Team 55

No. 13-01234

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JAQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee

v.

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee.

D.C. No. 155-CV-2012

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee

and

SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross Appellee

v.

JAQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

D.C. 165-CV-2012

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGRESS
D.C. 165-CV-2012

BRIEF FOR JAQUES BONHOMME
Defendant-Appellant, Cross-Appellee

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

United States Supreme Court

United States Courts of Appeal

United States District Courts

Constitutional Provisions

Federal Rules of Civil Procedure

Statutes

Regulations

Other Authorities

JURISDICTIONAL STATEMENT

This is an appeal from the final order of the United States District Court for the District of Progress. (R.3). The district court had subject matter jurisdiction over the claim based on federal question jurisdiction. 28 U.S.C. § 1331. Specifically, Federal Rule of Civil Procedure Rule (FRCP) 17 and the Clean Water Act (CWA) are matters of federal question at issue on appeal. 28 U.S.C. § 1331. Jacques Bonhomme (Bonhomme) now timely appeals the district court's final order granting Shifty Maleau (Maleau) and the State of Progress' (Progress) motion to dismiss this case. (R. 1-2). This court has jurisdiction over the decision of the district court based on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Bonhomme is a real party in interest under the Federal Rule of Civil Procedure 17(a).
2. Whether, as a foreign national, Bonhomme is within the definition of "citizen" under CWA §505(a), 33 U.S.C. §1365(a), allowing him to bring suit against Maleau.
3. Whether Maleau's overburden mining debris piles qualify as a point source under CWA §502(12), (14), 33 U.S.C. § 1362(12), (14).
4. Whether Ditch C-1 is a "navigable water" or "water of the United States" under CWA § 502(7), (12), 33 U.S.C. 1362(7), (14).
5. Whether Reedy Creek is a "navigable water" or "water of the United States" under CWA § 502(7), (12), 33 U.S.C. 1362 (7), (14).
6. Whether Bonhomme is liable for violating the CWA by allowing arsenic pollution to travel through his culvert from Ditch C-1 to Reedy Creek.

STATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of Progress denying Bonhomme's motion to dismiss. (R. 10). After providing proper notice, Bonhomme filed a civil action against Maleau for violations of the CWA, 33 U.S.C. § 1251-1387, under the CWA's citizen suit provision, 33 U.S.C. § 1365. (R. 4). Bonhomme alleged that Maleau violated § 301(a) of the CWA, 33 U.S.C. § 1331(a), when arsenic from Maleau's mining waste piles flowed into an adjacent ditch, and then into a nearby creek. (R. 4-5).

Progress later filed a citizen suit against Bonhomme, alleging Bonhomme violated the CWA by discharging arsenic into a navigable water via a culvert on his property. (R. 5). Maleau intervened in Progress's action against Bonhomme under CWA § 505(b)(1)(B), 33 U.S.C. § 1365. *Id.* Progress and Maleau subsequently moved to consolidate their case with Bonhomme's suit against Maleau because the facts and law relating to the two cases were the same. *Id*. Because Bonhomme did not object, the district court granted the motion to consolidate the actions. *Id.* The defendant in each suit filed motions to dismiss. *Id.*

On July 23, 2012, the district court dismissed Bonhomme's suit holding that Bonhomme was not a proper plaintiff. (R. 10.) However, it would have held: (1) Bonhomme is not a real party in interest under FRCP 17 to bring a suit against Maleau; (2) Bonhomme is not a "citizen" under § 505 of the CWA, 33 U.S.C. 1365; (3) Maleau's mining waste piles are not "point sources" as defined by the CWA, 33 U.S.C. §1362(12), (14); (4) Ditch C-1 is not a "navigable water" under the CWA, 33 U.S.C. § 1362(7), (14); (5) Reedy Creek is a "navigable water" under the CWA, 33 U.S.C. § 1362(7), (14); and (6) Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property. (R. 2-3).

Following the district court's order, Bonhomme, Maleau, and Progress each filed a Notice of Appeal. (R. 1). Bonhomme contends that the district court erred in dismissing five of the issues (1, 2, 3, 4, and 6). (R. 1-2). Maleau disagrees with the court's holding on issue 5, that Reedy Creek is a navigable water. (R. 2). Progress takes issue with the decision on issue 4, that Ditch C-1 is not a navigable water. *Id.* This Court granted review on September 14, 2013.

STATEMENT OF THE FACTS

Maleau operates a gold mining and extraction operation in Progress. (R. 5). Maleau brings the overburden and slag debris from the operation across county lines where he creates piles of debris adjacent to Ditch C-1. (R. 5). Rainwater falls onto the piles and percolates through them, discharging arsenic-laden water into Ditch C-1 through gravity-created erosion ditches. (R. 5). Ditch C-1 is a man-made drainage ditch created for agricultural use which eventually discharges through a culvert on Bonhomme's property into Reedy Creek. (R. 5). Neither Ditch C-1 nor Reedy Creek have previously been held to be navigable. Reedy Creek is fifty miles long and runs between Progress and the State of New Union, where it is used as the water supply for an interstate highway service plaza. (R. 5). In both states, the water from Reedy Creek is also used for agricultural purposes. (R. 5). Once in Progress, Reedy Creek flows in Wildman Marsh, which is mostly owned and maintained by the federal government. (R. 6). Wildman Marsh attracts millions of migrating birds as well as over $25 million in economic hunting revenue. (R. 6). Bonhomme's property borders Wildman Marsh and he owns a hunting lodge, which he primarily uses for hunting activities with business friends. (R. 6).

Bonhomme tested the water for arsenic in Ditch C-1, both upstream and downstream of Maleau's property. (R. 6). He also tested Reedy Creek both upstream and downstream of where Ditch C-1 flows into it. (R. 6). The testing revealed that no arsenic is present in Ditch C-1 upstream of Maleau's property, but high concentrations exist directly downstream from Maleau's property. (R. 6). In Reedy Creek, there is no arsenic upstream from where Ditch C-1 joins it, but downstream from Ditch C-1's output, there is a significant concentration of arsenic. (R. 6). Where Reedy Creek drains into Wildman Marsh, arsenic is also present. (R. 6). Bonhomme has decreased his use of the hunting lodge from eight times to two, a decrease of 75%, due to the arsenic present in Wildman Marsh, therefore lowering the amount of economic revenue derived from hunting in connection to the Marsh. (R. 6).

Bonhomme is a French citizen, not a citizen of the United States. (R. 8). Additionally, he does live at his property adjacent to Wildman Marsh. (R. 7). He is also a 3% shareholder and

Director of Precious Metals International, Inc. (PMI), which is a gold mining company in direct competition with Maleau. (R. 7). PMI conducted or paid for the sampling and testing of the arsenic in Reedy Creek and Wildman Marsh, and is paying for the current litigation. (R. 7).

STANDARD OF REVIEW

A district court's dismissal of a complaint for failure to state a claim under FRCP Rule 12(b)(6) is reviewed de novo by an appellate court. *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210 (10th Cir. 2011). A motion to dismiss may only be granted if a complaint does not have enough allegations of fact, accepted to be true, "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To survive a motion to dismiss, the "factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" *Id.* at 555.

SUMMARY OF THE ARGUMENT

This is the case of rampant water pollution being blamed on an innocent man. Shifty Maleau, true to his name, has been attempting to evade liability from violating the CWA by blaming his arsenic output on his unsuspecting neighbor, Jacques Bonhomme. Bonhomme is a concerned citizen who reported to the EPA because Maleau because polluting waters and wetlands of the United States with arsenic discharging from the debris piles that he collected from gold mining. Through this appeal, Bonhomme hopes to use his ability to bring a citizen suit under the CWA to rectify the injustice done to the environment from Maleau's violation of the CWA.

Bonhomme is the kind of person that Congress intended to use the citizen suit provision of the CWA. He has been injured by Maleau's pollutant discharge and is therefore within the class of individuals that should be entitled to bring a CWA suit. For this reason, this Court should recognize that he is a real party in interest under Federal Rule of Civil Procedure 17.

