Team No. 54

C.A. No. 13-01234
Civ. Nos. 155-2012 & 165-2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

STATE OF PROGRESS

Plaintiff-Appellant – Cross-Appellee

and

SHIFTY MALEAU

Intervenor-Plaintiff-Appellant – Cross-Appellee

v.

JACQUES BONHOMME

Defendant-Appellant – Cross-Appellee

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

Brief for THE STATE OF PROGRESS, Plaintiff-Appellant

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Jacques Bonhomme filed an action in the United States District Court for the District of Progress against Shifty Maleau alleging violations of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (2012). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2012). Plaintiff-Appellant State of Progress also filed an action in the district court against Jacques Bonhomme for violating the Clean Water Act. The district court consolidated the actions thereafter. Each defendant filed motions to dismiss, R. 5, and all three parties filed a Notice of Appeal. (R. 1). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction pursuant to 28 U.S.C. § 1291 (2012) because the district court's order was a final decision.

STATEMENT OF THE ISSUES

I. Whether Jacques Bonhomme is the real party in interest, under Federal Rules of Civil Procedure 17, to bring a citizen suit against Shifty Maleau for violating section 301(a) of the Clean Water Act because he alleges harm to Precious Metals International, Inc. and not himself personally.

II. Whether Jacques Bonhomme, as a foreign national, may bring a citizen suit under section 505 of the Clean Water Act because the plain language of the statute and the legislative history support that a party bringing suit must be a citizen of the United States.

III. Whether Shifty Maleau's mining waste piles are "point sources" as defined in section 502(14) of the Clean Water Act because they do not discretely convey pollutants to a navigable water nor do they channel or collect stormwater carrying such pollutants.

IV. Whether Reedy Creek is a "navigable water" within the meaning of section 502(7) of the Clean Water Act because it is a permanent and continuously flowing body of water that extends between two states, is used in interstate commerce, and can be regulated under the Property Clause.[1]

[1] This issue is fifth in the district court order; however, the argument for Ditch C-1 depends on establishing that Reedy Creek is a navigable water, therefore it is placed fourth in the analysis of this brief.

V. Whether Ditch C-1 is a "navigable water" within the meaning of section 502(7) of the Clean Water Act because it is a tributary to Reedy Creek, which is a navigable water, and contains agricultural stormwater discharge and irrigation return flow, which expressly excludes it from the definition of "point source" in section 502(14).

VI. Whether Jacques Bonhomme violates the Clean Water Act because he channels water from Ditch C-1 and conveys arsenic directly into Reedy Creek through a culvert on his property even if Shifty Maleau is the but-for cause of the presence of the arsenic.

STATEMENT OF THE CASE

Jacques Bonhomme (Bonhomme) commenced the present action against Shifty Maleau (Maleau) pursuant to the citizen suit provision of the Clean Water Act (CWA). 33 U.S.C. § 1365 (2012). Bonhomme alleges that Maleau illegally discharges arsenic into Ditch C-1 (Ditch) from piles of gold mining overburden, waste rock, and dirt. (R. 4-5). Bonhomme is seeking an injunction, civil penalties, and litigation costs under 33 U.S.C. § 1365 (2012). (R. 4). The State of Progress also commenced an action against Bonhomme under the citizen suit provision, alleging that Bonhomme violates the CWA because he discharges arsenic from his culvert into Reedy Creek (Creek). (R. 5). Maleau intervened as a matter of right in Progress' action against Bonhomme pursuant to 33 U.S.C. § 1365(b)(1)(B) (2012). *Id.* The district court consolidated the two cases thereafter because they contain the same facts and law. *Id.* Bonhomme and Maleau each filed motions to dismiss. *Id.*

On appeal, Progress respectfully requests that this Court affirm the district court's order granting Maleau's motions to dismiss because: (1) Bonhomme is not the real party in interest; (2) Bonhomme is not a citizen within the context of the CWA; and (3) the waste piles on Maleau's property are not point sources. (R. 2). Progress requests that this Court affirm the district court's denial of Maleau's motion to dismiss regarding whether Reedy Creek is a navigable water. (R. 3). Progress challenges the district court's order granting Maleau's motion to dismiss that Ditch C-1 is not a navigable water. (R. 2). Finally, Progress requests that this

Court affirm the district court's denial of Bonhomme's motion to dismiss regarding whether Bonhomme's culvert is a point source. (R. 3).

STATEMENT OF THE FACTS

Maleau owns two pieces of property in Progress: one in Lincoln County and one in Jefferson County. (R. 5). Maleau operates an open pit gold mining and extraction business in Lincoln County and complies with the requisite CWA permits. *Id.* Maleau transports overburden and slag composed of rock and dirt from his mining operation in Lincoln County to his property in Jefferson County and piles it adjacent to Ditch C-1. (R. 5, 7). When it rains, rainwater runoff flows down and percolates through the piles. (R. 4-5). Channels eroded by gravity carry arsenic from the configuration of the waste piles into Ditch C-1. *Id.*

In 1913, Ditch C-1 was dug in saturated soils to drain the surrounding agricultural properties in Progress for agricultural use; restrictive covenants require current landowners to maintain the Ditch on their properties. (R. 5). The Ditch is three feet across and averages a depth of one foot. *Id.* It contains drained groundwater from agricultural soil as well as rainwater runoff, which runs continuously through it except during an annual drought that lasts from several weeks to three months. *Id.* The Ditch begins before Maleau's Jefferson County property and runs for three miles through several agricultural properties, discharging through a culvert located underneath a farm road on Bonhomme's property directly into Reedy Creek. *Id.*

Reedy Creek, into which the Ditch empties, is approximately fifty miles long. *Id.* It begins in the State of New Union and travels into Progress, where it flows for several miles and discharges into Wildman Marsh (or Marsh). *Id.* The Creek maintains water flow throughout the year and supplies water to Bounty Plaza, a service area on Interstate 250, a federally funded

highway. *Id.* The Creek also supplies water for irrigation to farmers in both New Union and Progress, who sell their products in interstate commerce. *Id.*

The terminus of Reedy Creek, Wildman Marsh, is an extensive wetlands located in Progress. (R. 5-6). Most of these wetlands comprise the Wildman National Wildlife Refuge (or Wildlife Refuge), which is owned and maintained by the United States Fish and Wildlife Service (USFWS). (R. 6). The Marsh serves as a biannual stopover for over a million ducks and waterfowl. (R. 5). People come from six neighboring states as well as some foreign countries to hunt the ducks and waterfowl, an activity that contributes at least $25 million to Progress's economy annually. (R. 6).

