on his property rights. R. 7. As Bonhomme possesses his own interest to sue as a result of Maleau's infringement upon his property rights, Bonhomme is the real party in interest.

B. Bonhomme Has A Significant Interest In This Case Through Injury In Fact.

In order for Bonhomme to bring a claim, he must possess Article III standing. The question of standing is relevant to Rule 17(a) because, while the Real Party of Interest requirement is distinct from Article III standing, courts have held that when a party has standing, "that ruling disposes of any real party in interest objections as well." Apter, 510 F.2d at 353; Zee Medical Distrib. Ass'n v. Zee Medical, 23 F. Supp.2d 1151, 1159 n.2 (N.D. Cal 1998). Although the district court did not raise the issue of standing, and instead dismissed on other grounds, federal appellate courts are obligated to determine standing regardless. See R. 10; Juidice v. Vail, 430 U.S. 327, 331-32 (1977). Therefore, addressing the issue of constitutional standing will dispose of both issues.

There are three elements to prove Article III standing:

> a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000). Neither traceability nor redressability are at issue here because, for the purposes of a motion to dismiss, the fact that arsenic was found downstream from Maleau's property and that he is the source is presumed to be true and satisfies those elements. See R. 6. In a CWA case, standing is conferred to any "person or persons having an interest which is or may be adversely affected." Friends of

the Earth, Inc. v. Gaston Copper Recycling Corp. ("Gaston Copper I"), 204 F.3d 149, 155 (4th Cir. 2000). Thus, only the issue of "injury in fact" is in question.

At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889 (1990)). Courts have recognized that economic harm to the plaintiff is a clear showing of injury. See Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n., 453 U.S. 1, 16-17 (1981); Sierra Club v. Morton, 405 U.S. 727, 738 (1972); Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 154 (1970).

In addition to economic harm, in Laidlaw, the Supreme Court held that an individual's mere "reasonable fear" of pollution is enough to constitute an injury for the purposes of standing, and, additionally, it has long been held that damage to a "purely aesthetic" or recreational interest is a cognizable harm. 528 U.S. at 183. Further, to allege a legally protected, concrete interest, a plaintiff must show merely that the challenged action affects his aesthetic or ecological surroundings. Gaston Copper I, 204 F.3d at 154. Conversely, when there is no injury to the plaintiff other than being "personally displeasing or distasteful" to the plaintiff, this is not enough to satisfy the "injury in fact" requirement. Morton, 405 U.S. at 731.

Here, Bonhomme has satisfied the injury in fact requirement. While Bonhomme may suffer economic harm if PMI's stock value decreases or if the company loses profits from Maleau's actions, Bonhomme's injury is much greater than this. See R. 6-7; Middlesex Cnty., 453 U.S. at 16-17. Maleau's actions directly threaten Bonhomme's property value, as arsenic crosses his property through Ditch C-1 and that arsenic travels to the surrounding area where it is significantly affecting at least three Blue-winged teal, and possibly other species, in the Refuge.

R. 6. Both of these issues will likely have a significant effect on Bonhomme's property value and effect both his aesthetic and recreational surrounding. See id.; Gaston Copper I, 204 F.3d at 154. Further, Bonhomme has had to decrease his hunting parties from eight a year to two a year because he is "afraid" to use the marsh. R. 6. Because Bonhomme hunts ducks, such as the Blue-winged Teal, and therefore, he has every right to be concerned about potentially being exposed to or ingesting arsenic. See id. Thus, this recreational and psychological harm goes far beyond finding Maleau's activities displeasing. See R. 6; Morton, 405 U.S. at 731.

Bonhomme has Article III standing, and therefore Rule 17(a)'s real party in interest test is satisfied. See Apter, 510 F.2d at 353. Bonhomme possesses the right to bring a claim personal to him against Maleau and has the right to enforce his significant interest, thus satisfying the real party interest standard. Accordingly, Bonhomme is the proper plaintiff in this suit.

II. BONHOMME CAN SUE MALEAU AS A "CITIZEN" BECAUSE THE TERM DOES NOT REQUIRE UNITED STATES CITIZENSHIP, INSTEAD IT IS SUFFICIENT THAT HE ALLEGED AN INTEREST THAT MAY BE ADVERSELY AFFECTED.

Bonhomme is a "citizen" under the CWA and, despite his foreign nationality, Bonhomme can sue Maleau under the citizen suit provision because Bonhomme owns property and hunts regularly in the geographic area. Foreign nationals have standing to sue in federal court. See U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1332(a)(2); Servicios Azucareros de Venezuela, C.A. v. John Deere Thibodeaux, Inc., 702 F.3d 794, 805 (5th Cir. 2012); Ibrahim v. Department of Homeland Sec., 669 F.3d 983, 992-94 (9th Cir. 2012). Therefore, foreign nationals have standing to sue under a federal act so long as the requirements under that statute are satisfied.

Bonhomme has satisfied the necessary requirements to sue under the CWA, which defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Further, the Act defines the term "person" as "an individual,

corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). This definition was meant to reflect "the decision of the U.S. Supreme Court in the case of Sierra Club v. Morton," that a person may bring a suit so long as they have an interest in the case. S. Rep. 92-1236, at 3823 (1972) (Conf. Rep.). Thus, this definition is meant to extend broadly to *any* person fulfilling this requirement.

This interpretation is consistent with the purpose of citizen suits under the CWA, and the purpose of the Act itself. When a permit holder fails to comply with his permit, the federal or state government is entitled to enforce compliance. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 52-53 (1987). However, in the absence of this enforcement, private citizens are entitled to sue under the CWA's "citizen suit" provision. § 1365(a)(1). As intended, the citizen suit provision ensures that CWA violators are held liable for their actions when they may otherwise be unaccountable for their environmental damage.