PMI's involvement in this litigation does not preclude this fact. In actuality, its control of the present litigation supports the argument that Bonhomme is the real party in interest because PMI will be precluded from re-litigation against Maleau by collateral estoppel. In addition, even if this Court finds that Bonhomme is not a real party in interest for purposes of this suit, this is insufficient cause to dismiss this case and this Court should grant him leave to amend his pleadings.

Bonhomme's status as a foreign national also does not preclude his ability to bring the present suit against Maleau. The CWA defines "citizen" in such a broad manner that this Court should hold that it does not restrict foreign citizens from utilizing the citizen suit provision. This fact is supported both by the plain meaning of the term, in which Congress meant for standing as the only requirement for a person to bring suit under the CWA, and the Congressional purpose to create a class of "private attorneys general."

To violate the CWA, a plaintiff must prove that a defendant: (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source (5) without a NPDES permit. A point source is a "discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." While point sources may include man-made conveyances, such as pipes or ditches, natural conveyances, such gravity flow, erosion features, or debris piles, may also qualify as point sources. These latter features can be qualified as point sources if human effort is involved in their collection or channeling. That human effort must also be the means which led to the result of pollution entering a navigable water of the United States. If these features resulted in a pollutant being discharged, or added, into a navigable water, then the feature is qualified as a point source.

The debris piles belonging to Maleau were created from mining overburden as a result of Maleau's mining activity. Maleau then transported the debris from one site to another, where he collected the debris into piles on the banks of a navigable United States' water, Ditch C-1. While collected on near Ditch C-1, rain water leached through the debris piles, causing arsenic to leach into the soil and to enter into Ditch C-1 through naturally made erosion channels. Since Maleau

initially collected the debris into piles, he was the means which ultimately led to the arsenic entering Ditch C-1 so his debris piles qualify as "point sources" for purposes of the CWA.

Navigable waters are defined within the CWA as "the waters of the United States," which have been interpreted to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce;" "all interstate waters;" and "tributaries" and "wetlands adjacent to" such waters. Because these interpretations are based on a permissible construction of the CWA and the legislative history, the Court should defer to the agency's judgment using the *Chevron* standard.

Reedy Creek is a navigable water for purposes of the CWA. First, it is used in interstate commerce because its water is used by travelers along Interstate 250 as well as for agricultural uses in both Progress and New Union. Additionally, Reedy Creek drains into Wildman Marsh, which supports interstate commerce through commercial duck hunting. Second, Reedy Creek flows between Progress and New Union, thus qualifying as an interstate water. Third, Reedy Creek is a tributary to Wildman Marsh, which itself qualifies as "waters of the United States." Because Reedy Creek satisfies multiple definitions of "waters of the United States," it is clearly a navigable water.

Ditch C-1 also qualifies as a navigable water because it is a tributary of Reedy Creek. Though Ditch C-1 does not fall within the traditional definition of navigability, courts have extended the definition of "waters of the United States" to waterways with an ordinary presence of water. Ditch C-1 is relatively permanent and therefore satisfies the *Rapanos* Court's definition. Additionally, Maleau alleged that Ditch C-1 cannot be a navigable water because it is a point source. However, because Ditch C-1 has a more permanent flow and is not a "discernible, confined, discrete conveyance," it is not burdened by the "point source" definition. Finally, because the *Rapanos* Court did not have a majority decision, this Court is not precluded from finding that Ditch C-1 is a navigable water.

For there to be a violation resulting in liability under the CWA, a party must satisfy the five requirements listed above. If any of these requirements are not met, then that party has not

violated the CWA and cannot be held liable. To satisfy the "discharge" prong of the CWA liability test, a party must add any pollutant to navigable waters from a point source. Under the EPA's interpretation, navigable waters are qualified as a unified body. Thus, when water is moved between waterways, it is merely a transfer, rather than an addition, of water which does not require a NPDES permit as long as the water has not been subject to "intervening industrial, municipal, or commercial use." Since Congress has not directly spoken to this, the EPA's interpretation should be given deference under *Chevron* because it is reasonable. Even if deference is not given to this interpretation, moving water between two hydrologically indistinguishable bodies of water does not qualify as an "addition" of water.

Bonhomme did not violate the CWA by allowing arsenic-laden water to pass through his culvert because, under the EPA's interpretation, he was merely transferring water between Ditch C-1 and Reedy Creek. Even if deference is not afforded to the EPA, Bonhomme is still not liable for adding arsenic to Reedy Creek through his culvert because Ditch C-1 and Reedy Creek are hydrologically indistinguishable bodies of water. This is because boundaries between waters are inherently ambiguous, especially when in close proximity and comprised of similar waters. Thus, Bonhomme merely moved water between two parts of the same waterway, which does not qualify as a discharge nor does it require a NPDES permit so, since he has not satisfied all parts of the test for CWA liability, Bonhomme cannot be held liable for violating the CWA.

The lower court's dismissal of his case was incorrect, as was its findings that: Bonhomme is not a "citizen", not the real part in interest, that Maleau's waste piles are not point sources, Ditch C-1 is not a navigable water, and that Bonhomme violated the CWA by moving pollutants between Ditch C-1 and Reedy Creek. However, the lower court was correct in holding that Reedy Creek is a navigable water. Therefore, upon de novo review, this Court should reverse the lower court's findings and hold that: Bonhomme is a "citizen" and the real party in interest, that Ditch C-1 is navigable water, and that Bonhomme is not liable for violating the CWA. This Court should affirm the lower court's finding that Reedy Creek is a navigable water.

ARGUMENT

I. BONHOMME IS A REAL PARTY IN INTEREST UNDER FRCP 17 IN THIS SUIT BROUGHT FOR MALEAU'S VIOLATION OF § 301(a) OF THE CWA, 33 U.S.C. §1311(a).

Federal Rule of Civil Procedure 17(a) states that "an action must be prosecuted in the name of the real party in interest." Fed.R.Civ.P. 17(a). For a plaintiff to assert classification as the "real party in interest" in this suit, it must be shown that he has a significant interest in this action and that the law under which the action is brought has created a substantive right that the plaintiff is entitled to assert. 6A Charles Alan Wright et al., Federal Practice and Procedure § 1542 (2013). Bonhomme has a significant interest in this action based on the injuries that he sustained from Maleau's release of arsenic from his mining operation, which also entitled Bonhomme to bring this case under the citizen suit provision of the CWA. 33 U.S.C § 1365(a). These facts are best indicated by a more general consideration of the fact that Maleau's discharge of pollutants has given Bonhomme standing to bring this suit.

Bonhomme's classification as the real party in interest is not precluded by the involvement of PMI because PMI will be barred from relitigating Maleau's violation of the CWA in a subsequent suit. The primary function of FRCP 17(a) is to ensure that a judgment "will have its proper effect as res judicata." Fed.R.Civ.P. 17(a) advisory committee note (1966). PMI will be barred from bringing a later suit against Maleau because PMI's control over the present litigation established its privity with Bonhomme.

Finally, even if Bonhomme is not the real party in interest in this case, this is not a sufficient cause for dismissal of this action. Rule 17(a) states that "no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of that action by, or joinder or substitution of, the real party in interest." Fed.R.Civ.P. 17(a). Allowing substitution or ratification is allowable when "an honest mistake has been made in choosing the party in whose name the action is to be filed." Fed.R.Civ.P. 17 advisory committee's note (1966). Even if

Bonhomme is not the real party in interest, the circumstances of this case indicate that this was a reasonable mistake and Bonhomme should be given leave to amend his pleadings. Thus, Rule 17 is not a valid cause for dismissal of this case because either Bonhomme is the real party in interest or he should be given leave to amend.

A. Bonhomme is the real party in interest in this case because he can establish that he has standing.

The lower court should have found that Bonhomme is the real party in interest in this case because he satisfies the requirements necessary to attain Article III standing. FRCP 17(a)(1)(G) states that "a party authorized by statute" may sue in that person's own name without joining the party for whose benefit the action is brought. Fed.R.Civ.P. 17(a)(1)(G). This provision makes it clear that a person qualifies as the real party in interest when a statute gives the party the right to bring suit. While his standing shows that Bonhomme has a significant interest in this suit, it also indicates that Bonhomme is entitled to bring this action against Maleau under the citizen suit provision of the CWA because the citizen suit provision impliedly includes that "any citizen [with standing]" may bring suit. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). Therefore, because Bonhomme has satisfied the Article III standing requirements of injury-in-fact, causation, and redressability that were established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), he is the real party in interest in this case.