Bonhomme is a French national and not a United States citizen. (R. 8). He is the President as well as a three percent shareholder of Precious Metals International, Inc. (PMI), a Delaware corporation that owns gold mines nationally and internationally. (R. 6, 7). Bonhomme owns property that abuts the Marsh near the point where the Creek empties into the Marsh. (R. 6). Bonhomme's property contains a large hunting lodge that is used to host duck hunting parties for the benefit of PMI. (R. 6-7).

Bonhomme alleges that arsenic, a well-known poison, is polluting the Creek and the Marsh, including the wildlife residing there, and that this has hindered his ability to host hunting parties, which he has reduced from eight to two per year. (R. 6). However, this reduction is more likely associated with a decline in the general economy and PMI's declining profits. *Id.* Bonhomme tested the water in Ditch C-1 upstream and downstream of Maleau's property and the water in Reedy Creek upstream and downstream of the outflow of Ditch C-1. *Id.* Arsenic was found in significant concentrations in the Ditch and the Creek and in lower levels in the Marsh. *Id.* USFWS detected arsenic in three Blue-winged Teal in the Marsh. *Id.* Though not a

party to this suit, PMI conducted or paid for the sampling and analysis of the waters collected as well as the attorney and expert witness fees for Bonhomme. (R. 7).

STANDARD OF REVIEW

A motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6) is reviewed *de novo*. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008). The Plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face if there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff must allege facts sufficient to "raise a right to relief above [a] speculative level." *Twombly*, 550 U.S. at 555.

SUMMARY OF THE ARGUMENT

Bonhomme is not the real party in interest, pursuant to Federal Rule of Civil Procedure (FRCP) 17, to bring a suit under section 301(a) of the CWA against Maleau because he failed to show harm to himself in his individual capacity, separate from that of PMI. The citizen suit provision, section 505 of the CWA, affords a substantive right to relief to a party who is harmed. Bonhomme alleges harm because, due to the presence of arsenic in the water, he reduced his hunting parties from eight to two per year. However, because the hunting parties were composed primarily of PMI's business clients and associates, reducing the hunting parties actually harms PMI. PMI demonstrated its interest in this lawsuit when it paid for the sampling and analyses of Ditch C-1 and Reedy Creek and paid for Bonhomme's attorney and expert witness fees. Finally, Bonhomme does not satisfy the requirements for prudential standing because he is not the real party in interest.

Bonhomme also does not have the right to sue under the citizen suit provision because he is a foreign national and therefore not a "citizen." Based on the plain language of section 505 of the CWA, Congress intentionally specified that "citizens" rather than "persons" can bring an action under the citizen suit provision. In addition, the CWA's citizen suit provision is meant to allow citizens to act in place of the government, when needed, to enforce the CWA and achieve the objective of clean water in the United States. Non-citizens do not have the same protectionist interest as citizens do in preserving the country's clean water. Therefore, allowing non-citizens of the United States to act in place of government authorities does not comport with the underlying purpose of the CWA.

Regardless of Bonhomme's ability to bring a suit, Maleau does not violate section 301(a) of the CWA because his mining waste piles are not point sources. Bonhomme does not show that Maleau discharged a pollutant into navigable waters from a point source without a permit. Point sources are physical structures that transport, but do not necessarily generate, pollutants. In addition, the CWA's definition of point source pollution excludes any unchanneled and uncollected surface water. Stormwater is not discretely collected and conveyed from Maleau's piles, but rather flows from the general configuration of gravity-eroded channels around the piles. As such, the piles do not constitute a point source because they neither collect nor channel stormwater transporting arsenic to Reedy Creek, a navigable water.

Reedy Creek is a navigable water under section 502(7) of the CWA because it is an interstate water that begins in New Union and flows into Progress. The Creek is also a navigable water because it is used in interstate commerce as water for an interstate service station, to irrigate agriculture sold interstate, and economically affects interstate hunting. An analysis of Commerce Clause jurisdiction over waters included in the CWA is valid under the third category

of *United States v. Lopez*. Under this category, Congress may use the Commerce Clause to regulate activities that have a substantial relation to or substantially affect interstate commerce. Reedy Creek is also a navigable water under the CWA as a tributary of the federally owned Wildlife Refuge.

Ditch C-1 is also a navigable water under the CWA because it is a tributary of a navigable water, Reedy Creek. Even if Reedy Creek is a tributary to Wildman Marsh, Ditch C-1 is still a navigable water because it is a tributary to Reedy Creek, which is a tributary of the federally owned Wildlife Refuge and therefore is subject to federal regulation pursuant to the Property Clause. Though termed a "ditch," Ditch C-1's water flows continuously for most of the year directly into Reedy Creek, thereby functioning like a tributary and should be regulated as such. Furthermore, the Ditch is not a point source under section 502(14) of the CWA because it contains agricultural stormwater discharge and irrigation return flow, which is explicitly excluded from CWA permit requirements.

Finally, Bonhomme alleges that arsenic is detected in Ditch C-1 water, which discharges directly from his culvert into Reedy Creek. Regardless of who adds arsenic to the Ditch, Bonhomme is liable for violating section 301(a) of the CWA because his culvert, a point source, conveys the arsenic to Reedy Creek, a navigable water. In enacting the CWA, Congress intended to regulate point sources that transport, but do not necessarily generate, pollutants because the source of the discrete conveyance is where the Environmental Protection Agency (EPA) has the most control over regulating what goes into the water. Culverts are well established point sources, portraying the same physical and functional characteristics as the examples listed in the point source definition of the CWA. Therefore, even if Maleau is the

cause of the arsenic's presence in Ditch C-1, Bonhomme, as the owner of the point source, is liable for the discharge of the arsenic into Reedy Creek.

ARGUMENT

I. BONHOMME IS NOT THE REAL PARTY IN INTEREST UNDER FRCP 17 AND THEREFORE CANNOT BRING A SUIT AGAINST MALEAU FOR VIOLATION OF THE CWA.

