TEAM #58

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C. A. No. 13-01234

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee

v.

JACQUES BONHOMME

Defendant-Appellant, Cross-Appellee

On Appeal from the Order of the United States District Court for the District of Progress, D.C. No. 155-CV-2012 and D.C. No. 165-CV-212, Dated July 23, 2012.

BRIEF FOR SHIFTY MALEAU, Defendant-Appellant, Cross-Appellee

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STATEMENT OF JURISDICTION

Appellant Jacques Bonhomme filed a complaint in the United States District Court for the District of Progress under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C § 1365. The State of Progress filed a citizen suit against Bonhomme, alleging violation of the CWA, in which Maleau intervened as a matter of right. 33 U.S.C §§ 1365(b)(1)(B). Progress and Maleau moved to consolidate their case with *Bonhomme v. Maleau*. D.C. No. 155-CV-2012 and D.C. 165-CV-2012 The Court granted the motion to consolidate. (Rec. 5)

This appeal is from an Opinion and Order entered by the district court on July 23, 2012 dismissing all of Bonhomme's claims against Maleau because he is not the proper plaintiff and Bonhommes's motion to dismiss because Progress adequately stated a cause of action. (Rec. 9). The district court's order is a final judgment and this Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2006).

ISSUES PRESENTED FOR APPEAL

The appeal presents the following issues:

I. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33. U.S.C. § 1331(a).

II. Whether Bonhomme—a foreign national—is a "citizen" under CWA § 505, 33 U.S.C. 1365, who may bring suit against Maleau.

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

IV. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA §§ 502(7), (12), 33 U.S.C. §§ 1362(7), (14).

V. Whether Reedy Creek is a "navigable water/water of the United States" under CWA §§ 502(7), (12), 33 U.S.C. §§ 1362(7), (14).

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

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

This is an appeal from an Order of the District Court for the District of Progress dismissing Bonhomme's suit against Maleau and denying Bonhomme's motion to dismiss Progress' suit against Bonhomme. (Rec. 4). Bonhomme brought suit against Maleau under the Clean Water Act's (CWA) citizen suit provision requesting all relief available under § 1365, to stop Maleau from depositing his slag piles on Maleau's property in Progress. (Rec. 4). Bonhomme supported his claim against Maleau with a detailed complaint alleging Maleau violated the CWA, 33 U.S.C. §§1251-1387 (2012), by depositing arsenic into Ditch C-1. (Rec. 5).

Subsequent to Bonhomme's suit against Maleau, Progress instituted a citizen suit alleging that Bonhomme violated the CWA by discharging arsenic from a culvert on Bonhomme's property. *Id*. Maleau intervened as a matter of right and the Court granted consolidation because the facts and the law are the same. *Id.* The defendants in each suit filed motions to dismiss. *Id.*

The district court ultimately dismissed Bonhomme's suit against Maleau. (Rec. 10). Bonhomme is not a proper plaintiff, and denied Bonhomme's motion to dismiss because Progress adequately stated a cause of action. *Id.* Bonhomme presently seeks judicial review of the trail court's dismissal of his suit against Maleau and the court's denial of his motion to dismiss Progress's suit against Bonhomme.

II. FACTUAL BACKGROUND

Shifty Maleau keeps overburden and slag piles from an off-site mining operation, on his property in Jefferson County, Progress. The property is along side Ditch C-1, a ditch used to drain the surrounding land for agricultural use. Ditch C-1 is on average three feet wide and one foot deep. The ditch contains running water except during annual periods of drought lasting several weeks to three months. When it rains, rainwater runoff flows down the piles and percolates through them, eventually discharging through channels eroded by gravity from the waste piles into Ditch C-1, leaching and carrying arsenic, an undisputed pollutant, from the piles into the water in the ditch. Ditch C-1 begins before Maleau's property, runs three miles through a number of agricultural properties, then through a culvert under a road on Jacques Bonhomme's property discharging the water into Reedy Creek. Reedy Creek enters Progress, runs along side Bonhomme's property and terminates in Wildman Marsh, a national wildlife refuge. A restrictive covenant in Bonhomme and Maleau's deeds require them to maintain the Ditch on their properties.

Bonhomme is on the board of directors and is the largest shareholder of Precious Minerals International ("PMI"). Bonhomme has a lodge on his property that is used for hunting parties primarily composed of PMI clients and associates. Bonhomme alleges that arsenic flowing from Maleau's waste piles into the marsh has fouled the waters, and as a result, he has had to decrease the number of his hunting parties.