This Court should find that the court below erred in granting Progress' and Maleau's motion to dismiss, and instead find that Bonhomme is a "citizen" as defined under §§ 1365(g), 1362(5). As addressed below, even though Bonhomme is a French national, he need only have an interest in the suit to bring suit under the CWA. Further, defining the term "person" to include French nationals does not read the term citizen out of the Act.

A. The Plain Language Of The CWA Specifically Dictates That Bonhomme Need Only Have An Interest In The Suit To Bring A Claim Under The Citizen Suit Provision, He Is Not Required To Be An U.S. Citizen.

Bonhomme has standing to sue under the citizen suit provision of the CWA despite his French nationality because the purpose and plain language of the CWA require only that a person have an interest in order to sue. After an individual has demonstrated that they have suffered an injury sufficient for Article III standing, then that individual has also satisfied the requirements for citizen suit standing under the CWA, regardless of citizenship. See §§ 1362(5),

1365(g); Morton, 405 U.S. at 735, 738-40; Friends of the Earth v. Gaston Copper Recycling ("Gaston Copper II"), 629 F.3d 387, 396 (4th Cir. 2011).

1. "Citizen" is specifically defined in the Statute.

Rules of statutory interpretation dictate that the first step is to analyze the plain language of the statute itself. Gwaltney, 484 U.S. at 56. Under the CWA, the term "citizen" is specifically defined under the Act, which demonstrates that it should not be given independent meaning. 33 U.S.C. § 1365(g); see, e.g., Perrin v. U.S., 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); Benjamin v. Jacobson, 172 F.3d 144, 155 (2nd Cir. 1999) ("If the statute includes an explicit statutory definition, we accord that definition controlling weight, even if it varies from common usage.") (internal citations omitted).

The CWA specifically defines citizen to mean "a person or persons having an interest which is or may be adversely affected." § 1365(g). The term "person" is defined as an "individual." Id. at § 1362(5). Combined, this language unambiguously provides that any individual may file a citizen suit under the CWA so long as they "have an interest which is or may be adversely affected" by a defendant's activity. As Bonhomme is undoubtedly an "individual" under the CWA, with an interest, as described above, he satisfies this requirement.

2. The statute's definition comports with congressional intent to give foreign nationals, like Bonhomme, standing under the CWA.

If this Court finds that the definition of "citizen" is not clear, it should look to the purpose and history of the statute. Gwaltney, 484 U.S. at 56. For the term citizen, it was "the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' [to] reflec[t] the decision of the U.S. Supreme Court in the case of Sierra Club v. Morton." S. Rep. 92-1236 at 3823. In that case, the Court held that the Sierra Club lacked interest to sue because it had failed to allege how many of its members would be injured by a

developer building in a certain geographic area. Morton, 405 U.S. at 735, 738-40. This was based on the lower court's finding that the Sierra Club had not asserted in its complaint any facts stating how its members would be affected, other than the fact that they found these actions "personally displeasing or distasteful." Id. at 731. The Court held that any injury to aesthetic and environmental stability or economic harm could be enough to establish injury as required for standing. Id. at 734.

Based on the Court's decision, the Second Circuit held that Friends of the Earth had standing when one of its members found pollution in a river offensive, and his family occasionally picnicked and fished along the river. Friends of the Earth v. Consol. Rail Corp., 768 F.2d 57, 60-61 (2nd Cir. 1985). These cases never address whether these individuals are United States citizens, suggesting that this simply is not relevant to standing under the CWA. Further, courts have specifically held that in order for an individual to be a citizen under the citizen suit provision, one need only have an interest that is, or may be, adversely affected, and do not extend this inquiry to any other type of citizenship.

Even though the CWA does not indicate specifically whether foreign individuals can sue under the CWA, it does not specifically state that they cannot sue. Therefore, courts must look to whether or not the "object of the legislature intended to apply to them." Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1076 (9th Cir. 2006) (citation omitted). In Pakootas, the court held that a foreign person could be covered under "any person" in the CERCLA statute because the purpose of CERCLA is to hold parties responsible for hazardous waste sites in the United States environment, and therefore, the intent of the legislature was to apply to any party that is responsible for waste sites, regardless of nationality. Id. at 1077. This is analogous to the intended purpose of the citizen suit under the CWA, to supplement government enforcement on behalf of the United States. See Gwaltney, 484 U.S. at 52-53. Thus, it is clear from both the

language of the CWA and the legislative history that "[i]f a plaintiff asserting an interest under the CWA meets the constitutional standing requirements to satisfy Article III, then that plaintiff satisfies the statutory threshold as well." Gaston Copper II, 629 F.3d 387, 396 (4th Cir. 2011).

As established under Section I(B), supra, Bonhomme has satisfied the requirements to establish Article III standing. Bonhomme owns property in the geographic area and hunts regularly around that area. R. 6. The "object of the legislature" was meant to apply to foreign nationals because the objective of the CWA is to restore the integrity of our nation's waters, and therefore it makes sense to allow anyone with any interest to sue to protect that interest. See Pakootas, 452 F.3d at 1076. As cases require a personal connection to the surrounding area, Bonhomme has a clear interest through his hunting lodge and through hunting in the Refuge. See Morton, 405 U.S. at 738-40; Consol. Rail Corp., 768 F.2d at 60-61. This harm to Bonhomme is alleged in his complaint, and he alleged more injury than simply his "distast[e]" for Maleau's behavior. See R. 5-7; Morton, 405 U.S. at 731. Bonhomme can no longer use his property the way he chooses, and instead he is "afraid" to have hunting parties or use the Refuge. R. 6. Thus, this Court should find that Bonhomme is a citizen under the Act.