This Court should affirm the district court's order granting the motion to dismiss because, based on the record, Bonhomme failed to show harm to himself in his individual capacity and separate from that of PMI. FRCP 17 states that "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. Pro. 17(a)(1) (2013). The real party in interest is the person "vested with the right of action on a given claim." *White v. JPMorgan Chase Bank, NA*, 521 Fed. Appx. 425, 428 (6th Cir. 2013) (quoting *Weston v. Dowty*, 414 N.W.2d 165, 167 (1987)) (internal quotation marks omitted). In addition, the substantive law that creates a right to sue and a right to relief is the determining factor in a real party in interest analysis. *Id.*

A. <u>The CWA does not provide Bonhomme a substantive right to relief because the alleged harm of fewer hunting parties affects PMI and not Bonhomme.</u>

The citizen suit provision of the CWA affords the party who is harmed a substantive right to relief. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). The CWA states that "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 under this chapter." 33 U.S.C. § 1365(a)(1) (2012). Bonhomme alleges that Maleau violates the CWA because Maleau unlawfully discharges arsenic into Ditch C-1, R. 4-5, and the arsenic fouls Reedy Creek, Wildman Marsh, and wildlife residing in or visiting the Marsh. (R. 6). Based on

the presence of arsenic in Reedy Creek and Wildman Marsh, Bonhomme alleges that he is harmed because he reduced his hunting parties from eight to two per year. *Id.*

It is more likely, however, that the number of hunting parties were reduced as a result of a decline in the general economy and PMI's declining profits. *Id.* Even if Bonhomme's allegations are found to be true, the harm of fewer hunting parties actually affects PMI, not Bonhomme. As the President of PMI, Bonhomme hosts PMI clients on his property in his representative capacity because the hunting parties are held for the benefit of PMI. *Id.* Bonhomme only uses his property for this purpose. (R. 7-8). Bonhomme does not allege that arsenic harms his property; he only alleges that the arsenic is in Reedy Creek and Wildman Marsh, where the hunting takes place. (R. 6). Arsenic has not changed the flora and fauna surrounding the hunting lodge, *id.*, which supports that the arsenic is not affecting Bonhomme's property. The USFWS detected arsenic in three Blue-winged Teal in Wildman Marsh, *id.*, further supporting that the arsenic harms PMI's hunting parties rather than Bonhomme directly.

PMI receives the benefit of having a venue to host the hunting parties for its clients. PMI has also demonstrated its interest in the lawsuit through several actions, including paying for the sampling and analyses of the water taken from Ditch C-1 and from Reedy Creek for testing of the presence of arsenic and paying for the attorney and expert witness fees for this case. (R. 7). PMI overtly acknowledges its interest in the lawsuit and this Court should not allow PMI to stay on the sidelines of litigation.

B. PMI was given a reasonable time to ratify, join, or substitute itself into the action, but failed to do so.

The FRCP states that a court cannot dismiss an action until, "after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted

into the action." Fed. R. Civ. Pro. 17(a)(3) (2013). PMI was not added as a party to the suit, despite Maleau providing Bonhomme an opportunity to amend his complaint. (R. 7).

Reversing the district court's decision and allowing Bonhomme to go forward with the lawsuit goes against the purpose of FRCP 17, which is "to prevent multiple or conflicting lawsuits by persons such as assignees, executors, or third-party beneficiaries, who would not be bound by res judicata principles." *Gogolin & Stelter v. Karn's Auto Imps., Inc.*, 886 F.2d 100, 102 (5th Cir. 1989). If PMI later decides to bring a lawsuit against Maleau, Maleau would then be subject to multiple litigation, which is exactly what FRCP 17 seeks to avoid by requiring the real party in interest to join the lawsuit from the start.

C. Bonhomme does not satisfy prudential standing requirements because he is not the real party in interest and a lawsuit initiated personally by him instead of by PMI would be contrary to the shareholder-standing rule.

The real party in interest requirement under FRCP Rule 17 is essentially a codification of the prudential limitation on standing. *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008). For example, "[o]ne well-established prudential-standing limitation is the principle that a litigant cannot sue in federal court to enforce the rights of third parties." *Id.* (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004)); *see also Gianfrancesco v. Town of Wrentham*, 712 F.3d 634, 637 (1st Cir. 2013) (stating "[t]he shareholder-standing rule is a species of prudential limitation . . ."). The shareholder-standing rule "holds that a shareholder generally cannot sue for indirect harm he suffers as a result of an injury to the corporation." *Rawoof*, 521 F.3d at 756; *see Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.,* 493 U.S. 331, 336 (1990). When a corporation is injured, a shareholder has a derivative injury in the sense that it has an interest in the corporation; however, this injury does not give the shareholder a right to bring an independent cause of action. *White*, 521 Fed.Appx. at 428.

In this case, Bonhomme fits within the shareholder-standing rule because he is a three percent shareholder in PMI. (R. 7). Bonhomme, as a shareholder, suffers a derivative injury to PMI's alleged direct harm of fewer hunting parties due to arsenic in the water, but Bonhomme cannot sue for his derivative injuries under the shareholder-standing rule.

Dismissal of Bonhomme's claim for a CWA violation against Maleau is proper because Bonhomme did not meet his burden of showing it is plausible he is the real party in interest to the suit. PMI was given a reasonable time to add itself to the lawsuit and chose not to do so. *Id.* Therefore, this Court should affirm the district court's order granting the motion to dismiss on this issue.

II. BONHOMME, AS A FOREIGN NATIONAL, CANNOT BRING A CITIZEN SUIT UNDER THE CWA BECAUSE THE PROVISION IS LIMITED TO U.S. CITIZENS.

This Court should affirm the district court's order granting the motion to dismiss because it is not plausible that a foreign national has the right to sue under the citizen suit provision of the CWA. First, the plain language of the statute makes it clear that a foreign national is not a "citizen." Second, allowing a foreign national to sue under the CWA citizen suit provision does not fit within the entire context of the statute. Finally, the legislative history supports that a "citizen" means a citizen of the United States.

A. Within the plain language of the CWA, a foreign national is not a "citizen."

Based on the plain language of section 505 of the CWA, the court below did not err in granting the motion to dismiss because Bonhomme is a foreign national and not a "citizen." The Supreme Court stated that "in interpreting a statute a court should always turn first to one, cardinal rule before all others . . . that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In addition, "[w]hen the words of a statute are unambiguous, . . . 'judicial

inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. U.S.*, 449 U.S. 424, 430 (1981)). Allowing Bonhomme to go forward with this lawsuit is contrary to the plain meaning of "citizen" under the CWA.

Beginning with this first rule of statutory interpretation, Congress states that "any citizen may commence a civil action on his own behalf." 33 U.S.C. § 1365(a) (2012). Congress specifically chose to include the word "citizen" when it stated who may bring a civil action. By contrast, in other environmental laws with citizen suit provisions, Congress uses the word "person" instead of the word "citizen." *See, e.g.*, "Clean Air Act" 42 U.S.C. § 7604 (2012); "Resource Conservation and Recovery Act" 40 U.S.C. § 6972 (2012); "Comprehensive Environmental Response, Compensation, and Liability Act" 42 U.S.C. § 9659 (2012); "Endangered Species Act" 16 U.S.C. § 1540(g) (2012) (all stating "any *person* may commence a civil suit on his own behalf") (emphasis added). The placement of the word "citizen" means that Congress intentionally specified the type of person that can utilize the citizen suit provision.

The CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2012). The definition of "citizen" within the statute is narrowed in the EPA's definition of "person." "Person" is defined as "an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof." 40 C.F.R. § 122.2 (2013). The definition only broadens the term "person" to entities other than an individual; nothing within the definition indicates that "person" was meant to include a foreign national.