Testing, paid for by PMI, revealed that there was no arsenic in Ditch C-1 above Maleau's property. As the water flows along the Ditch C-1 below Maleau's property towards Reedy Creek the amount of arsenic decreases in proportion to the amount of water in the Ditch. In Reedy Creek arsenic is undetectable above Bonhomme's culvert.

SUMMARY OF ARGUMENTS

Precious Minerals International ("PMI") is the proper plaintiff in this case. PMI, not Bonhomme, has suffered the requisite injuries and possesses the right under substantive law to bring a suit against Maleau for violating § 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a); therefore PMI is the real party in interest under the Federal Rules of Civil Procedure and the suit was properly dismissed.

Bonhomme is not a citizen of the United States. The CWA has expanded the term "citizen" in order to bring a suit for violation of the Act but Bonhomme does not fit under this broadened term, meant to include corporations, partnerships and government entities. If Congress desired to broaden the term to include foreign nationals it could have done so expressly.

Maleau's mining waste piles are not "point sources" under the Clean Water Act. In order for there to be a violation under the CWA there must be a discharge from a "point source." There has been no conveyance or collection of the storm water runoff from Maleau's waste piles to create a discrete "point source." The facts of this case, involving stormwater runoff, are similar to those in *Ecological Rights Foundation*, and this court should find as they did. Finally if Maleau's piles were found to be "point sources" they would fall under the CWA specific exclusion for agricultural stormwater discharge.

Ditch C-1 is a not "navigable water or water of the United States" under the CWA. In order for there to be a violation of the CWA there must be pollutants discharged into "navigable water." The ditch is man-made, and does not contain a relatively permanent flow. Ditch C-1 cannot be both under the definition of "point source" and "navigable water" thus satisfying independently two separate requirements of a violation. Finally, for the reasons Ditch C-1 cannot be a "water of the United States" it can also not be considered a tributary.

Reedy creek does not fit under the traditional understanding of the term "navigable water," as it is not navigable in fact. The portion of Reedy Creek, as well as the wetlands in Wildman Marsh are also isolated which would not include them in the CWA definition of "water of the United States."

Finally, if anyone is to be found in violation of the CWA it is Bonhomme. Bonhomme has violated the CWA by adding arsenic to Reedy Creek through a culvert on his property. The culvert is a point source and the flow of arsenic through it counts as an "addition." If the court finds that Ditch C-1 is a navigable water it should not apply the

EPA's Water Transfer Rule, either because the statute is not ambiguous, nor would the EPA's interpretation be reasonable.

STANDARD OF REVIEW

This appeal turns on questions of statutory construction and interpretation, "a quintessential question of law" subject to *de novo* review. *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010); *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999).

ARGUMENT

1. PMI, not Bonhomme, is the real party in interest because it has suffered the requisite injuries and possesses the right under substantive law to bring suit against Maleau.

Precious Minerals International ("PMI") is the proper plaintiff in the case at bar. Federal authorities agree that the real party in interest is the party who, by substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery. *First Nat. Bank of Chicago v. Mottola*, 302 F. Supp. 785, 791 (N.D. Ill. 1969) *aff'd sub nom*. *First Nat. Bank of Chicago v. Ettlinger*, 465 F.2d 343 (7th Cir. 1972). Here, it is clear that although Bonhomme may benefit from a successful action under substantive law, he does not possess the right as a non-citizen to bring suit under the Clean Water Act ("CWA"). The CWA allows only citizens to sue as

is clear from the plain language of the statute. 33 U.S.C. § 1365. Bonhomme is not a citizen of the United States, therefore he is not the real party in interest primarily because he does not have the right, under substantive law, to enforce this suit. PMI possessed this right but did not exercise it in a timely manner therefore the case was properly dismissed.

PMI is the real party in interest because Bonhomme has not shown injury apart from that suffered in association with PMI. Courts have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 183 (2000). The record shows that Bonhomme does not live at his lodge and it is instead used for hunting parties composed of primarily business clients and associates of PMI. (Rec. 7-8). Therefore, Bonhomme's only injuries are those he suffers collaterally through PMI's loss of use. This is supported by the fact that the decrease in hunting parties has been mirrored by a decline in PMI's profits. (Rec. 6). While Bonhomme may claim these "recreational injuries" are his own, they are in fact PMI's losses.