B. Defining The Term Person To Include A Foreign National Does Not Force The Term Citizen To Lose Its Meaning.

Bonhomme does not need to be a citizen of the United States because the term "citizen" means something broader, as it has been defined in the CWA, similar to "navigable waters." Congress defined "citizen" to mean "a person or persons having an interest," and, in turn, defines "person" as "an individual." §§ 1365(g), 1362(5). The Supreme Court stated that Congress meant for "navigable water" to encompass something more than waters that are navigable-in-fact, but did not intend to read the broader term out of the statute when it defined this term as "waters of the United States." Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs

("SWANCC"), 531 U.S. 159, 171-72 (2001). Not only is the term "citizen" capable of different meanings, but other non-citizens can file a citizen suit, as per Congress's express intent.

Similarly, courts have held that "navigable waters" can include non-navigable waters, because the intent of Congress was to "exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985); Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 287-88 (4th Cir. 2011). The fact that "Congress elected to redefine 'navigable waters,"' to have a broader definition than the traditional understanding indicates an intent to move away from the classic definition of the term. U.S. v. Deaton, 332 F.3d 698, 709 (4th Cir. 2003). Congress showed the same intent to expand the definition of citizen.

Similarly, the dictionary defines citizen as "an inhabitant of a city or town," "a member of a state" or "a native or naturalized person." Merriam Webster's Collegiate Dictionary, 226 (11th ed. 2004). While the statutory definition should be given superior weight, the dictionary clearly supports the definitions emphasis on geography, rather than nationality. See id. Just like "navigable water," citizen cannot be read entirely out of the CWA, but reading citizen this way still allows for its plain meaning based on the definition the dictionary provides. The reading of the definition of citizen, which the Court should find conclusive, has been supported by regulation. See, e.g., 40 C.F.R. § 122.2 (deciding that the term "waters of the United States," and the definition of "navigable waters," was intended to include waters "[w]hich are or could be used by interstate or *foreign travelers* for recreational or other purposes."). Bonhomme satisfies the dictionary requirement of citizen as Bonhomme owns property in the geographic area that is being polluted and hunts there regularly. R. 6.

Further, under the CWA, "person" is defined not only as an individual, but also as a

"corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 C.F.R. § 1362(5). These are not the traditional definitions of "persons," and therefore, person has an expanded meaning. More importantly, the lower court conceded to this expanded meaning by allowing Progress to sue. See R. 8.

Congress intended this reading when it chose not to include the House Report into the CWA. The House Committee Report defined "citizen" much more narrowly, wanting "the term 'citizen' to mean (1) a citizen of the geographic area having a direct interest which is or may be affected and (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy." Sierra Club v. SCM Corp., 747 F.2d 99, 105 (2nd Cir. 1984) (internal citations omitted). However, even if the House Report's definition, with its narrower meaning of citizen, was included in the Act, Bonhomme would still satisfy the requirements because he is "a citizen of the geographic area having a direct interest which is or may be affected." See id.

As illustrated above, Bonhomme's express statutory rights were denied when the lower court held that he could not file a citizen suit, and therefore this Court should reverse the motion to dismiss because Bonhomme is a citizen under § 1365(g) and § 1362(5) of the CWA.

III. THIS COURT SHOULD HOLD THAT MALEAU'S WASTE PILES ARE A POINT SOURCE BECAUSE IT IS A DISCERNABLE CONVEYANCE THAT IS DISCHARGING A POLLUTANT.

Maleau is violating the Act, as he is unlawfully discharging arsenic from waste piles, a point source, without a permit. See 33 U.S.C. § 1311(a). The Act defines the term "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." Id. at § 1362(12). The EPA's regulations define discharge of a pollutant to include additions of pollutants from "surface runoff which is collected or channelled by man [sic]." 40 C.F.R. § 122.2. Under the Act, a point source is a "discernible, confined and discrete conveyance,

including but not limited to any pipe, ditch, channel . . . from which pollutants are or may be discharged." § 1362(14). Both of these terms, discharge of a pollutant and point source, are defined broadly, as "it is essential that [the] discharge of pollutants be controlled at the source." Rapanos v. U.S., 547 U.S. 715, 803 (2006); see also U.S. v. Earth Scis., Inc., 599 F.2d 368, 373 (10th Cir. 1979); S. Rep. 92-414 (1971), reprinted in 1972 U.S.C.C.A.N. 3668, 3742.

The Supreme Court stated that a point source does not need to be "the original source of the pollutant," but can be what "transport[s]," or "convey[s]" that pollutant. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 105 (2004). Rather, the term point source was "intended to function as a means of identifying industrial polluters," and the Act focuses on "point source polluters" because they can be more easily "identified and regulated" than "nonpoint source polluters." See U.S. v. Plaza Health Labs., 3 F.3d 643, 647, 649 (2nd Cir. 1993); Natural Res. Def. Council v. U.S. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990). Therefore, the definition of point source was meant to include conveyances that make "structural sense." See Plaza Health Labs., 3 F.3d at 649.

This Court should find that Maleau's waste piles are point sources because they are discernable conveyances that are discharging a pollutant, and are not nonpoint sources. Additionally, this Court should find that Maleau's trucks are point sources, as discussed below.