To establish that he is the real party in interest in this case, Bonhomme must first show that he has a significant interest in the outcome. While standing is not an explicit issue that has been raised in this appeal, it is a relevant consideration because the concepts of real party in interest and standing are interrelated. *See Gonzalez ex rel. Gonzalez v. Reno*, 86 F.Supp.2d 1167, 1182 (S.D. Fla. 2000). Standing, like the requirement of being a real party in interest, is dependent on "having a personal interest in the controversy." *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992). Some courts have even proposed the maxim that any plaintiff that has standing

has precluded any objections that she is not a real party in interest. *See Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975).

Bonhomme must also establish that the law under which he has brought the action entitles him to bring this action. Like showing a personal interest in the controversy, this may be proved with a standing analysis. Bonhomme brought this action under § 505(a) of the CWA, which states that "any citizen may commence an action on his own behalf . . . against any person." 33 U.S.C. § 1365(a). The Supreme Court confirmed that Congress intended to permit use of the citizen suit provision by any person with standing. *Middlesex*, 453 U.S. at 16. Therefore, if Bonhomme establishes his standing he will indicate that the citizen suit provision of the CWA has entitled him to bring this action, establishing him as the real party in interest.

Bonhomme has standing to bring this suit. Standing requires that a plaintiff demonstrate injury-in-fact, a causal connection between the injury and the defendant's actions, and a likelihood that the injury will be redressed by the suit. *Lujan*, 504 U.S. at 560-61. Bonhomme's injury-in-fact stems from his fear of continuing to use Wildman Marsh. (R. 6). Bonhomme's water tests have established a sufficient causal connection between his fear of using the Marsh with Maleau's discharge of arsenic. *Id.* Finally, a favorable ruling for Bonhomme will stop Maleau's discharge of arsenic into the marsh, satisfying the redressability element.

Bonhomme has suffered an injury in fact. In *Lujan*, the Supreme Court ruled that to satisfy the injury-in-fact element, an injury must be concrete and particularized, as well as actual or imminent. 504 U.S. at 560. Courts have been especially prone to find standing where a plaintiff recreates in the area that has been affected by a polluter-defendant. *See, e.g., NRDC v. Texaco Refining & Mktg. Inc.*, 2 F.3d 493, 505 (3rd Cir. 1993). In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000), for example, the plaintiff organization alleged that its members could no longer use a river for recreational purposes because they knew that the defendant was discharging pollutants into it. *Id.* at 181. Many members lived close to the river at issue and, before the defendant began operations, fished, swam, and camped in and near it. *Id.* Addressing the Court's previous ruling in *Sierra Club v. Morton*, 405 U.S. 727 (1972), that

harm to a plaintiff's aesthetic and recreational values in an area are adequate to establish injury in fact, the Supreme Court held that Friends of the Earth had standing because concerns about pollutant discharge into a river had affected its members ability to recreate in public areas. *Laidlaw* at 183.

Bonhomme's injuries from Maleau's discharge of arsenic are both actual and imminent. Bonhomme is now afraid to continue to use Wildman Marsh because of the arsenic that has pervaded it and his duck hunting expeditions there have decreased from eight per year to two per year. (R. 6). Bonhomme has therefore suffered actual injuries stemming from his decreased use of the marsh as well as imminent injuries as arsenic continues to pollute an area that he uses frequently for recreation.

The lower court erroneously found that Bonhomme was not a real party in interest because he does not live at the hunting lodge adjacent to Wildman Marsh. However, Bonhomme's injury-in-fact stems from his recreational duck hunts in the marsh and not the hunting lodge itself. While his ownership of the lodge may make his injury more apparent, it is not directly applicable in determining his interest in this case. The more important consideration is his fear to continue using the marsh for recreational activities which, analogously to the situation is *Laidlaw*, is sufficient to establish his interest in this action.

The injuries that Bonhomme has suffered were caused by Maleau's actions. The Supreme Court in *Lujan* stated that an injury must be "fairly traceable to the challenged action of the defendant." 504 U.S. at 560. The water tests conducted by Bonhomme indicate that arsenic from Maleau's mining operation is flowing directly from Ditch C-1 into Reedy Creek and then into Wildman Marsh. (R. 6). Bonhomme's injuries are therefore "fairly traceable" to Maleau's actions.

The lower court was correct in its statement that Maleau is the source of arsenic. In the case of a motion to dismiss, a court must presume that a plaintiff's factual allegations are true and may only dismiss the action if the plaintiff has not stated a claim for relief "that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In this case, Bonhomme has

alleged that Maleau's waste piles have discharged arsenic into Wildman Marsh. (R. 6). This allegation is supported by Bonhomme's water tests, and he has therefore sufficiently alleged a causal connection between the discharges of arsenic in Maleau's waste piles and the arsenic that is now present in Wildman Marsh.

Finally, a favorable judgment for Bonhomme will redress his injuries. *Lujan* provides that satisfaction of the redressability element of standing requires that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." 504 U.S. at 560. The court in *Laidlaw* acknowledged that the civil penalties provided by the CWA have a deterrent effect on present and future violations of the Act by defendants, and that this effect provides an acceptable form of redress for plaintiffs. 582 U.S. at 185-86. Here, Bonhomme has sought the full gamut of potential relief under 33 U.S.C. § 1365, which includes an assessment of civil penalties and injunctive relief. (R. 4). Synonymous with the reasoning in *Laidlaw,* these penalties provide an effective stimulus to halt Maleau's discharge of arsenic into Wildman Marsh. A favorable judgment will therefore entail a cessation of harm to a place that Bonhomme frequently recreates in, establishing his redressability in this action, and sufficiently supporting his contention that he is the real party in interest.

B. Bonhomme's status as the real party in interest is supported by the fact that collateral estoppel will bar PMI from re-litigating any of the issues in this case in a subsequent action against Maleau because Bonhomme and PMI are in privity with each other.

The lower court improperly found that PMI was the real party in interest to this action because it incorrectly focused its analysis on the association between Bonhomme and PMI, as well as PMI's control of the present litigation. The function of FRCP 17(a) "is simply to protect the defendant from a subsequent action by the party actually entitled to recover, and to ensure generally that the judgment will have its proper effect as res judicata." Fed.R.Civ.P. 17(a) advisory committee note (1966); *See also Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 170 (4th Cir. 2001) (addressing the "negative function" of Rule 17, which is

to protect the defendant against a subsequent action by the party actually entitled to relief). The district court should have focused on the preclusive effect of a judgment in this case and found that, even if PMI is entitled to recover, it will be barred from re-litigation of the issues in the present case and therefore its involvement does not affect Bonhomme's classification as the real party in interest.

Although PMI is not a party to the present action, collateral estoppel will bar it from re-litigating any of the issues in this case in a subsequent claim against Maleau. Collateral estoppel, which is associated with the broader concept of res judicata, is based on the rule that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United States,* 440 U.S. 147, 153 (1979). A nonparty is in privity with a party for res judicata purposes "if he has succeeded to the party's interest in property, . . . if he controlled the prior litigation, . . . [or] if the party adequately represented his interests in the prior proceeding." *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990) (citing *Benson & Ford, Inc. v. Wanda Petroleum,* 833 F.2d 1172 (5th Cir. 1987)). These elements are essentially meant to determine "whether the interests of one party are so identified with the interests of another that representation by one party is representation of the other's legal right." *Weinberger v. Tucker*, 510 F.3d 486, 491 (4th Cir. 2007).

The lower court was incorrect in its finding that PMI's funding for Bonhomme's water tests and for the present litigation precludes Bonhomme from being the real party in interest in this case. In *Montana v. United States* the federal government was precluded from re-litigating an issue by collateral estoppel because it had, among other things, required that a plaintiff file an action in a previous suit, approved the plaintiff's complaint, and paid for the attorney's fees and costs in the litigation. 440 U.S. at 155. The Supreme Court noted that the interests associated with res judicata "are . . . implicated when nonparties assume control over litigation in which they have a direct financial or proprietary interest." *Id.* at 154. Similarly, in this case, PMI has controlled the action brought by Bonhomme because it paid for the water tests that form the core of Bonhomme's allegations, and is also funding the present litigation. In addition, PMI has a

direct financial interest in this action because Maleau's business is in direct competition with PMI and Bonhomme's hunting lodge is used frequently to host business clients of PMI. (R.7, 8). PMI's control over this litigation, in combination with PMI's financial interest in this action, is sufficient to establish its privity with Bonhomme, and PMI will therefore be barred from any repetitious litigation against Maleau.