The definition of "citizen" should not be read so broad as to include foreign nationals because it would eliminate the significance of the use of "citizen." The Supreme Court analyzed another term in the CWA, "navigable waters," under a similar set of concerns. *See Solid Waste*

Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (*SWANCC)*. In *SWANCC*, the Army Corps of Engineers included isolated ponds, wholly located within Illinois, within the definition of "navigable waters." *Id.* at 171-72. The Court determined that the Army Corps' broad definition would assume that the term "navigable" did not have an independent significance within the context of the statute. *Id.* at 172 (citation omitted). Similarly, reading the term "citizen" as including a foreign national would assume that "citizen" also does not have an independent meaning. Congress intentionally placed "citizen" within the wording of the CWA and further defined the term to only include entities beyond an individual. Congress made no indication of including foreign national within the meaning of "citizen."

B. The term "citizen" within the entire context of the citizen suit provision logically means only U.S. citizens because they have a protectionist interest in achieving clean water in the United States.

Reading the plain language of the CWA's definition of "citizen" to include foreign nationals does not comport with the underlying purpose of the citizen suit provision. If a statute is ambiguous, the next step in determining a reasonable meaning is to place the text "in the context of the entire statutory structure." *Natural Res. Def. Council, Inc. v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998) (stating a central tenet of interpretation is "that a statute be considered in all its parts when construing any one of them"). In addition, "[a] statute should be interpreted in a way that avoids absurd results." *U.S. v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000).

Congress stated the objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). Congress then set out national goals to achieve this objective. *Id.* The primary function of the citizen suit "is to enable private parties to assist in enforcement efforts where federal and state authorities appear unwilling to act." *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552,

556 (1st Cir. 1991). In other words, the provision allows citizens to take the place of the government, when needed, to enforce the CWA and achieve the objective of clean water in the United States.

With this purpose in mind, allowing foreign nationals to sue under the citizen suit provision yields an absurd result. The CWA gives no indication that Congress meant to allow foreign nationals, or any non-citizens of the United States, to take the place of the government to enforce the CWA. Citizens of the United States have an interest in keeping their own country's waters clean for their own benefit. Non-citizens do not have the same protectionist perspective. Therefore, within the context of the entire CWA, the most logical meaning of "citizen" is citizen of the United States.

C. The legislative history of the CWA supports that Congress intended the term "citizen" to mean U.S. citizen and not foreign national.

Finally, the legislative history of section 505 of the CWA reinforces Congress's intent that "citizen" within the context of the CWA was meant to be a U.S. citizen. In 1972, Congress, among a series of amendments, amended the definition of "citizen." *See* S. Rep. No. 92-1236, at 3823 (1972) (Conf. Rep.). The initial definition of "citizen" included: "(1) a citizen of a 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." H.R. Rep. No. 11896 at 135 (1972). Congress then amended the definition to its current state: "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2012).

The original definition of "citizen" in the House Bill reflects the intent for it to mean U.S. citizen because it states that a person must be a "citizen of the geographic area." H.R. Rep. No. 11896 at 135 (1972). In addition, discussions during a conference report and debate support that

suits under the CWA were meant for U.S. citizens. For example, Senator Muskie stated "every citizen of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States." Comm. on Public Works, 93D Cong., A Legislative History of the Water Pollution Control Act Amendments of 1972 221 (Comm. Print 1973). Representative Mahon noted the citizen suit provision would "give all *our citizens* and environmental organizations an opportunity to succeed in eliminating pollution." *Id.* at 348 (emphasis added). Therefore, the CWA's plain language read in the entire context of the statute as well as the legislative history, demonstrates that Congress intended to allow only U.S. citizens to bring a citizen suit.

III. MALEAU'S MINING WASTE PILES DO NOT FULFILL THE PHYSICAL AND FUNCTIONAL CHARACTERISTICS OF POINT SOURCES WITHIN THE DEFINITION OF THE CWA.

Regardless of Bonhomme's ability to bring a suit, this Court should affirm the district court's order granting the motion to dismiss because Maleau's mining waste piles are not "point sources" under section 502(14) of the CWA. To establish a violation of the CWA, Bonhomme must prove that Maleau discharged a pollutant into navigable waters from a point source without a permit. 33 USC § 1311(a) (2012); *see Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980). "Point source" is defined as "any discernible, confined and discrete conveyance," which includes "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2012). Point source pollution thereby excludes unchanneled and uncollected surface water. *Consol. Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Therefore, Maleau's piles are not point sources because they neither (1) discretely convey nor (2) collect or channel stormwater runoff carrying pollutants to a navigable water.

A. Maleau's piles do not constitute physical structures that discretely convey stormwater runoff to a navigable water.

In the context of mining, Congress intended nonpoint sources as "runoff caused primarily by rainfall around activities that employ or create pollutants." *Trs. for Alaska v. Envtl. Prot. Agency,* 749 F.2d 549, 558 (9th Cir. 1984) (citing *U.S. v. Earth Sciences, Inc.,* 599 F.2d 368, 373 (10th Cir. 1979)). It is undisputed that arsenic is a pollutant under the CWA. (R. 8); 40 C.F.R. § 401.15(6) (2013). Discharging arsenic, however, only violates the CWA if Bonhomme proves that the pollutant comes from a point source. *See* 33 USC § 1311(a) (2012). Maleau's overburden piles of dirt and stone are not point sources because they do not have the same physical or functional characteristics of the point source examples listed in section 502(14) of the CWA.

When interpreting the meaning of "point source," courts focus on the word "conveyance," finding that a "discernible, confined and discrete conveyance" includes physical structures that transport, but do not necessarily generate, pollutants. *See e.g. Trs. for Alaska,* 749 F.2d at 558 ("[P]oint and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance") (citing *Earth Sciences,* 599 F.2d at 373); *Natural Res. Def. Council, Inc. v. Cnty. of L.A.*, 725 F.3d 1194, 1197 (9th Cir. 2013) (stating a municipal separate storm sewer system is a collection of point sources, including "roads with drainage systems, catch basins, curbs, gutters, ditches, man-made channels, or storm drains"); *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 188 (2d Cir. 2010) (stating trucks and helicopters used by county to spray pesticides were point sources); *Parker v. Scrap Metal Processors, Inc*., 386 F.3d 993, 1009 (11th Cir. 2004) (stating that debris and construction equipment were point sources).