The purpose of the real party in interest rule is to enable the defendant to present his defenses against the proper persons, to avoid subsequent suits and to proceed to finality of judgment. *In re Energy Co-op., Inc.*, 17 B.R. 600, 609 (Bankr. N.D. Ill. 1982). Not prosecuting this case in the name of PMI does not allow Maleau to present his defenses to the proper persons and may even unjustly expose him to future lawsuits. PMI, who is both a citizen within the definition of the CWA and has suffered the requisite injury, has the only valid claim.[1]

[1] PMI is incorporated in Delaware and headquartered in New York City.

Since Bonhomme and PMI's injuries are essentially the same, Maleau may be subject to litigation of the same facts and issues twice. This is exactly what FRCP 17 attempts to protect against, "the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover." Fed. R. Civ. P. 17 advisory committee's notes (1966 amendment). Allowing Bonhomme to bring suit for injuries that belong to PMI's would illegally disallow Maleau the protection against subsequent suits FRCP 17 provides.

Finally, the real party in interest objection is not founded on Article III standing principles, but is a prudential rule intended to ensure that the party bringing the action is the party entitled to make the claim. *In re Rodeo Canon Dev. Corp.*, 362 F.3d 603, 607 (9th Cir. 2004) *opinion withdrawn and superseded on other grounds*, 126 F. App'x 353 (9th Cir. 2005). PMI – not Bonhomme – meets all of the requisites for this citizen suit and is entitled to make this claim. Therefore, PMI is the proper party and the "Real Party in Interest."

FRCP 17 is clear, if the real party in interest objection is made in a timely manner and the Real Party is not substituted within a reasonable time the suit should be dismissed. Fed. R. Civ. P. 17(3). After Maleau's objection, PMI was not substituted despite more than sufficient time. As such the judgment of the trial court, to dismiss the suit, was proper.

2. Bonhomme cannot maintain a citizen suit because he is not a citizen of the United States.

Bonhomme cannot be a plaintiff in this suit because he is not a citizen. The United States Constitution states that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." U.S. Const. Amend. XIV, § 1. Merriam Webster's dictionary defines "citizen" as "a person who legally belongs to a country." *Citizen Definition*, merriam-webster.com, http://www.merriam-webster.com/dictionary/citizen (last visited October 19th 2013). Bonhomme is not a citizen because he was neither born, nor naturalized in the United States, nor legally belongs to the United States.

The CWA allows for "citizens" to bring suit against violators of the statute. Bonhomme is correct that "citizen" is defined in the statute to mean "a person or person having an interest which is or may be adversely affected." 33 U.S.C. §1365(g). Congress intended to broaden potential citizen suit plaintiffs beyond individuals. *Sierra Club v. SCM Corp*., 747 F.2d 99, 104 (2d Cir. 1984). Bonhomme incorrectly argues that "citizen" therefore means any person without regard to nationality because he misconceives Congresses' intent when it broadened "citizen" by defining it as "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g).

The Supreme Court in *Sierra Club v. Morton*, contemplated the standing of an environmental group under the Administrative Procedure Act, in their objection to a federal forest service's plan. *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972). The Court refused the environmental group standing on the basis that standing is an issue of,

"[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Id* at 731. The issue in front of the Court in *Morton* was whether or not an environmental group could sustain an injury by virtue of its individual members. The Court was not concerned with nationality.

The Court in *Sierra Club v. SCM*, stated that "[t]he legislative history thus leads to the conclusion that § 505(g)'s definition of 'citizen' as a 'person or persons having an interest which is or may be adversely affected,' means those who can claim injury in fact within the meaning of *Morton*." *Sierra Club v. SCM Corp*., 747 F.2d at 104-05. When Congress adopted the definition of "citizen" as it was reflected in *Morton*, it intended the use of the word "person" to broaden the potential citizen plaintiffs to include "corporations, partnerships, government entities, political subdivisions of the state, or any interstate body," which would have included the environmental organization at issue. 33 U.S.C. § 1362(5).

Shortly after *Morton*, Congress passed the Clean Water Act. The standing provision of the CWA citizen suit was drafted by a Conference Committee, which stated that "the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*." *Sierra Club v. SCM Corp.*, 747 F.2d at 105 (quoting S. Conf. Rep. No. 1236, 92d Cong., 2d Sess.)