The fact that PMI will also benefit from this action is not dispositive for determining that Bonhomme is the real party in interest. The advisory committee notes specifically indicate that the enumerations of instances in which a plaintiff is a "real party in interest" in subsections 17(a)(1)(A) through (G) are meant to highlight the fact that a plaintiff need not be the one benefited by the suit. Fed.R.Civ.P. 17 advisory committee's note (1966). 17(a)(1)(G) specifically allows a plaintiff like Bonhomme that is "authorized by statute" to do so. Fed.R.Civ.P. 17(a)(1)(G). PMI benefitting from this action is irrelevant by nature of the primary function of Rule 17(a) which is to simply bar repetitive litigation through res judicata. Fed.R.Civ.P. 17 advisory committee's note (1966).

The lower court was correct to focus on the connection between PMI and Bonhomme, but this connection was improperly applied to the real party in interest analysis. PMI's interest in, and control over, this litigation should bar it from bringing any repetitive litigation against Maleau, but does not bar Bonhomme from bringing the present action. Thus, the function of Rule 17 as a tool for ensuring that Bonhomme's present action will have its proper effect as res judicata is served by establishing that Bonhomme is the real party in interest.

C. Even if Bonhomme is not the real party in interest, dismissal of this case is improper because he should first be given leave to amend.

The lower court incorrectly dismissed this case on the grounds that Bonhomme had not amended his pleadings to include PMI as a party. Rule 17(a)(3) states that an action may not be dismissed "for failure to prosecute in the name of the real party in interest 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.P. 17(a)(3). This rule is meant to be applied where substitution of the real party in interest is necessary to avoid injustice and an excusable mistake has been made. *See Esposito v. United States*, 368 F.3d 1271, 1276 (10th Cir. 2004). Although the district court may dismiss an action where there is no possibility that a reasonable mistake was made in naming the improper plaintiff, "there plainly should be no dismissal where substitution of the real party in interest is necessary to avoid injustice." *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997). In deciding whether to dismiss the case, the district court should have considered whether "the plaintiff engaged in deliberate tactical maneuvering (i.e. whether his mistake was 'honest')" and whether the substitution will have a prejudicial effect on the defendant. *Esposito*, 368 F.3d at 1276.

In this case, even if Bonhomme is not the real party in interest, he made an honest mistake by declaring that he, rather than PMI, was the plaintiff in this action. As indicated by the standing analysis above, Bonhomme has sustained injuries to his ability to recreate on a personal level, regardless of his connection as a shareholder and officer of PMI. This alone should move this Court to recognize that any mistake made in Bonhomme's pleadings was reasonable, and he should be granted leave to amend this action to add the proper plaintiff. *See* Fed.R.Civ.P. 20 (allowing joinder of plaintiffs that assert a right to relief arising from the same transaction or occurrence).

In addition, the substitution of PMI will not have a prejudicial effect on Maleau. Even if the pleadings in this case are amended such that PMI is the plaintiff instead of Bonhomme, the amended complaint will have the same issues as the instant case. Furthermore, because PMI is already funding the present litigation, a change of plaintiffs in this action would have no substantial effect on Maleau. Therefore, even if the court finds that Bonhomme is not a real party in interest in this action, because he made a reasonable mistake and because Maleau will not be prejudiced by an amendment to the pleadings, this case should not be dismissed and Bonhomme should be given leave to amend.

II. BONHOMME IS A "CITIZEN" AS DEFINED IN CWA §§ 505(g), 502(5), 33 U.S.C. §§ 1354(g), 1362(5) BECAUSE HE FITS WITHIN THE PLAIN MEANING AND CONGRESSIONAL INTENT OF THE TERM.

Bonhomme can properly bring this case under the citizen suit of the CWA because he falls within the class of persons that are entitled to do so. Section 505(a) of the CWA grants that "any citizen may commence a civil action on his own behalf . . . against any person." 33 U.S.C. § 1365(a). Section 505(g), in turn, defines citizen as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Finally, section 502(5) defines 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(12). Because Bonhomme is clearly a "person" and "individual," the plain meaning of the CWA entitles him to bring this suit against Maleau.

In addition, Congress' intended application of the citizen suit provision indicates that Bonhomme is within the class of individuals that are entitled to bring suit against CWA violators. The definition of the term "citizen" in the CWA was intended to reflect the decision of the Supreme Court in *Sierra Club* which granted the ability to bring a citizen suit to all persons that have standing. *See Gonzales v. Gorsuch*, 688 F.2d 1263, 1266 (9th Cir. 1982). Rather than focusing on a narrow view of the provision's name, "Citizen suits", the lower court should have effectuated the primary purpose of the statute, which "is to enable private parties to assist in enforcement efforts where Federal and State Authorities appear unwilling to act." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987). Therefore, the plain meaning and congressional purpose of section 505(a) indicate that Bonhomme is entitled to bring this suit.

A. Bonhomme's status as a "citizen" within the meaning of § 505(a) is established by its definition in §§ 505(g) and 502(5) of the CWA.

The lower court should have found that Bonhomme is a "citizen" within the plain meaning of 505(a). It is well settled that "the starting point for interpreting a statute is the language of the statute itself." *Gwaltney,* 484 U.S. at 56 (quoting *Consumer Product Safety*

Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Furthermore, the Supreme Court has held that the phrase "any person" should be taken at face value. *Bennett v. Spear*, 520 U.S. 154, 165 (1997). 505(g) states that the term citizen "means a person or persons having an interest which is or may be adversely affected". 33 U.S.C. § 1365(g). Bonhomme falls within this definition because he is a person and has been adversely affected by the violations of the CWA by Maleau.

The lower erroneously found that Bonhomme is barred from bringing a section 505(g) citizen suit because it improperly interpreted the citizen suit provision to only apply to citizens of the United States. However, Bonhomme's status as a "citizen," whatever the commonplace meaning of this word may be, cannot limit his ability to bring this suit because headings and titles "cannot limit the plain meaning of the text." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947). Any focus on the meaning of "citizen," rather than on the plain meaning of the term set out in the definition in 505(g), is an incorrect approach in an interpretation of the CWA.

This narrow interpretation notwithstanding, the lower court also failed to consider the fact that Bonhomme is a "citizen," regardless of his status in the United States. There are many varieties of citizen, and the 11th amendment of the Constitution, for example, refers explicitly to "citizens of another state, or . . . citizens or subjects of any foreign state." U.S. Const. am. 11. Even if the commonplace understanding of the term citizen is to be considered instead of the definition set out in 505(g), there is no reason for this Court to presume that Congress intended for "citizen" to refer explicitly to citizens of the United States. Therefore, the plain meaning of the term "citizen" includes Bonhomme and he is entitled to bring this suit against Maleau.

B. Bonhomme's status as a "citizen" within the meaning of § 505(a) is confirmed by Congress' purpose in enacting the citizen suit provision of the CWA.

In its interpretation of the meaning of "citizen" in 505(a), the lower court should have recognized that the congressional purpose of citizen suits mandates that foreign nationals like

Bonhomme be entitled to their use. The lower court incorrectly noted that Congress intended to expand the meaning of citizen beyond individuals, rather than beyond citizens of American nationality, with the 505(g) definition. On the contrary, by defining "citizen" as "a person or persons having an interest which is or may be adversely affected," 33 U.S.C. § 1365(g), Congress intended to expand the realm of potential CWA plaintiffs to all persons that possessed standing under the *Sierra Club* test for standing. *Middlesex*, 453 U.S. at 16. The conference report for the 1972 amendments to the CWA explicitly states that "under the language agreed to by the conference, a noneconomic interest in the environment, in clean water, is a sufficient base for a citizen suit under section 505." *Id.* Furthermore, if Congress intended to limit use of the citizen suit to only "citizens of the United States", it would have explicitly expressed this intent. Thus, to restrict the definition of citizen any further than this simple limitation by barring foreign nationals would be a patent contradiction with Congress' intent.