A. Maleau's Waste Piles Are A Point Source Because They Are A Discernable Conveyance That Is Discharging A Pollutant.

As noted above, under the CWA, a point source is a discernible conveyance, which specifically includes discharges of pollutants from surface runoff that is "channeled by man." See § 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2. Only the broadest definition of a point source will further the intent of the Act. Earth Scis., 599 F.2d at 373. The Fifth Circuit held that overburden piles were a point source because surface runoff from rainwater was being channeled

via those piles. Sierra Club v. Abston Constr. Co., 620 F.2d 41, 43, 47 (5th Cir. 1980); see also Consol. Coal Co. v. Costle, 604 F.2d 239, 249 (4th Cir. 1979) (the definition of point source "excludes unchanneled and uncollected surface waters."); Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976) (the definition of point source "does not include unchanneled and uncollected surface waters."). Furthermore, piles are point sources, even if nothing has been done "beyond the mere collection of rock and other materials." Abston Constr. Co., 620 F.2d at 45; see also Parker v. Scrap Metal Processors, 386 F.3d 993, 1009 (11th Cir. 2004) (holding that "piles of debris" were "point sources"); Friends of Santa Fe Cnty. v. LAC Minerals, Inc., 892 F. Supp. 1333, 1359 (D.N.M. 1995) (holding that overburden piles are point sources because they are "human-made discernible, confined, and discrete conveyance[s].").

Here, Maleau's waste piles fall under this definition, and it makes "structural sense" to include them, because they have created a conveyance by which arsenic is discharged. See R. 5; Plaza Health Labs., 3 F.3d at 649. Similar to Abston Constr. Co. where the court held that piles were point sources, rainwater has eroded channels into Maleau's waste piles, and it is through those channels that arsenic is discharged. See R. 4-5; 620 F.2d at 47.

Further, as the facts alleged in the complaint must be accepted as true, had Maleau not transported the waste piles, they would have been left at his gold mining operation in Lincoln County, adjacent to navigable waters. See R. 5. These waste piles would still be channeling rainwater and discharging arsenic, and Maleau would be required to comply with his CWA permit requirements. See R. 5,7. Therefore, the waste piles are point source in Lincoln, and should be viewed the same in Jefferson.

B. Maleau's Waste Piles Do Not Fall Within The Agricultural Or Mining Exception Of The Act.

Agricultural and mining activities can be nonpoint sources, and are exempt from the Act,

only if they do not also fall within the definition of point source. Miccosukee, 541 U.S. at 106. It "contravenes the intent" of the Act to exempt "any activity that emits pollution from an identifiable point." Earth Scis., 599 F.2d at 373. The Act focuses on "point source polluters" because they can be more easily "identified and regulated," than "nonpoint source polluters." NRDC v. EPA, 915 F.2d at 1316.

As mentioned above, the waste piles fall within the definition of a point source, and therefore, the waste piles cannot fit within either of the nonpoint source exceptions. More importantly, Maleau's waste piles cannot be nonpoint sources because the arsenic is coming from an identifiable point where the pollutants have escaped. See R. 4, 5. The purpose of the Act cannot be fulfilled if an activity emitting pollution from an identifiable point is exempt. See Earth Scis., 599 F.2d at 373. Here, the arsenic is coming from the waste piles because arsenic is undetectable above the Ditch C-1 discharge into the Reedy, but below that discharge, arsenic is present in "significant concentrations." See R. 6.

C. In Addition To The Waste Piles, Maleau's Trucks Are Also Point Sources.

A truck is a point source because it is a discernable conveyance that "transport[s]" pollutants, which "ultimately" discharge into navigable waters. Miccosukee, 541 U.S.at 105; Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983); see also Parker, 386 F.3d at 1009 (holding that trucks and earth-moving equipment are point sources); Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 119 (2nd Cir. 1994) (holding that "manure spreading vehicles themselves were point sources."); U.S. v. Holland, 373 F. Supp. 665, 668 (M.D.Fla.1974) (holding that bulldozers are point sources.).

Here, Maleau's trucks are point sources because they conveyed overburden, fifty miles from his mining operation, where rainwater eroded the waste piles and discharged arsenic, which "ultimately" finds its way into navigable waters, as discussed infra. See R. 5, 7. Without the

trucks, the overburden would be left in Lincoln County, and Maleau has tried to evade the permit requirement by trucking the arsenic laden overburden away from his CWA permit restricted mining operation. See id.; Avoyelles, 715 F.2d at 922. Therefore, this Court should find that Maleau's waste piles are point sources because they are discernable conveyances that are discharging a pollutant, and are not nonpoint sources.

IV. DITCH C-1 IS A "NAVIGABLE WATER" UNDER THE CWA BECAUSE IT IS A TRIBUTARY OF THE REEDY.

This Court should find that Ditch C-1 is a "navigable water" because it is a tributary of the Reedy, which is itself a "navigable water" as defined by the Act. 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2. Alternatively, if this Court finds that Ditch C-1 is not a tributary, Bonhomme has still sufficiently alleged a cause of action under the CWA because, under Rapanos, there can be more than one point source transporting a pollutant to a "navigable water." 547 U.S. at 743.

It is well established that tributaries to "waters of the United States" are properly regulated under the Act. Id. at 781. The issue in Rapanos was whether wetlands next to tributaries of navigable waters could be regulated under the CWA, necessitating that tributaries by themselves are regulated under the Act. Id. Kennedy's concurrence states that an agency "must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries," in order to "avoid unreasonable applications of the statute." Id. at 782. This presupposes that *all* tributaries to navigable waters are covered by the Act, and it is only the extension of jurisdiction to wetlands next to those tributaries that require a particular hydrological connection. While this concurrence is almost universally applied as the relevant standard for determining whether a wetland next to a tributary of a navigable water is covered by the Act, several circuits have determined that a wetland can be covered if it meets either the plurality's or Kennedy's test. See, e.g., N. Cal. River Watch v. City

of Healdsburg, 496 F.3d 993, 995 (9th Cir. 2007) (Kennedy test controls); U.S. v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006) (Kennedy's test controls); but see, e.g., U.S. v. Donovan, 661 F.3d 174, 176 (3rd Cir. 2011) (wetlands are subject to CWA if they meet either plurality or Kennedy test); U.S. v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006) (government can establish jurisdiction under either test).