In this case, the overburden piles do not fulfill the characteristics of a point source because the piles do not constitute a physical structure conveying pollutants to a navigable water. Instead, the record establishes that rainwater flows generally down and through the piles. (R. 4-5). As an example, in *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 509 (9th Cir. 2013), the court established that utility poles allegedly carrying wood preservatives that leached into generalized stormwater runoff did not constitute a point source within the meaning of the CWA absent an allegation that the stormwater was discretely collected and conveyed to waters of the United States. Similarly, Bonhomme's claim does not allege that stormwater is discretely collected and conveyed from the piles themselves, but rather from the general configuration of gravity-eroded channels around the piles. (R. 4-5).

In *Abston*, the court noted that "[c]onveyances of pollution formed either as a result of natural erosion or by material means, *and which constitute a component of a mine drainage system*, may fit the statutory definition [of a point source] and thereby subject the operators to liability under the [CWA]." *Abston*, 620 F.2d at 45 (emphasis added); *see generally Earth Sciences*, 599 F.2d at 372-73. The spoil pile walls were eroding and the sediment itself was part of the alleged pollution that was conveyed into the navigable water. *Abston*, 620 F.2d at 45. In this case, Maleau's waste pile walls do not convey a pollutant due to erosion. (R. 5). In addition, although the contents of Maleau's piles came from a gold mining operation, the piles were not formed as a component of a mine drainage system. (R. 7). As such, the facts support a finding that the piles did not discretely convey pollutants to Ditch C-1 and are not point sources.

B. <u>Maleau's piles neither collect nor channel stormwater because rainwater merely flows down and percolates through the piles.</u>

A point source, in addition to conveying a pollutant, must collect or channel a pollutant. *N.W. Envtl. Def. Ctr. v. Brown,* 617 F.3d 1176, 1181–82 (9th Cir. 2010) (stating "[s]tormwater

that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source"). The Ninth Circuit further established that non-point source pollution occurs if the water is not confined or contained. *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1153 (9th Cir. 2010).

Cases where pollutants were collected or channeled involve structures, which collect pollutants or transport them from one place to another. *See, e.g.*, *N.W. Envtl. Def. Ctr. v. Decker*, 728 F.3d 1085, 1085-86 (9th Cir. 2013) (stating the Supreme Court left intact the Ninth Circuit's holding that "when stormwater runoff is collected in a system of ditches, culverts, and channels and is then discharged into a stream or river, there is a 'discernable, confined and discrete conveyance' of pollutants, and therefore a discharge from a point source"); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co*., 556 F.3d 177, 190 (4th Cir. 2009) (stating that water collected in a valley fill for mining overburden and channeled into a sediment pond, is a point source); *Abston*, 620 F.2d at 45 (stating that sediment basins dug by the miners and designed to collect sediment may be point sources); *Greater Yellowstone Coal.*, 628 F.3d at 1152 (stating that a stormwater drain system is "exactly the type of collection or channeling contemplated by the CWA."). The rainwater from Maleau's piles is not collected or channeled in a physical structure. Rather, the rainwater simply flows down and filters through the piles in a generalized manner before entering Ditch C-1. (R. 5). Rainwater runoff of this nature from overburden piles is outside the scope of the CWA and contrary to the traditional interpretation and meaning of "point source."

IV. REEDY CREEK IS A NAVIGABLE WATER BECAUSE IT IS AN INTERSTATE WATER, IT IS USED IN INTERSTATE COMMERCE, AND IT IS A TRIBUTARY OF A WILDLIFE REFUGE OWNED BY THE FEDERAL GOVERNMENT.

This Court should affirm the district court's finding that Reedy Creek is a "navigable water" under section 502 of the CWA. Reedy Creek is a navigable water because (1) it is an

interstate water; (2) it is used in interstate commerce; and (3) it is a tributary to the Wildlife Refuge owned by the United States.

A. Reedy Creek is a navigable water because it flows through two states, which makes it an interstate water.

The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7) (2012). Congress charged the EPA with enacting the necessary regulations to further the CWA. 33 U.S.C. § 1361 (2012). Under this Congressional grant of authority, one of the ways the EPA defines "waters of the United States" is as "all interstate waters." 40 C.F.R. § 122.2 (2013). The Supreme Court supported the EPA's definition of interstate waters when it stated that "the [CWA] makes clear that it is federal, not state, law that in the end controls the pollution of interstate or navigable waters." *Ill. v. City of Milwaukee, Wis.*, 406 U.S. 91, 102 (1972); *see also Am. Elec. Power Co., Inc. v. Conn.*, 131 S.Ct. 2527, 2534 (2011) (stating the CWA "installed an all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively with interstate water pollution").

EPA draft guidance further clarifies the meaning of interstate waters. The guidance states that "[i]nterstate waters, defined by the federal water pollution control statutes prior to the CWA as 'all rivers, lakes, and other waters that flow across, or form a part of, State boundaries,' remain jurisdictional waters under the CWA, even if such waters are not traditional navigable waters." EPA and Army Corps of Engineers Guidance Regarding Identification of Waters Protected by the Clean Water Act, 76 Fed. Reg. 24479 (proposed May 2, 2011) (quoting the Water Pollution Control Act of 1948, § 10(e), 62 Stat. 1155, 1161).

Reedy Creek is an interstate water because it begins in New Union and flows into Progress where it ends at Wildman Marsh. (R. 5). The Creek fulfills the EPA guidance

definition because it flows across state boundaries. Therefore, the district court correctly found that Reedy Creek is a "navigable water" under section 502 of the CWA.

B. Reedy Creek satisfies the definition of "navigable water" because it is used in interstate commerce.

The Constitution states that Congress shall have the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In addition to including interstate waters as "navigable waters," the EPA regulations define "waters of the United States" as "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . . ." 40 C.F.R. § 122.2 (2013). Reedy Creek satisfies the plurality opinion in *Rapanos v. U.S.*, 547 U.S. 715 (2006) concerning waters that are used in interstate commerce. In addition, analysis of Commerce Clause jurisdiction over waters included in the CWA is appropriate under the third category of *U.S. v. Lopez*, 514 U.S. 549, 558-59 (1995).

1. When used in interstate commerce, waters of the United States must be continuously present and fixed bodies of water and are not restricted to only traditional navigable waters.

The *Rapanos* Court, with a 4-1-4 outcome, was unable to reach a decision that clearly controls future cases. The Supreme Court stated "[w]hen a fragmented Court decides a case . . . the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. U.S.*, 430 U.S. 188, 193 (1977). However, determining which rationale constitutes the narrowest grounds depends on the specific circumstances of every case. Recognizing this, the dissent in *Rapanos* stated that Justice Kennedy's test, set forth in his concurrence, would likely be controlling in most cases, "but in the unlikely event that the plurality test is met but Justice Kennedy's is not, courts should also uphold the [agency's] jurisdiction." *Rapanos*, 547 U.S. at 810 n. 14. Therefore, CWA jurisdiction can be proven under either the plurality or concurrence test. *Id.*

The district court erroneously stated that the Supreme Court in *Rapanos* ruled that "rivers must be highways of interstate commerce to fall within the definition of 'navigable water' under the CWA." (R. 9). Instead, the plurality opinion in *Rapanos* rejected the argument that navigable waters and waters of the United States are limited to waters that are navigable in fact or could be made so. *Rapanos*, 547 U.S. at 730-731. The Court stated "the [CWA's] term 'navigable waters' includes something more than traditional navigable waters." *Id.*; *see U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The Court additionally included that "waters of the United States" are those that are "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 547 U.S. at 733.