Furthermore, an interpretation of "citizen" that includes foreign nationals is consistent with Congress' effort to enable a class of "private attorneys general." *See Bennett*, 520 U.S. at 165. By establishing a broad field of potential plaintiffs authorized to utilize citizen suit provisions, Congress meant to establish a class of individuals that could enforce environmental statutes like the CWA where government entities are unable or unwilling to do so. *Gwaltney*, 484 U.S. at 60-61. To restrict foreign citizens, like Bonhomme, in their ability to utilize the citizen suit provision would be contrary to Congress' intent to establish the broadest possible realm of potential plaintiffs and this Court should therefore find that Bonhomme is within the CWA's definition of citizen.

III. MALEAU WILL BE LIABLE UNDER THE CWA BECAUSE HIS DEBRIS PILES ARE POINT SOURCES WHICH DISCHARGED ARSENIC INTO THE NAVIGABLE WATER OF DITCH C-1 WHICH IS A TRIBUTARY OF THE NAVIGABLE WATER REEDY CREEK; HOWEVER, BONHOMME WILL NOT BE LIABLE FOR VIOLATING CWA BECAUSE NO LIABILITY ATTACHES WHEN TRANSFERRING WATER FROM DITCH C-1 TO REEDY CREEK.

To establish liability for a violation under § 301 of the CWA, the plaintiff must prove that the defendant: (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source (5) without a National Pollution Discharge Elimination System (NPDES) permit. *Reynolds v. Rick's Mushroom Serv., Inc.*, 246 F. Supp. 2d 449, 454 (E.D. Pa. 2003).

Discharge is the "addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12); *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 47 (5th Cir. 1980); *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009). Strict liability attaches to such a discharge, regardless of whether the discharge was intentional or accidental. 33 U.S.C. § 1362(12). It is undisputed that arsenic is a pollutant and commonly associated with gold mining. (R. 6). Also undisputed is that the arsenic leached into Ditch C-1 from Maleau's debris piles on his property. (R. 5). A point source is a "discernible, confined, and discrete conveyance including but not limited to any pipe, ditch, channel, tunnel, [or] conduit…from which pollutants are or may be discharged…not [including] agricultural stormwater discharges". 33 U.S.C. § 1362(14). Navigable waters are "the waters of the United States." 33 U.S.C. § 1362(7). It is also undisputed here that neither Maleau nor Bonhomme had NPDES permits that would allow the discharge of arsenic into navigable waters without violating the CWA.

When issues of statutory interpretation arise, courts utilize a two-step approach established in *Chevron , U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Courts must first determine if "Congress has directly spoken to the precise question at issue" within the text of the statute. *Id.* at 842. If the intent is explicitly clear, then both courts and agencies "must give effect to unambiguously expressed intent of Congress." *Id.* at 843. If the statute is silent or has not "directly addressed the precise question at issue," then courts defer to agency interpretations, so long as they are "based on a permissible construction of the statute." *Id.* The EPA and the Army Corps of Engineers are the proper administrative agencies to defer to in regards to CWA interpretation.

A. Ditch C-1 and Reedy Creek are both navigable waters, based on the EPA's permissible interpretation of "waters of the United States," because Reedy Creek is used in interstate commerce, is an interstate water, and is a tributary of a federal wetland, and because Ditch C-1 is a tributary of Reedy Creek.

1. Both Reedy Creek and Ditch C-1 classify as "navigable waters" based on the EPA's permissible interpretations of the Clean Water Act.

The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The regulations of both the Army Corps of Engineers and the EPA interpret "waters of the United States" broadly to include a wide variety of bodies of water. 33 C.F.R. § 328.3; 40 C.F.R. § 122.2. The definition includes, but is not limited to, "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce;" "all interstate waters;" and "tributaries" and "wetlands adjacent to" such waters. 40 C.F.R. § 122.2. The lower court correctly found that Reedy Creek is a navigable water under CWA §502(7), 33 U.S.C. § 1362(7). However, neither the CWA nor the EPA's interpretation of the Act contain negative language that explicitly excludes any specific body of water from either definition. Thus, the lower court erred in granting Maleau's motion to dismiss this issue as Ditch C-1 falls within a permissible interpretation of "navigable water" under the CWA. *Id.*

Additionally, courts have turned to the original legislative intent, recognizing that Congress expressly intended "that the term 'navigable waters' be given the broadest possible constitutional interpretation." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 914 (5th Cir. 1983) (quoting 1 *Legislative History*, at 178 (Senate consideration of the Conference Report on S. 2770, Oct. 4, 1972). Evidence suggests 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." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The CWA's legislative history indicates that Congress was dissatisfied with prior legislation's narrow interpretation of "navigable waters" because of its restrictive effects in practice. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 n.15 (9th Cir. 1978); *see also California v. Environmental Protection Agency*, 511 F.2d 963, 964 n.1 (9th Cir.

1975), *rev'd on other grounds sub nom. Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200 (1976)("Congress clearly meant to extend the Act's jurisdiction to the constitutional limit . . . "). To overcome previous deficiencies, Congress passed the CWA with the intent to broadly cover more waters to achieve the overall water quality control purposes of the Act. *Leslie Salt Co.,* 578 F.2d at 754 n.15.

Since Congress has not directly spoken to the exact meaning of navigable waters in the CWA, the interpretation of the EPA is entitled deference as long as the construction is reasonable. *Friends of Everglades*, 570 F.3d at 1228; *Chevron,* 467 U.S. at 843. Utilizing the *Chevron* test, it is clear that the CWA only expressed the intent to incorporate "waters of the United States" within the definition of "navigable waters." 33 U.S.C. § 1362(7). Because the statute is silent on precisely which waters are to be covered, the court should utilize the *Chevron* standard and defer to the EPA's regulations. The definitions for "waters of the United States" as interpreted in 40 C.F.R. § 122.2 are a permissible construction of the CWA because they incorporate both the plain language of the Act with the legislative intent, recognizing that the term should be given an expansive and broad class of waters to fully execute the Act's original intent. *See generally United States v. Hubenka*, 438 F.3d 1026, 1033 (10th Cir. 2006).

2. Reedy Creek is a navigable water under 33. U.S.C. § 1362(7) because it is used in interstate commerce, is an interstate water, and is a tributary of a federal wetland.

The traditional test for navigability determines "navigability-in-fact," classifying waters as "navigable" when they are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. 557, 563 (1871). However, the CWA does not explicitly require navigability-in-fact. *See United States v. Oxford Royal Mushroom Products, Inc.,* 487 F. Supp. 852 (E.D. Penn. 1980). The U.S. Supreme Court recently declined to extend the requirement that waters be navigable in fact "wholesale to the CWA." *Rapanos v. United States,* 547 U.S. 715, 730 (2006). Instead, the Court noted that the CWA uses the phrase as a defined term, equating "navigable waters" to "the waters of the United States." *Id.* at 730-31

(quoting 33 U.S.C. § 1362(7)). The Court again recognized that "navigable waters" as used in the CWA is intended to be a broader perception than the traditional understanding. *Id.* at 731. *See also Solid Waste Agency v. United States Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 167 (2001); *Riverside,* 474 U.S. at 133. Though incorporated into the EPA's regulations, Bonhomme is not required to demonstrate that Reedy Creek satisfies the traditional definition of navigability because it is but one of many available classifications in the interpretation of "waters of the United States." 40 C.F.R. § 122.2.

The lower court rejected Bonhomme's first claim that the use of Reedy Creek as a water supply for Interstate 250 travelers and its flow into Wildman Marsh, which supports interstate commerce through duck hunting, makes Reedy Creek "necessary for interstate commerce". (R. 9). The lower court held that the decision in *Rapanos* requires that waterways satisfy a standard set forth in *United States v. Lopez*, 514 U.S. 549 (1995). (R. 9-10). In *Lopez*, the U.S. Supreme Court found three broad categories of activities that Congress may regulate under its constitutional commerce power. 514 U.S. at 558; *see* U.S. CONST. art. I, § 8, cl. 3. First, Congress may regulate and protect the "use of the channels of interstate commerce." *Id.* Second, Congress can protect the "instrumentalities of interstate commerce," even if they are "intrastate activities." *Id.* Finally, Congress can regulate activities that have a "substantial relation to interstate commerce." *Id.* at 559.