The plurality attempted to constrain the agency's ability to regulate wetlands adjacent to tributaries by requiring that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," are covered by the Act." Rapanos, 547 U.S. at 742 (emphasis in original). Yet, even with this restricted rule, the plurality noted that they "do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." Id. at 732, n. 5 (emphasis in original). Furthermore, the plurality specifically agreed with the dissent "that ditches, channels, conduits and the like 'can hold water permanently as well as intermittently,'" remarking that "we usually refer to them as 'rivers,' 'creeks,' or 'streams,'" and they are covered by the Act. Id. at 736, n. 7 (citations omitted). Thus, the terminology used to describe the waterway is significantly less important than the nature of the water flow.

Here, Ditch C-1 would certainly satisfy Justice Kennedy's jurisdictional test, as it presupposes that all tributaries of navigable waters fall within the Act's coverage. Id. at 782. But, even if that were not enough to fall within the Act's jurisdiction, Ditch C-1 also falls within the plurality's notion of covered waters, as Ditch C-1 is on average 3 feet across and 1 foot deep and "contains running water except during annual periods of drought." R. 5. This is exactly the type of seasonal stream contemplated by the plurality as being included in the "relatively permanent, standing or continuous bodies of water" covered by the term "waters of the United States." Rapanos, 547 U.S. at 739. Additionally, the fact that this particular waterway is termed a "ditch"

is of no consequence to the Act's coverage. Id. at 736, n. 7.

Finally, Ditch C-1 can be both a navigable water and a point source, as many courts have recognized that "ditches and canals, as well as streams and creeks," are "waters of the United States." See 33 U.S.C. § 1362(7); U.S. v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997); see, e.g., U.S. v. Velsicol Chem. Corp., 438 F. Supp. 945, 947 (W.D. Tenn. 1976) (sewers that lead to Mississippi River separated the point source from the covered water); Holland, 373 F. Supp. at 673 (mosquito canals that empty into bayou arm of Tampa Bay). However, if this Court finds that Ditch C-1 is not a navigable water, it should affirm the lower's court decision that Ditch C-1 is a point source. See R. 9; See also § 1362(14) (point source means "any pipe, ditch, channel, tunnel" etc.). Under the Act, when a pollutant is discharged from "any point source," then a CWA permit is required. See §§ 1311(a), 1362(12). Thus, there can be multiple point sources, all requiring a CWA permit. See 33 U.S.C. § 1312 (discharges "from a point source or *group* of point sources" must comply with effluent limitations.).

V. THE REEDY IS A "NAVIGABLE WATER," FITTING SQUARELY WITHIN THE AGENCY'S REASONABLE DEFINITION, THE DEFINITION IS WITHIN CONGRESS'S COMMERCE POWER, AND THE REEDY FLOWS INTO THE MARSH, WHICH IS ALSO A NAVIGABLE WATER.

Maleau's activity is in violation of the CWA because the Reedy and the Refuge must be considered "waters of the United States" to effectuate the purpose of the CWA and Maleau's activity has substantial impacts on interstate commerce. This holding would allow Bonhomme to protect his interest in living near safe waterways and Progress to adequately exercise its authority under the Act. The CWA prohibits the discharge of any pollutant by any person unless authorized by a CWA permit. 33 U.S.C. §§ 1311, 1342. As discussed under Part III, supra, the Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source," and "navigable waters" as "waters of the United States, including

the territorial seas." § 1362(12) and (7). The EPA[1] has promulgated regulations to define "waters of the United States" that must be given deference because Congress intended for the agency responsible for implementing the Act to define this term in a manner that effectuated the Act's purpose. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

The EPA's definition includes "interstate waters," such as the Reedy, that potentially carry pollutants that one state alone would not be able to regulate. See 40 C.F.R. § 122.2. This definition is clearly within Congress's commerce power, which allows the regulation of "those activities having a substantial relation to interstate commerce." See U.S. v. Lopez, 514 U.S. 549, 558-59 (1995). Because the Reedy is an interstate water, and is large enough to serve as a water source of both Bounty Plaza and the Refuge, it should be considered a "navigable water." R. 5. Furthermore, both Maleau's mining operations and his discharge of arsenic have substantial impacts on interstate commerce.

A. The Reedy Is A "Waters Of The United States" Because It Is An "Interstate Water," A Definition That Deserves Chevron Deference Because The EPA's Interpretation Of The CWA Is Reasonable.

In each of the cases addressing the EPA's definition of "navigable waters," the Supreme Court has applied some variation of the Chevron analysis to determine if the agency's definition is an acceptable interpretation of the CWA. Riverside, 474 U.S. at 131; SWANCC, 531 U.S. at 171, 173; Rapanos, 547 U.S. 715, 716 (2006). Pursuant to Chevron, a court analyzing an agency's interpretation of its enabling statute must first determine if the statute is ambiguous. 467 U.S. at 842–83. If the statute is unambiguous, the court shall apply the clear meaning of the language; but if the statute is ambiguous, the court must give deference to any reasonable

[1] The EPA and Army Corps of Engineers are both responsible for implementing the CWA and have promulgated identical definitions of the term "waters of the United States." Compare § 122.2, with 33 C.F.R. 328.3(a). For the sake of clarity, this brief will refer to the EPA or "the agency" when referring to the definition of "waters of the United States."

interpretation by the agency. Id. at 843. The Court has, on a number of occasions, sought to clarify the Act's use of the term "waters of the United States," remarking that the definition remains "notoriously unclear," and thus ambiguous. Sackett v. EPA, 132 S. Ct. 1367, 1375 (2012). Therefore, this Court must look to the second step of the Chevron analysis and give deference to an agency's reasonable interpretation. Riverside, 474 U.S. at 131.