Reedy Creek satisfies the definition set forth in the *Rapanos* plurality opinion. It is unknown whether the Creek is a traditional navigable water, R. 9; however, the *Rapanos* plurality does not require this. Reedy Creek is a navigable water because it is a fixed body of water that maintains a continuous flow throughout the year. (R. 5). Therefore, even though the district court misapplied *Rapanos*, it correctly found that Reedy Creek is a navigable water.

2. Under the third category of *Lopez*, Congress has the authority to regulate activities causing pollution to Reedy Creek that threaten to substantially affect interstate commerce.

The district court incorrectly stated *Rapanos* established that waters "*must* be within the first prong of *Lopez*" to fall within the Commerce Clause. (R. 9-10) (emphasis added). No majority opinion was issued regarding the permissible reach of the CWA under the Commerce Clause. While four Justices in the plurality relied on the canon of constitutional avoidance, *Rapanos*, 547 U.S. at 738, the four dissenting Justices found the wetlands played an important role in the watershed and fell under the Commerce Clause. *Id.* at 803-04. In his concurrence, Justice Kennedy did not subscribe to either position, saying the regulatory interpretation "does

not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption[,]" *id.* at 782, and that "[t]he possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the [CWA's] text and structure." *Id.* at 783. As there is no controlling opinion from *Rapanos* regarding the CWA and the Commerce Clause, an analysis under the third category of *Lopez* is valid.

Under *Lopez*, Congress's authority under the Commerce Clause extends to regulation of activity: (1) involving the use of the channels of interstate commerce; (2) involving the instrumentalities of interstate commerce, or persons or things in interstate commerce; or (3) that has a substantial relation to or substantially affects interstate commerce. *Lopez*, 514 U.S. at 558-59. The Supreme Court noted that Congress intended "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." *Riverside Bayview,* 474 U.S. at 133; *see also Hodel v. Va. Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 282 (1981) (stating 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"); *Costle*, 604 F.2d at 243 (finding the CWA "is to be given the broadest possible reading consistent with the commerce clause" (*rev'd on other grounds*)); *Earth Sciences*, 599 F.2d at 368 (stating that Congress intended to regulate discharges made into "every creek, stream, river or body of water that *in any way may affect* interstate commerce") (emphasis added).

In a factually similar case to Reedy Creek, the Tenth Circuit held that Rito Seco Creek was a navigable water even though it was not navigable in the traditional sense and was not used

to transport goods or materials. *Earth Sciences*, 599 F.2d at 375. The creek supported trout and beaver and the water collected in the reservoirs were used for agricultural irrigation, of which products were sold in interstate commerce. *Id.* Based on these facts, the court found that the creek indicated "at least some interstate impact," which was all that was necessary under the CWA. *Id*. at 374. *Rapanos* did not overturn this case because it did not address the Commerce Clause issue. Therefore, the decision is still applicable to Reedy Creek's interstate commerce analysis.

Reedy Creek affects interstate commerce to a greater extent than that of Rito Seco Creek. The Creek is used as a water supply at a gas and food station for interstate travelers on I-250, an interstate highway that receives federal funding. (R. 5). The Creek's water also contributes substantially to Wildman Marsh, which supports interstate commerce through income from duck hunting. (R. 5-6). The Marsh attracts hunters from six neighboring states, as well as people from other countries; this hunting adds over $25 million to the local economy from interstate hunters. (R. 6). In addition, the Creek's water is used to irrigate of nearby agricultural properties in both Progress and New Union, and the resulting agricultural products are sold in interstate commerce. (R. 5).

Arsenic is listed as a toxic pollutant, 40 C.F.R. § 401.15(6) (2013), and could substantially affect Reedy Creek's interstate commerce activities by harming the crops that are irrigated with water containing it, animals that are hunted at the Marsh, and the health of the interstate travelers who stop at the I-250 gas station. *See Idaho Conservation League v. Atlanta Gold Corp.*, 879 F. Supp. 2d 1148, 1158-59 (D. Ida. 2012) (finding that discharging water containing excess amounts of arsenic is highly likely to cause long-term environmental damage); *see also Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1070 (9th Cir. 2006) (noting

that arsenic causes harm to human health and the environment). Therefore, under a *Lopez* analysis using the third category, Congress can regulate activities that affect Reedy Creek and its use in interstate commerce under the Commerce Clause.

C. Reedy Creek is a navigable water because it is a tributary of the federally owned Wildlife Refuge and therefore is subject to federal regulation pursuant to the Property Clause of the U.S. Constitution.

Finally, Reedy Creek is a navigable water as a tributary to Wildman Marsh. Much of the Marsh is contained within the federally owned Wildlife Refuge. (R. 6). In the Property Clause, 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 established this clause affords Congress the right to protect public lands, *Cotton v. U.S.*, 52 U.S. 229, 231 (1851), including the power to regulate and protect the wildlife on those lands. *Kleppe v. N.M.*, 426 U.S. 529, 540-41 (1976). The Property Clause allows the United States "to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." *U.S. v. Lindsey*, 595 F.2d 5, 6 (9th Cir. 1979).

Reedy Creek discharges into the federally owned Wildlife Refuge. (R. 5-6). Arsenic is present in Reedy Creek in significant concentrations and detectable at lower levels in the Marsh. (R. 6). These facts, as well as the fact that arsenic was found in three Blue-winged Teal in Wildman Marsh, *id.*, show that pollution in Reedy Creek substantially affects the Marsh and the Refuge contained within the Marsh. Therefore, the Property Clause grants Congress the authority to regulate Reedy Creek under the CWA because it substantially affects a federal property and regulation is reasonably necessary to protect that property.

V. DITCH C-1 IS A NAVIGABLE WATER AS A TRIBUTARY TO A NAVIGABLE WATER AND IS NOT A POINT SOURCE.

This Court should reverse the district court's order granting Maleau's motion to dismiss because Ditch C-1 is a navigable water, not a point source. The district court stated that because Ditch C-1 is a point source, it cannot simultaneously be a navigable water. (R. 9). However, the district court's reasoning in concluding that Ditch C-1 is a point source is flawed. Ditches that contain "agricultural stormwater discharge and return flows from irrigated agriculture" are explicitly excluded from point sources under section 502(14) of the CWA. 33 U.S.C. § 1362(14) (2012). Ditch C-1 is a navigable water because it is a tributary to Reedy Creek, a navigable water. The CWA also has jurisdiction over Ditch C-1 because regulation is reasonably necessary to protect the Wildlife Refuge, a federally owned property. Therefore, Progress fulfills the requisite plausibility standard showing that Ditch C-1 is a navigable water and should be regulated as such.