The lower court rejected Bonhomme's claim, erroneously holding that the determination of Reedy Creek's navigability needs to fall within the first prong of the *Lopez* test. (R. 10). However, the court in *Rapanos* never clearly indicated that it intended to exclusively extend the first prong of the *Lopez* definition of commerce to waterways under the CWA. 547 U.S. 715 (2006). Even if applied, the first prong of *Lopez* is still applicable to Bonhomme's case, as the use of Reedy Creek has the potential to cause real effects to interstate commerce. (R. 5-6); *see Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (noting that "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (quoting *United States v. Women's Sportswear Mfrs. Assn.,* 336 U.S. 460, 464

(1949))). As mentioned, "use" is not confined to the traditional uses of navigation. *Rapanos,* 547 U.S. at 731. Because Reedy Creek is used as a water supply for Interstate 250 travelers, as well as a water supply for agricultural purposes in both the State of Progress and State of New Union, it plays a role in interstate commerce and still qualifies for the first prong of the *Lopez* test. (R. 5).

Reedy Creek also satisfies two other definitions of "waters of the United States." 40 C.F.R. § 122.2. First, Reedy Creek is "interstate water," the second category within the EPA's regulations. *Id.* "Interstate" is defined as "between two or more states." BLACK'S LAW DICTIONARY (9th ed. 2009). Reedy Creek starts in the State of New Union and flows into the State of Progress, thus by its plainest meaning qualifies as an "interstate water." (R. 5).

Second, Reedy Creek can be viewed as a tributary to Wildman Marsh as it drains into federally owned wetlands. (R. 5-6). Wildman Marsh is in part a National Wildlife Refuge, owned and operated by the U.S. Fish and Wildlife Service. (R. 6). The federal ownership and control of Wildman Marsh distinguishes its nature from the wetlands discussed in *Rapanos*, which were on privately owned property. *See* 339 F.3d at 448-449. Because Wildman Marsh is subject to federal control under the National Wildlife Refuge system and is federal property, its waters are inherently "waters of the United States" under its plain meaning. *See* 16 U.S.C. § 668dd.

Additionally, Wildman Marsh qualifies as "waters of the United States" on its own right under 40 C.F.R. § 122.2. In *Riverside*, the Court recognized that drawing boundaries between various types of "waters" is "inherently ambiguous." 474 U.S. at 132. Recognizing the trans-boundary nature of water, the lower court correctly emphasized that any pollution from Reedy Creek would have a hydrological connection with, and would flow into, Wildman Marsh. (R. 10). The Court in *SWANCC* categorized this type of connection as a "significant nexus" between wetlands and navigable waters. 531 U.S. at 167. Reedy Creek thus qualifies as a "tributary" of Wildman Marsh and falls within the EPA's definition of "waters of the United States." *See* 40 U.S.C. § 122.2.

To qualify as a "water of the United States" under the EPA's regulations, Bonhomme must prove that Reedy Creek satisfies only one of the seven possible categories listed in 40 C.F.R. § 122.2. However, Reedy Creek clearly satisfies multiple classifications. It is used in interstate commerce as a water supply for an interstate highway, as a water source for agricultural purposes in both the State of New Union and the State of Progress, and through Wildman Marsh, as economic revenue from duck hunting. (R. 5-6). It is also by its very definition an interstate water as it crosses state lines. (R. 5). Finally, it is a tributary to Wildman Marsh, a federally owned property that is on its own merit a "water of the United States." (R. 5-6). For these reasons, the lower court properly held that Reedy Creek is a "water of the United States" and thus is a "navigable water" under 33 U.S.C. § 1362(7).

3. Ditch C-1 is a navigable water because it is a tributary of Reedy Creek, which statutorily satisfies the definition of a navigable water.

Tributaries of navigable waters are considered "waters of the United States." 40 C.F.R. § 122.2. The Corps defines a tributary as a water that feeds into a navigable water (or a tributary thereof) and has a high-water mark. *See Rapanos,* 547 U.S. at 781. Since the *SWANCC* decision did not directly address this issue, many courts have since upheld jurisdiction for tributaries, including irrigation ditches. *See Hubenka*, 438 F.3d at 1032; *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-55 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526, 534 (9th Cir. 2001). In *Rapanos*, the Court re-evaluated its decisions in *SWANCC* and *Riverside* regarding the connection between tributaries and wetlands, holding that adjacent channels must have a "significant nexus" to "waters of the United States." 547 U.S. at 742. However, the courts in *Rapanos*, and *SWANCC* were concerned with isolated bodies of water that did not directly flow into a navigable body of water. *See Rapanos,* 547 U.S. at 741-42; *SWANCC,* 531 U.S. at 171. Ditch C-1 is distinguishable because it is not an isolated tributary, but rather flows directly into Reedy Creek, a navigable body of water. (R. 5).

Maleau would argue that Ditch C-1's seasonal dry periods and characteristics as a man-made drainage ditch preclude its consideration after the *Rapanos* decision. In *Rapanos*, the Court noted that in defining "navigable waters," it was not necessary to require the traditional definition be used, but rather maintained that the term's original significance could not be ignored completely. 547 U.S. at 734. The Court's attempt to narrow the interpretation of "waters of the United States" focused on the "ordinary presence of water." *Id.* After noting that dry channels are not open bodies of water, the Court concluded that "the phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features.'" *Id.* at 739. The Court failed to define the terms "ordinary" or "relatively permanent" in explicit terms, but noted that "relatively permanent" did not exclude "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Ditch C-1 contains running water, except during annual periods of drought, and therefore satisfies the *Rapanos* Court's definition of "waters of the United States."

Maleau also argues that Ditch C-1 cannot be a navigable water because it is listed as a point source in the CWA. (R. 9). The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The lower court relied on *Rapanos* to state that "a ditch cannot be simultaneously two elements in the water pollution offense." (R. 9). The *Rapanos* plurality suggested that "the definition of 'discharge' would make little sense if the two categories were overlapping." 547 U.S. at 735. The Court continued, noting "the separate classifications of 'ditch[es], channel[s], and conduit[s]' – which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow – shows that these are, by and large, *not* 'waters of the United States.'" *Id.* at 735-36.

The plurality's argument is weakened by Justice Kennedy's concurrence, in which he argued "even were the statute read to require continuity of flow for navigable waters, certain water bodies could conceivably constitute both a point source and a water." *Id.* at 772 (Kennedy,

J., concurring). Justice Kennedy recognized that in real-world situations, it may not be easy to distinguish between the two categories. *Id.* Additionally, the concurrence once again highlighted the trans-boundary nature of water. *Id.* Should the *Rapanos* plurality's decision govern, it is conceivable that any waterway may be deemed a "point source" and lose its navigability status. It would be unreasonable to claim that a navigable river should lose its status as a "navigable water" every time it carried a pollutant into a lake. Similarly, to deem Ditch C-1 as a "point source" instead of a tributary of Reedy Creek just because it was the mechanism for which Maleau's pollutants traveled to Reedy Creek would be contrary to public policy. To require waterways to be labeled as either a "point source" or a "navigable water" might encourage polluters to purposefully choose certain waterways in which to dump pollutants to avoid permitting requirements. *See generally id.* at 800 (Stevens, J., dissenting).

In his *Rapanos* concurrence, Chief Justice Roberts noted his concern for the lack of a majority opinion as it created even more confusion as to how to read Congress' limit of authority under the CWA. *Id.* at 758 (Roberts, C.J., concurring). Chief Justice Roberts suggested that the lack of consensus of the Court in *Rapanos* requires lower courts to examine the issue on a case-by-case basis. *Id.* As such, the *Rapanos* decision does not preclude this court from finding that Ditch C-1 is a navigable water. This court should find that Ditch C-1 is a tributary of Reedy Creek, which is a navigable water, and is therefore subject to a designation as a "water of the United States" under 40 C.F.R. §122.2.