The EPA issued regulations defining "waters of the United States" as, in relevant part:

> (b) All interstate waters including interstate wetlands; (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . the use, degradation or destruction of which could affect interstate or foreign commerce including: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purpose by industries in interstate commerce.

40 C.F.R. § 122.2. Under this definition, this Court should find that it was reasonable for the Corps to interpret the statutory term "waters of the United States" as intending to cover "interstate waters." Neither the Court nor this Circuit have addressed this specific provision.

In Riverside, the Court held that, under Chevron deference, it was "appropriate" for the agency to "look to the legislative history and underlying policies of its statutory grants of authority." 474 U.S. at 132. The Supreme Court also acknowledged that the term '"navigable waters"' carried some of its prior meaning, but this *definition* was broadened "to encompass all 'waters of the United States.'" SWANCC, 531 U.S. at 180. The Conference Report Committee "fully intend[ed] that the term 'navigable waters' be given the broadest possible constitutional interpretation." See S. Rep. 92-1236, at 3822. Furthermore, in Riverside, the Court expressly declared that Congress "intended to repudiate limits that had been placed on federal regulation," and "to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133.

The EPA's inclusion of "interstate waters" in the definition is not only reasonable in light

of this statutory history but is necessary in order to achieve the fundamental purpose of the CWA, to restore the integrity of the Nation's waters. 33 U.S.C. § 1251(a). This interpretation does not "stretc[h] the outer limits of Congress's commerce power," a concern the Supreme Court highlighted, because Congress must have authority to regulate interstate waters that individual states cannot regulate independently. See Rapanos, 547 U.S. at 738.

Of course, EPA's definition of "waters of the United States" is not unlimited, as the Supreme Court limited the definition's inclusion of the Migratory Bird Rule. See SWANCC, 531 U.S. at 171, 173. Unlike in this case, the Court addressed agency jurisdiction over isolated waters, not tributaries, and therefore those waters could not affect other "waters of the United States." Rapanos, 547 U.S. at 794 (Stevens, J., dissenting). The Fourth Circuit noted that "one would expect that the phrase 'waters of the United States,' when used to define the phrase 'navigable waters' refers to waters which, if not navigable in fact, are *at least interstate or closely related to navigable or interstate waters*." U.S. v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997) (emphasis added). One district court specifically addressed the issue, holding that Congress's intention reasonably includes "all interstate waters as well as their tributaries." Ga. v. City of E. Ridge, 949 F. Supp. 1571, 1577-78 (N.D.Ga. 1996). The court held that a tributary that intersected a creek in Georgia, which then flowed north into Tennessee, was a "navigable water" because the tributary flowed into interstate waters. Id. at 1578.

Here, the Reedy is a 50 mile long waterway beginning in New Union and ending in Progress. R. 5. Not only does this waterway maintain water flow throughout the year, but it maintains enough flow to supply water to the Bounty Plaza, a service area on an interstate highway, selling gasoline and food," provide irrigation for many farmers in both New Union and Progress, and terminates in an "extensive wetlands." Id. at 5, 6. The fact that this waterway crosses state lines is enough for it to fall within the agency's jurisdiction under the Act. See

Wilson, 133 F.3d at 257; E. Ridge, 949 F. Supp. at 1577-78. The fact that this waterway is not considered "navigable-in-fact" should have no bearing on whether the Reedy is a "water of the United States" because the EPA reasonably determined that all interstate waters should be included in the definition. § 122.2; Chevron, 467 U.S. at 842–83.

Thus, not only was it reasonable for the EPA to have included "interstate waters" in the definition, but it is reasonable for this particular waterway to fall within the agency's jurisdiction under the Act because this waterway has a significant impact on many interstate travelers, farmers, and on the ecological integrity of the Refuge. R. 5, 6.

B. Both Maleau's Mining Activities And His Pollution Of The Reedy Substantially Affect Interstate Commerce, And Thus, His Activity Can Be Regulated By The Act.

This Court should find that Maleau is violating the CWA because his mining activity is polluting an interstate water that has substantial effects on interstate commerce. Congress has extensive power to regulate three broad categories under the commerce clause: "the use of channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and "those activities having a substantial relation to interstate commerce." See U.S. Const. art. I, § 8, cl. 3; Lopez, 514 U.S. at 558-59; Hodel v. Ind., 452 U.S. 314, 323-24 (1981).

Under the third category, in order for an intrastate activity to be regulated, the activity must "substantially affect interstate commerce." Lopez, 514 U.S. at 559. The Court has upheld several statutes regulating intrastate economic activity, including the regulation of intrastate coal mining, and inns and hotels catering to interstate guests. Id. at 559-60. The Court in Wickard v. Filburn upheld the regulation of production and consumption of homegrown wheat. 317 U.S. 111, 127-28 (1942). The Supreme Court in Lopez reviewed the history of commerce cases and concluded that to regulate these activities, they must "arise out of or [be] connected with a

commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 514 U.S. at 561.

Surface mining has been reviewed by the Supreme Court as an activity with an adverse effect on both interstate commerce and water resources, citing the House Committee Report: "The most wide spread damages…are environmental in nature. Water users and developers incur significant economic and financial losses as well." Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 280 (1981). The Court also highlighted congressional findings that "nationwide…'standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards…within their borders."' Id. at 281-82. The Court held that "the Commerce Clause [is] broad enough to permit … regulation of activities" causing pollution and other environmental hazards affecting "more than one State." Id. at 282.