A. The function of Ditch C-1 as an agricultural ditch statutorily excludes it from being a "point source" within the meaning of the CWA.

Under section 502(14) of the CWA, "the term 'point source' . . . does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14) (2012). Ditch C-1 falls within both of these exceptions: first, the sole purpose of the Ditch is to transport stormwater discharge from the surrounding agricultural properties; second, the Ditch transports return flows from irrigated agriculture back to Reedy Creek.

1. Ditch C-1 is excluded as a point source under the CWA because it contains agricultural storm water discharge.

Stormwater means "storm water runoff . . . and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13) (2013). The EPA excludes permit requirements for non-point source agricultural and silvicultural activities, "including storm water runoff from orchards, cultivated crops,

pastures, range lands, and forest lands." 40 C.F.R. § 122.3(e) (2013). Stormwater runoff, which occurs when precipitation comes in contact with agriculture, is explicitly excluded as a point source under the CWA. *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994). Therefore, a ditch containing agricultural stormwater runoff is excluded.

When rain falls on the agricultural properties adjacent to Ditch C-1, that stormwater runs through the properties eventually discharging into the Ditch. (R. 5). This means that Ditch C-1 falls squarely within the exemption stated in the CWA because it contains agricultural stormwater runoff. As such, the Ditch does not fall under the scope of "point source" as defined under section 502(14) of the CWA.

2. Ditch C-1 is excluded as a point source under the CWA because it contains return flow from irrigation.

Return flow from irrigated agriculture is also excluded from the definition of "point source." 40 C.F.R. §§ 122.2, 122.3(f) (2013). The Eleventh Circuit stated that when water used on agricultural land for irrigation is returned back to the water source it originated from, it is return flow from irrigated agriculture within the meaning of the CWA exemption. *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002). Therefore, return flow occurs when water is taken from its source to irrigate agriculture and then is returned back to that same source.

Water is diverted from Reedy Creek to irrigate agricultural properties. (R. 5). The water then drains into Ditch C-1, which transports this flow back into the original source, Reedy Creek. *Id.* This excludes Ditch C-1 from the definition of "point source" because it carries return flow from irrigated agriculture. Therefore, contrary to the district court's conclusion, Ditch C-1 is not simultaneously a navigable water and a point source under the CWA because it contains both agricultural stormwater discharge and return flow from irrigated agriculture.

B. Ditch C-1 is a navigable water because it is a continuously flowing tributary of a navigable water, Reedy Creek.

As explained above, the CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7) (2012). "Waters of the United States" is defined as interstate waters, 40 C.F.R. § 122.2 (2013), and waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce. 40 C.F.R. § 122.2 (2013). As previously shown, Reedy Creek is a navigable water because it satisfies these two definitions. "Waters of the United States" also includes tributaries of interstate water and waters used in interstate or foreign commerce. 40 C.F.R. § 122.2 (2013).

The plurality opinion in *Rapanos* stated that "waters of the United States" does not refer to water in general, but includes only waters that are "relatively permanent" and "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which waters occasionally or intermittently flow," *Rapanos*, 547 U.S. at 732-33, though this does "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought." *Id.* at footnote 5. Therefore, tributaries of navigable waters are themselves navigable waters and fall under the jurisdiction of the CWA as "waters of the United States" when they are relatively permanent and continuously present fixed bodies of water. *Id.* at 732-33.

"A tributary is a 'stream which contributes its flow to a larger stream or other body of water.'" *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (citing Random House College Dictionary 1402 (rev. ed. 1980)). Various federal courts establish that the CWA has jurisdiction over tributaries of navigable waters. For example, the Fifth Circuit interpreted the *Rapanos* plurality as recognizing that the federal government has jurisdiction "over waters that neighbor tributaries of navigable waters." *U.S. v. Lucas*, 516 F.3d 316, 326 (5th Cir. 2008). The Tenth Circuit found that the Army Corps had authority under the CWA to

regulate dredge and fill activities on a tributary of navigable waters. *U.S. v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir. 2006). Also, in *U.S. v. Brink*, 795 F. Supp. 2d 565, 577 (S.D. Tex. 2011), the court stated that even though the creek at issue was seasonal, it was a tributary of a stream, which was a navigable water of the United States and therefore subject to the jurisdiction of the CWA.

With regards to Ditch C-1, restrictive covenants require adjoining landowners to maintain the Ditch, making it permanent. (R. 5). Ditch C-1 contains a continuous flow of water, which is only disrupted during periodic drought, and discharges through a culvert directly into Reedy Creek. (R. 5). The Creek then flows into Wildman Marsh, much of which comprises the Wildman Refuge. (R. 5-6). Arsenic was detected in significant concentrations in Ditch C-1, decreasing as the water moves towards the Creek, and was detected in Reedy Creek below the Ditch discharge. (R. 6). Also, arsenic was detected in lower levels in the Marsh and in some wildlife inhabitants. *Id.* This is evidence that the Ditch water contributes its flow to Reedy Creek and then to the Marsh. Ditch C-1 is a tributary of the Creek, a navigable water, and is therefore subject to CWA jurisdiction as a water of the United States.

C. Ditch C-1 is a navigable water because it is a tributary to Reedy Creek, which is a tributary of the federally owned Wildlife Refuge, and therefore is subject to federal regulation pursuant to the Property Clause of the U.S. Constitution.

Finally, Ditch C-1 is a navigable water because it is a tributary to Reedy Creek, which discharges into and affects the federally owned Wildman Refuge. As stated above, under the Property Clause, the federal government has the power "to regulate conduct on non-federal land when reasonably necessary to protect adjacent federal property or navigable waters." *Lindsey*, 595 F.2d at 6.

Ditch C-1 discharges into Reedy Creek, which then flows into the federally owned Wildlife Refuge. (R. 5). Arsenic is present in Ditch C-1 and Reedy Creek in significant

concentrations, and is detectable at lower levels in the Marsh. (R. 6). These facts show that pollution in Ditch C-1 affects Reedy Creek, which subsequently affects the Marsh and the Refuge. Therefore, the Property Clause grants Congress the authority to regulate Reedy Creek under the CWA because it substantially affects federal property and regulation is reasonably necessary to protect that property.