B. Maleau's debris piles are considered point sources under 33 U.S.C. § 1362(12), (14) because his human effort led to the conveyance of arsenic into Ditch C-1, a navigable water, and Bonhomme is not liable for violating CWA by transferring the arsenic from Ditch C-1 to Reedy Creek under the EPA's interpretation and because Ditch C-1 and Reedy Creek are hydrologically indistinguishable.

1. Maleau's mining waste piles are point sources under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14) because his piles are considered point sources once Maleau put his human effort into collecting or chanelling them.

The EPA interprets the discharge of pollutants to "[include] additions of pollutants into waters of the United States from surface runoff which is collected or channeled [sic] by man [and] discharges through … conveyances owned by a … person which [does] not lead to a treatment works" from any point source. 40 C.F.R. § 122.2**.** *See Chevron,* 467 U.S. at 842-43. A discharge encompasses both accidental leaching of pollutants as well as intentional releases. 36 Am. Jur. Proof of Facts 3d 533 (Originally published in 1996). A point source is a "discernible, confined and discrete conveyance … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Congress intended that the definition of a point source should be interpreted broadly. *Dague v. City of Burlington,* 935 F.2d 1343, 1354–55 (2d Cir.1991); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004). A nonpoint source includes "uncollected, unchannelled, or diffuse runoff, such as rainwater that is not channeled through a point source." *Envtl. Def. Ctr., Inc. v. EPA,* 344 F.3d 832, 842 n.8 (9th Cir. 2003); *See Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009). Here, the issue is whether Maleau's mining waste piles constituted point sources that discharged the pollutant arsenic into a navigable water.

2. Maleau's piles are point sources because Maleau collected the mining waste into piles through his human effort which was the means that led to arsenic pollution discharge into the navigable waters of Ditch C-1 and Reedy Creek.

When rainwater runoff flows from material piles through channels eroded by gravity, resulting in a pollutant discharge into navigable waters, those piles may be a point source if human activity is involved in the initial collection of the material. *Abston*, 620 F.2d at 45-46; *Reynolds*, 246 F. Supp. 2d at 457. In *Abston*, miners collected spoil piles from discarded overburden which eroded during precipitation, creating "ditches, gullies, and similar conveyances," discharging pollutants into navigable waters. 620 F.2d at 43. The court held that surface runoff from rainfall constituted point source pollution when it was collected or channeled by the coal miners in connection with mining activities even if the discharges were unintentional.

Id. at 46, 47; *See also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994) (finding that a farming field constituted a point source when the field contained manure that eventually discharged into a navigable water way through rainfall runoff).

A point source conveyance can be a natural feature, such as an erosion ditch, and does not need to be man-made for liability to attach as long as human efforts are reasonably likely to be the means by which pollutants are deposited into navigable waters. *Abston*, 620 F.2d at 45-46. Although the miners themselves did not create the ditches, the court found that the miners' collection of waste into piles created the means through which the pollution could enter into the water, making the piles point sources. *Id.* at 45-46; *see also United States v. Lucas*, 516 F.3d 316, 336 (5th Cir. 2008) (finding that miners are not relieved from liability under the CWA simply because they did not actually construct conveyances so long as they are the reasonably likely to be the means by which pollutants were discharged into navigable waters).

Industrial debris piles can become point source conveyances when storm water collects in those piles and eventually discharges into navigable waters through erosion gullies. *Parker,* 386 F.3d at 1009. In *Parker*, the defendant owned a business which housed scrap metal and hazardous waste. *Id.* at 1000-01. The EPA investigated the site and found that "stained soil and soil samples showed evidence of contamination from metals, petroleum products, solvents, and paint wastes". *Id.* at 1001. Because surface water flowed from the defendant's property onto the plaintiff's adjacent property, depositing sediment and eroding the soil, soil testing was also conducted on the plaintiff's property. *Id.* at 1001-02. The soil samples revealed contamination of PCB's and heavy metals. *Id.* at 1002. Surface water also ran off of the defendant's property into an unnamed stream. *Id.* The plaintiff's produced photographs of the defendant's property showing debris piles and erosion gullies leading from the property to the stream. *Id.* at 1009. The court held that in light of the possibility of pollution traveling from the defendant's property to the stream through the erosion gullies, the debris piles qualified as a point source under the CWA. *Id.*

Gravity flow, natural erosion features, or industrial debris piles may all qualify as point sources if human effort is involved in their collection or channeling and that human effort was the means which led to the result of pollution entering a navigable water of the United States. *Abston*, 620 F.2d at *45-46; Reynolds,* 246 F. Supp. 2d at 457*; Parker*, 386 F.3d at 1009.

In the instant case, Maleau operated a gold mining and extraction operation from which he transported mining overburden and slag debris and collected them into debris piles on his property adjacent to Ditch C-1. (R. 5). When it rained, water percolated through the piles becoming laden with arsenic and the water discharged into Ditch C-1 through gravity erosion channels. (R. 5). Similar to *Abston*, Maleau collected mining overburden into piles which discharged pollutants through surface runoff into navigable waters during times of precipitation. (R. 5); 620 F.2d at 43. Since Maleau's human activity was involved in the initial collection of the debris material, then gravity flow resulting in polluted discharge into a navigable body should constitute a point source. *See Abston*, 620 F.2d at 45-46; *Reynolds*, 246 F. Supp 2d at 457.

Maleau's debris piles conveyed arsenic into Ditch C-1, a navigable water, through naturally made erosion ditches. (R. 5). Even though the erosion ditches were not man-made, Maleau should be held liable for the discharge of pollution. (R. 5). His human efforts in collecting debris piles were the means that ultimately led to pollution entering Ditch C-1. (R. 5). This is because the pollution existed in an entirely different county until Maleau transported and collected it at his property adjacent to Ditch C-1. (R. 5);*See Abston*, 620 F.2d at 45-46; *Lucas*, 516 F.3d at 336. Even though the discharge was unintentional, Maleau cannot evade liability since the arsenic would not have been discharged into Ditch C-1 but for his collection of the mining debris into piles. *See Abston*, 620 F.2d at 45-46; *Lucas*, 516 F.3d at 336.

The instant case is also similar to *Parker*, where rain water collected in industrial debris piles qualified as a point source when pollution was ultimately discharged into an stream through erosion gullies. 386 F.3d at 1001, 1009. Maleau's mining operation is undisputedly an industrial operation and he gathered industrial debris of overburden and slag into piles in which storm water collected. R. 5. The rain water eventually discharged arsenic into Ditch C-1 through both

groundwater percolation and transport via erosion ditches, qualifying Maleau's debris piles as point sources under *Parker*. 386 F.3d at 1009.

Alternatively, Maleau and Progress might argue that mining overburden debris piles are not explicitly listed under section 502(14) so they should not be considered point sources at all. 33 U.S.C. § 1362(14). However, this argument will fail for two reasons. First, Congress intended the definition of point source to be interpreted very broadly; this is evidenced by federal courts nationwide qualifying point sources that are not explicitly listed in the CWA. *See Dague,* 935 F.2d at 1354; *United States v. West Indies Transp., Inc.,* 127 F.3d 299, 300 (3d Cir.1997); *Abston*, 620 F.2d at 45-46; *Henry Bosma Dairy*, 305 F.3d at 955; *see Parker*, 386 F.3d at 1009. *See also Avoyelles*, 715 F.2d at 922; *Reynolds*, 246 F. Supp 2d at 457 (finding that gravity flow can qualify as a point source). This court should broadly interpret point sources by not restricting the definition to only those examples listed in 33 U.S.C. § 1362(14). Secondly, if Congress had intended for debris piles to be disqualified from consideration as point sources, it would have included "debris piles" in its explicit list of exclusions. 33 U.S.C. § 1362(14).