Thus, lower courts have applied the rule as requiring both the regulated activities and the pollution to have substantial impacts on interstate commerce. See, e.g., Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1068 (D.C. Cir. 2003) (holding that the construction of a 202 acre commercial housing development is clearly a commercial activity that could be regulated under the Endangered Species Act); Allied Local & Reg'l Mfrs. Caucus v. U.S. EPA, 215 F.3d 61, 82 (D.C. Cir. 2000) (holding that the Clean Air Act provisions concerning VOC emissions were expressly regulating "manufacturers…of consumer or commercial products for sale or distribution in interstate commerce," and thus had a commercial characteristic).

While the Supreme Court's decision in SWANCC limited the extent of the agency's ability to regulate intrastate activities, it did so expressly on the grounds that the agency exceeded its authority granted by Congress by regulating "isolated ponds, some only seasonal,

wholly located within [the State].” 531 U.S. at 171, 174. Since that decision, many circuit courts have narrowly construed its application. See, e.g., Deaton, 332 F.3d at 703; U.S. v. Krilich, 303 F.3d 784 (7th Cir. 2002); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001). Circuit courts have analyzed activities regulated by the CWA under commerce power, finding that the EPA’s regulation of dumping pollution into streams and ditches have enough effect on interstate commerce to regulate entirely intrastate activities. Deaton, 332 F.3d at 708 (holding that the interpretation “encompassing nonnavigable tributaries of navigable waters does not invoke the outer limits of Congress's power or alter the federal-state framework.”).

Here, this Court should find that Maleau’s activities were clearly commercial in nature, and the pollution of the Reedy has substantial effects on interstate commerce, and therefore, it should fall within the CWA’s definition of “navigable waters.” Not only is gold mining a commercial activity, as identified by the Supreme Court in Hodel and Lopez, but Maleau’s products presumably must be sold in an interstate market. See 452 U.S. at 280; 514 U.S. at 559. Maleau transports his mining waste from his mining operation 50 miles away to his private property, and although this occurs intrastate, the Supreme Court has stated that companies engaged in interstate commerce should not obtain a competitive benefit from substandard conditions simply because their activities are wholly intrastate. See R. 5; Hodel, 452 U.S. at 282.

Maleau’s mining activities occur adjacent to a navigable-in-fact river, which are unquestionably subject to CWA permits, but Maleau avoids the burden of those regulations by transporting the mining waste from Lincoln to Jefferson County. See R. 5. It is undisputed that arsenic “is commonly associated with gold mining and extraction and is a well-known poison” and that Buena Vista River is a navigable-in-fact river. R. 5, 6. By transporting the arsenic laden overburden, Maleau is gaining a competitive advantage in interstate commerce by avoiding compliance with this aspect of the CWA, which is exactly the type of activity the commerce

power is used to combat. Hodel, 452 U.S. at 282.

Further, by polluting the Reedy through Ditch C-1, Maleau is polluting an interstate water, which has a substantial effect on interstate commerce. As discussed in Part V(A), supra, the Reedy is a substantial waterway, running for about 50 miles from New Union into Progress. See R. 5. The Reedy maintains water flow year round, serves as the water supply for Bounty Plaza, and is diverted by farmers in both states to irrigate agricultural products sold in interstate commerce. See id. The pollution of this waterway could cause untold adverse effects to interstate commerce. Countless individuals stop at Bounty Plaza while travelling on the federally-funded interstate highway and these individuals would be harmed physically by consuming the agricultural products irrigated by a polluted Reedy, not to mention the economic harm that would come to the farmers themselves. See R. 5. Also, the Refuge is a "major destination for duck hunters from Progress, New Union and five neighboring states" and "[i]t attracts hunters from around the nation and even a few foreign countries." See R. 6. This is exactly the type of waterway that Congress intended to protect and exactly the type of interstate havoc that the Act is designed to prevent. Therefore, this Court should find that the Reedy was properly considered a "water of the United States," such that Maleau's intrastate activities must be regulated by the Act.

C. Wildman National Wildlife Refuge Is A "Water Of The United States."

Finally, this Court should find that the Reedy is a "water of the United States" as it contributes to the Refuge, which is federally protected and also a "water of the United States." See R. 5-6. The Refuge is regulated by the Department of Interior, through the FWS, as part of the National Wildlife Refuge System. R. 6. National Wildlife Refuge System Act of 1966, 16 U.S.C. § 668dd(a)(1). In 1966, Congress passed this Act to establish a comprehensive policy with a mission "to administer a national network of lands and waters for the conservation,

management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans." Id. at § 668dd(a)(2).

The property clause of the Constitution provides that "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." U.S. Const. art. IV, § 3, cl. 2. The Supreme Court stated that "the power over the public land thus entrusted to Congress is without limitations." Kleppe v. N.M., 426 U.S. 529, 539 (1976). Thus, Congress has complete power over public lands to "control their occupancy and use, to protect them from trespass and injury," and this "necessarily includes the power to regulate and protect the wildlife living there." Id. at 540-41. Also, in order to effectuate Congress's broad power to protect public lands, that power must include the "regulation of conduct on or off the public land that would threaten the designated purpose of federal lands." State of Minn. by Alexander v. Block, 660 F.2d 1240, 1249 (8th Cir. 1981).

One particularly important goal of the Wildlife Refuge System is to "assist in the maintenance of adequate water … to fulfill the mission of the System and the purposes of each refuge." § 668dd(a)(4)(F). In order to achieve this goal, the FWS must coordinate with other federal agencies such as the EPA to regulate pollutants both on and off the wildlife refuge. Pursuant to these obligations carefully identified by Congress, the Refuge must be considered a "water of the United States" under the CWA. If the Marsh within the Refuge is included in the definition, then the Reedy would be both a tributary to covered waters and a covered water itself, bringing Maleau's polluting activity squarely within the reach of the Act.