VI. BONHOMME'S CULVERT IS A POINT SOURCE BECAUSE IT ADDS ARSENIC DIRECTLY TO REEDY CREEK, WHICH VIOLATES THE CWA.

Bonhomme violates the CWA by discharging a pollutant into navigable waters from a point source without a permit. 33 U.S.C. § 1311(a) (2012). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2012). "Discharge" includes "surface runoff which is collected or channeled by man [and] discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works." 40 C.F.R. § 122.2 (2013). The EPA also clarifies that a discharge of a pollutant does not include an addition of pollutants by an indirect discharger. *Id.* "Point source" is defined as a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14) (2012). The United States Supreme Court found that owners of point sources are liable under the CWA, even if they did not initially add pollutants to the water, as long as their point sources convey the pollutants to navigable waters. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). Therefore, regardless of who added arsenic to Ditch C-1, Bonhomme is liable for violating the CWA because he owns the culvert directly discharging the pollutant into Reedy Creek. (R. 9).

A. Bonhomme's culvert is a point source because it is a "discernible, confined and discrete conveyance" that channels and directly discharges arsenic into a navigable water.

The culvert on Bonhomme's property is a point source because it is a "discernible, confined and discrete *conveyance*." 33 U.S.C. § 1362(14) (2012) (emphasis added). Bonhomme's culvert has the same physical characteristics and serves the same functional purpose as the examples of point sources enumerated in the CWA definition of "point source" and should be regulated as such. *See id*.

The Supreme Court held that when a point source changes the natural flow of the water and "causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." *S. Fla. Water Mgmt. Dist.*, 541 U.S. at 103-04. In this case, Bonhomme's culvert changes the natural flow of Ditch C-1 because without the culvert, the Ditch would end at Bonhomme's road. (R. 5). In turn, the culvert channels the water from a distinct body of water, the Ditch, to flow into another distinct body of water, Reedy Creek. *Id.* The culvert is a point source because it is the cause-in-fact of the discharge of arsenic into Reedy Creek.

The EPA supports the unitary waters theory, which states that an addition occurs "only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,* 570 F.3d 1210, 1217 (11th Cir. 2009) (certiorari denied). The facts in this case are distinguishable, however, because Bonhomme's culvert channels pollutants to Reedy Creek. (R. 5). But for the culvert, the water from Ditch C-1 would not have otherwise flowed directly into Reedy Creek. *Id.* As such, the culvert does not simply transfer pollutants from one navigable water to another, but instead redirects its flow.

Case law supports that culverts like Bonhomme's are point sources if they channel water from one navigable water under a road or railroad and discharge pollutants to another navigable

water. For example, the Second Circuit determined that the term "point source" should be defined broadly to include a culvert conveying landfill leachate from one navigable body of water to another, even though the culvert itself did not "add" pollutants to the navigable waters. *Dague v. City of Burlington,* 935 F.2d 1343, 1354–55 (2d Cir. 1991), *rev'd in part on other grounds,* 505 U.S. 557 (1992). Similarly, in this case, the water flows from Maleau's property line for three miles in Ditch C-1 through agricultural property to Bonhomme's culvert before discharging directly into Reedy Creek. (R. 5). Therefore, the culvert connects the Ditch to Reedy Creek for the purpose of channeling water which would have otherwise flowed generally over Bonhomme's farm road and other property. *Id.*

B. Bonhomme's culvert is a point source because it is the cause-in-fact source of pollutants in Reedy Creek.

Congress intended to regulate point sources that transport, but do not necessarily generate, pollutants. *See S. Fla. Water Mgmt. Dist.*, 541 U.S. at 105; *see also Earth Sciences,* 599 F.2d at 373. Thus, the initial source of the pollutant is irrelevant. Case law from various circuits further demonstrates that a point source refers only to the proximate source from which the pollutant is *directly* discharged to the destination water body. *Sierra Club v. El Paso Gold Mines, Inc.,* 421 F.3d 1133, 1143 (10th Cir. 2005) ("[T]he liability and permitting sections of the [CWA] focus on the *point of discharge*, not the underlying conduct that led to the discharge") (emphasis added); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481, 493 (2d Cir. 2001); *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.,* 13 F.3d 305, 308 (9th Cir. 1993); *U.S. v. Law,* 979 F.2d 977, 978 (4th Cir. 1992).

Culverts permit proper water drainage, channeling water under roads. *See, e.g.*, *Pye v. U.S.*, 269 F.3d 459, 463 (4th Cir. 2001). In this case, Bonhomme owns a culvert on his property that channels water containing arsenic from Ditch C-1, under his farm road, and discharges it

directly into Reedy Creek. (R. 5). It is not where the pollutant originated that determines a point source, but rather the structure conveying the pollutant to a navigable water. As such, regardless of who originally adds arsenic to the water, Bonhomme is liable under the CWA for the discharge of the arsenic into Reedy Creek, a navigable water.

C. Bonhomme's culvert is exactly the type of point source meant for regulation under the CWA to fulfill Congress's intent to "restore and maintain the chemical, physical, and biological integrity of the nation's waters."

The CWA's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). Congress implemented this goal by broadly defining "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12)(2012). While Congress limited the term "point source" to a "discernable, confined and discrete conveyance," 33 U.S.C. § 1362(14) (2012), courts interpret "point source" broadly to "embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Peconic Baykeeper*, 600 F.3d at 188 (quoting *Dague,* 935 F.2d at 1354-55).

The point source examples listed in section 504(14) of the CWA and case law illustrate this policy and demonstrate how Congress wanted the EPA to address and regulate water pollution. By regulating the sources that discretely and directly convey pollutants to navigable waters, the EPA has the most control over what goes into the water, thereby implementing Congress' goal. While it may be assumed at this stage of legal proceedings that Maleau's mining waste piles are the but-for cause of the presence of arsenic in the water, Bonhomme's culvert channels stormwater carrying the arsenic from Ditch C-1 and directly discharges it into Reedy Creek, which then flows to Wildman Marsh. (R. 5-6). Therefore, this Court should affirm the district court's denial of Bonhomme's motion to dismiss because Bonhomme's culvert is a point source that directly conveys arsenic to Reedy Creek. (R. 5).

CONCLUSION

For the foregoing reasons, the State of Progress respectfully requests this Court affirm the the granting of Maleau's motions to dismiss because: (1) Bonhomme is not the real party in interest; (2) Bonhomme is not a citizen within the context of the CWA; and (3) the waste piles on Maleau's property are not point sources. In addition, this Court should affirm the denial of Maleau's motion to dismiss regarding whether Reedy Creek is a navigable water. This Court should reverse the granting of the motion to dismiss that Ditch C-1 is not a navigable water. Finally, this Court should affirm the denial of Bonhomme's motion to dismiss regarding whether the culvert on Bonhomme's property is a point source.