Maleau and Progress might also argue that Ditch C-1 is a point source so Maleau's debris piles cannot also be a point source. This argument fails because a point source must be a "*discernible*, *confined,* discrete conveyance … from which pollutants are or may be discharged.. 33 U.S.C. § 1362(14) [emphasis added]. Classifying an entire water body, such as Ditch C-1, as a point source would negate the intent of the CWA because a point source must be identifiable. 33 U.S.C. § 1362(14). If Ditch C-1 was considered a point source, it would be nearly impossible to discern from where pollutants were being discharged. Also, Ditch C-1 is not a confined discharge of arsenic, so it fails the second element necessary to prove that a point source exists. Finally, the EPA has interpreted discharge to include "additions of pollutants into waters of the United States from: surface runoff which is collected or channelled [sic] by man." 40 C.F.R. § 122.2. Since the EPA's interpretation of the CWA is reasonable, it is entitled to deference. *See Chevron,* 467 U.S. at 844. Ditch C-1 is unchannelled and uncollected by man so, statutorily, it is not considered a point source. Also, as noted earlier, the *Rapanos* plurality suggested that "the

definition of 'discharge' would make little sense if the two categories were overlapping." 547 U.S. at 735. Furthermore, the court stated that "the definitions thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories." *Id.* at 735. Therefore, this court should affirm the lower court's statement, made in reliance on *Rapanos*, that "a ditch cannot be simultaneously two elements in the water pollution offense." (R. 9).

Therefore, Maleau's overburden debris piles qualify as point sources because Maleau initially collected the debris that led to the gravity flow discharge of arsenic into Ditch C-1 through an erosion gully. (R. 5). Since Maleau was the means that lead to the pollution which would not have occurred but for his human efforts, this Court should reverse the lower court's finding and hold that Maleau's debris piles are point sources.

3. Bonhomme did not violate the CWA when arsenic polluted water moved through a culvert on his property because he was merely transferring water between two hyrdrologically indistinct water bodies.

To violate the CWA, a party must: (1) discharge (2) a pollutant (3) to navigable waters (4) from a point source (5) without a NPDES permit. *Reynolds*, 246 F. Supp. 2d at 454. For Bonhomme to be liable for CWA violation, he must have discharged arsenic into Reedy Creek through his culvert without acquiring the required NPDES permit. If any of these elements fail, then Bonhomme will not be liable for a violation of CWA. Bonhomme cannot be liable for a CWA violation because he did not initially discharge the arsenic, but merely transferred it from Ditch C-1 to Reedy Creek, and therefore did not require an NPDES permit.

a. Under the EPA's interpretation, Bonhomme is not liable for violating the CWA because he merely transferred pollution between water ways which does not require a NPDES permit.

In 2008, the EPA adopted a new regulation clarifying whether, when referring to the discharge of pollutants under the CWA, "any addition of any pollutant *to navigable waters* from any point source" meant any addition to *any* navigable water or navigable waters generally. 33 U.S.C. § 1362(12) [emphasis added]; *Friends of Everglades,* 570 F.3d at 1218-19. In the

regulation, the EPA interpreted "navigable waters" as a unified body and that water transfers between navigable waters are "not subject to regulation under the [NPDES] permitting program." *Friends of Everglades,* 570 F.3d at 1218-19. Water transfers are defined "as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Therefore, under the EPA's interpretation, addition of a pollutant only occurs at the initial discharge and there would be no subsequent addition when polluted water is transferred between water ways. *Friends of Everglades*, 570 F.3d at 1217. As long as the polluted water is not subject to intervening use, then a NPDES permit is not required because the party would not be adding new pollution. *Id.* If there was no pollution discharge, a party could not violate the CWA. *Id.*

Congress has not directly spoken to the exact meaning of navigable waters in the CWA so the interpretation of the EPA is entitled deference as long as the construction is reasonable. *Friends of Everglades*, 570 F.3d at 1228; *Chevron,* 467 U.S. at 843. Since Congress leaves open the possibility to read the CWA discharge statute as referring to each navigable water way as either separate or unified, the EPA's interpretation of "navigable waters" should be given deference. *Id.*; 33 U.S.C. § 1362(12).

In the instant case, Bonhomme merely transferred polluted water from Ditch C-1 through his culvert into Reedy Creek. The arsenic was present in Ditch C-1 before it reached the culvert on Bonhomme's property so the passive transfer of water through the culvert does not require an NPDES permit because Bonhomme did not subject the polluted water to any intervening use. 40 C.F.R. § 122.3(i); *Friends of Everglades*, 570 F.3d at 1228. Since no NPDES permit is required for Bonhomme's water transfer under the EPA's regulation, Bonhomme has not fulfilled the elements necessary to find him liable. 40 C.F.R. § 122.3(i); *Friends of Everglades*, 570 F.3d at 1228.

b. Even if the EPA's regulation is not given deference, Bonhomme is not liable for violating the CWA by allowing arsenic to pass through his

culvert into Reedy Creek because Ditch C-1 and Reedy Creek are hydrologically indistinguishable.

Moving a pollutant through a point source between navigable waters that are hydrologically indistinguishable does not violate the CWA. *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004); *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 712-13 (2013). Also, as previously noted, in *Riverside*, the Court recognized that drawing boundaries between various types of "waters" is "inherently ambiguous." 474 U.S. at 132. In *Los Angeles*, pollution was present in a waterway with concrete lining. 133 S. Ct. at 712. That pollution then flowed downstream where the water way was no longer lined in concrete and the plaintiff's alleged that once the water entered into unlined areas, it constituted a discharge in violation of the CWA. *Id.* The court held that no additional discharge of pollutants occurred when polluted water flowed from one portion of a waterway, "through a concrete channel," and ended in a "lower portion of the same river." *Id.* at 712-713.

Bonhomme is not liable for violating the CWA because Ditch C-1 and Reedy Creek are hydrologically indistinguishable so he does not need an NPDES permit to transfer pollution between them via his culvert. *S. Florida Water Mgmt. Dist.,* 541 U.S. at 105; *Los Angeles Cnty. Flood Control Dist.*, 133 S. Ct. at 712-13. Groundwater and rainwater are the main components of Ditch C-1. (R. 5). When considering the close geographical proximity of Ditch C-1 and Reedy Creek, that close water boundaries are inherently ambiguous, and the fact that Ditch C-1 empties into Reedy Creek, it is highly likely that Ditch C-1 and Reedy Creek have similar composition. (R. 5); *Riverside,* 474 U.S. at 132. Thus, moving water from one part of the waterway, Ditch C-1, to another, Reedy Creek, "would not be considered addition of pollutants" just as if "one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *S. Florida Water Mgmt. Dist.,* 541 U.S. at 109-110.

It may be argued that Bonhomme is liable for violating the CWA because, in *S. Florida Water Mgmt. Dist.,* the court held that liability can attach to the owner of a point source that is

not the original source of a pollutant if the pollutant is being added to a hydrologically distinct navigable body. *S. Florida Water Mgmt. Dist.,* 541 U.S. at 105. However, this interpretation is no longer valid in light of the recently adopted EPA regulation, 40 C.F.R. § 122.3(i). Even if this court does not give deference to the EPA's regulation and follows precedent set forth in *S. Florida Water Mgmt. Dist.*, Bonhomme is still not liable for violating the CWA because Ditch C-1 and Reedy Creek are hydrologically indistinguishable since they are essentially the different parts of the same water body. *Id.*; *Los Angeles Cnty. Flood Control Dist.*, 133 S. Ct. at 712-13.

Therefore, this court should reverse the lower court's finding that Bonhomme is liable for discharging arsenic through his culvert because Bonhomme did not violate the CWA. Transferring arsenic polluted water between Ditch C-1 and Reedy Creek is not a violation because their boundaries are inherently ambiguous and they are hydrologically indistinguishable waters. Even if the waters are hydrologically distinct, this court should defer to the EPA's regulation which allows Bonhomme to transfer water between Ditch C-1 and Reedy Creek freely without attaching liability.

CONCLUSION

This Court should hold that Bonhomme is the real party in interest because he has standing to bring this suit. Bonhomme is considered a "citizen" for purposes of a section 505 citizen suit provision of the CWA. Maleau's mining waste piles are considered "point sources" because they discharged arsenic into Ditch C-1, a navigable waterway. Both Ditch C-1 and Reedy Creek are considered navigable waterways because they are "waters of the United States." Bonhomme is not liable for a CWA violation because he transferred, not added, arsenic into a navigable waterway. Therefore this Court should reverse the district court's decision to dismiss this case and remand for further proceedings.

Respectfully submitted,

_____

Counsel for Jacques Bonhomme