VI. THIS COURT SHOULD FIND THAT BONHOMME IS NOT LIABLE FOR THE CWA VIOLATION BECAUSE HE NEITHER OWNS NOR CONTROLS THE WASTE PILES FROM WHICH THE ARSENIC IS BEING DISCHARGED, AND HE DOES NOT HAVE EXCLUSIVE CONTROL OVER THE CULVERT.

The stated purpose of the CWA is to restore the "chemical, physical, and biological integrity of the Nation's waters," and thus, it is unlawful for any person to discharge any pollutant without a permit. See 33 U.S.C. §§ 1251, 1311(a). To achieve that goal, Congress chose to regulate "point source polluters," as they can be "identified and regulated more easily than nonpoint source polluters." See NRDC v. EPA, 915 F.2d at 1316; See also Friends of Sakonnet v. Dutra, 738 F. Supp. 623, 629 (D.R.I. 1990) (Congress "placed liability with those in control of the pollutants being discharged.").

Liability under the Act is analogized to owning a "leaky faucet" and being "responsible for its drips." Sierra Club v. El Paso Gold Mines, 421 F.3d 1133, 1145 (10th Cir. 2005). Thus, liability is "trigger[ed]" by "ownership of a point source," and "the person responsible for the discharge of any pollutant strictly liable." El Paso, 421 F.3d at 1144; Earth Scis., 599 F.2d at 374. The Fifth Circuit held that a gold mine owner was liable for placing overburden into piles, a point source, as it was "the means by which pollutants" were discharged. Abston Constr. Co., 620 F.2d at 45, 47. The Supreme Court stated that liability is found even if pollutants pass through other conveyances, as the Act does not mandate that point sources "emit 'directly into' covered waters." Rapanos, 547 U.S. at 743 (citation omitted); See also Velsicol, 438 F. Supp. at 947 (a discharger is still liable if its pollutant passes "through conveyances owned by another party.").

Furthermore, the Supreme Court has time and again explained that when a particular reading of a statute would lead to "absurd or futile results," the court is to look "beyond the words to the purpose of the act." See U.S. v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (citing several previous Supreme Court cases to support this proposition). Thus, an owner of a point source can be liable only if he is in control of the point source and its pollutants, or the statute would lead to an absurd and futile result. Certain provisions require owners to have

control over both the point source and its pollutants or they will be unable to comply. See, e.g., 33 U.S.C. §§ 1311(g)(2) (providing that "owner or operator" of a point source may apply for modification of permit requirements); § 1316(a) (defining an "owner" to be "any person" that "controls" a point source); § 1318(a) (stating that "owner or operator" of a point source must establish and maintain records). The EPA's regulations embody this reading of the statute, that liability assigned is only to those who have control over a point source, as it defines "addition of any pollutant" to include "conveyances owned by a . . . person," and defines an "owner" to be the one whose "activity" is capable of being controlled by a CWA permit. 40 C.F.R. § 122.2.

This Court should find that Bonhomme is not liable for the CWA violation because he does not own the point source from which the pollutants originate, and he does not have exclusive control over the culvert through which the pollutants pass. Bonhomme is not in violation of the Act because Maleau owns the "leaky faucet," as he is the operator of the activity that is producing the waste piles, which he then trucks to his private property in Jefferson County, where they sit and leach arsenic. See R. 5; El Paso, 421 F.3d at 1145. Thus, it is Maleau's ownership of the waste piles, and not Bonhomme's ownership of the culvert that "trigger[s]" liability. See El Paso, 421 F.3d at 1144. This conforms to the Supreme Court's interpretation of the Act, as it stated in Rapanos that it is not necessary that a pollutant discharge directly into a navigable water, but can pass through other conveyances, such as Bonhomme's culvert. See 547 U.S. at 743. Even Progress and Maleau agree that ownership is the key to liability, as they argued that Bonhomme is violating that Act because he owns the culvert, but it is Maleau's ownership that is relevant here, as he is changing the "chemical, physical, and biological integrity of the Nation's waters." See R. 9; 33 U.S.C. § 1251. To fulfill the purpose of the Act, Maleau must be liable for the CWA violation because he has complete control over the amount and type of pollutants that are in the waste piles, as they are on his property, and thus, he

is a "point source pollut[er]" that can be easily "regulated," as Congress intended. See R. 5; NRDC v. EPA, 915 F.2d at 1316.

Furthermore, the Act requires an "owner" to seek permission to modify the discharge of a pollutant, and an "owner" must establish and maintain records of its point source. See 33 U.S.C. §§ 1311(g)(2), 1318(a). Bonhomme's ownership of the culvert cannot require him to obtain a permit, because he would not have any way of diminishing the arsenic passing into the Reedy. If Maleau decided to add different or more pollutants to the piles, and Bonhomme was held in violation of the aforementioned provisions, he could be subject to $5,000 per day of violation, without any recourse or ability to comply. See id.; § 1319(c). Thus, the Act cannot require those who have no control over the point source to seek a permit, as that would lead to both an absurd and a futile result. See Am. Trucking Ass'ns, 310 U.S. at 543.

Additionally, Maleau's waste piles are discharging arsenic into Ditch C-1, which is three miles long, and has a restrictive covenant, requiring all the landowners to maintain the Ditch. R. 5. Maleau is violating the covenant by failing to maintain the Ditch because he is discharging arsenic into it. The Act cannot be construed to hold Bonhomme liable for all of the landowner's discharges, especially Maleau's, just because his culvert is at the end of the Ditch.

CONCLUSION

For the foregoing reasons, this Court, with its de novo review, should reverse issues 1, 2, 3, 4, and 6, and affirm issue 5.

Respectfully submitted,
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