Bonhomme is wrong to argue that the broadening of the definition of "citizen" by incorporation of the word "person" was intended to include an individual regardless of their nationality because the Court in *Morton* did not contemplate nationality. The Court observed in *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corp of Eng'rs*,

("SWANCC") that "[i]t is one thing to give a word limited effect and quite another to give it no effect whatever." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001). The Court in *SWANCC* found that by defining "navigable waters" as the expanded concept of "waters of the United States," section 502(7), the term "navigable" was not deprived of all meaning. *Id.* Similarly, in the instant case, the definition of "citizen" as the expanded concept of entities other than individuals, does not deprive the word of all its meaning. Citizen still retains the traditional meaning that draws a distinction between citizens and non-citizens because to hold otherwise would deprive the word of all its meaning.

a. If Congress desired to broaden potential plaintiff citizen suits to foreign nationals, it could have done so expressly.

Congress could have expressly extended citizen suits to foreign nationals by using the word "person" in place of the word "citizen." In contrast to the CWA, reference to the citizen suit provisions of many other statutes illustrate this point. Under the citizen suit provisions of the Clean Air Act, the Resource Conservation and Recovery Act, the Endangered Species Act, the Comprehensive Environmental Response Compensation and Liability Act, Congress provided that "any person" may bring suit against a violator of the Act. 42 U.S.C. §§ 7604, 6972; 16 U.S.C. §1640(g).

Moreover, Congress' use of the term "any person," within §1365 itself, is further evidence that Congress' intended that the meaning of "citizen" differ from the meaning of "person." Congress uses the term "person", one section down from its use of "citizen,"

to provide for whom a citizen suit may be brought against. If Congress had wanted broaden potential plaintiff suits beyond American Nationality, it could have easily done so by using the word "person," instead of "citizen." The Court in *Bennett v. Spear*, observed that the use of the term "person" is an "authorization of remarkable breadth when compared with the language Congress ordinarily uses." *Bennett v. Spear*, 520 U.S. 154, 155 (1997). In contrast, Congress' use of the word "citizen" must mean something less than the remarkable breadth of the word "person." The difference in §1365 is to limit potential plaintiffs, by requiring they be citizens, but broaden those liable by using the word "person."

The trail court correctly dismissed Bonhomme's suit because he is not a "citizen" for the purpose of filing a suit under the Clean Water Act. This Court should uphold the trial court's decision.

3. Maleau's mining waste piles are not "point sources" under the Clean Water Act.

Bonhomme alleges that Maleau is violating the Clean Water Act by discharging a pollutant without a permit. In order to be a violation of the Clean Water Act there must be a discharge from a "point source." 33 U.S.C. § 1362.The overburden and slag piles that Maleau has on his property are not point sources. While stormwater discharge has potential to be either a "point source" or "non-point source," in the present case it is the latter, which is not subject to federal regulation. Further, the piles on Maleau's do not have a "discernible, confined or discrete conveyance," which is required by the Clean Water Act definition of a "point source." 33 U.S.C. § 1362(14). Finally, even if this court

finds that these waste piles are unique and names them point sources they will likely fall under an established exemption for agricultural stormwater runoff. The court below did not err in finding the waste piles on Maleau's property are not point sources and granting the motion to dismiss on this issue.

The Clean Water Act prohibits the discharge of any pollutant without a permit. 33 U.S.C. § 1311(a). "Discharge of a pollutant" is clearly defined in the act as "any addition of any pollutant to navigable waters from a point source. 33 U.S.C. § 1362 (12). "Addition," while not defined in the act, has been accepted by the 2nd Circuit court to mean that a "point source must introduce the pollutant into navigable water from the outside world." *Catskill Mountains Chapter of Trout Unlimited, Inc. v City of New York*, 273 F.3d 481, 491 (2d Cir. 2001). Finally, the Clean Water Act defines the term point source as "any discernible, confined and discrete conveyance" offering such examples as a "pipe, ditch, channel, tunnel, etc.". 33 U.S.C. § 1362(14). Bonhomme has alleged that the overburden piles on Maleau's are point sources. The facts of this case show us however that it is only when it rains that rainwater runoff flows down the piles and percolates through them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying arsenic from the piles into the water in the Ditch. (Rec. 5). "Simple erosion over the material surface, resulting in the discharge water and other materials into navigable waters, does not constitute a point source discharge, absent some effort to change the surface." *Sierra Club v. Abston Const. Co. Inc*., 620 F.2d 41, 44 (5th Cir.1980). The rainwater runoff on Maleau's land is not through a conveyance, nor a point source, thus Maleau is not in violation of the Clean Water Act.

The facts do not show, and Bonhomme has not alleged, that stormwater runoff from the piles was collected in channels and then conveyed to the waters of the United States, or that the waste piles discharge directly into such waters. He may not be allowed to amend his complaint through arguments on appeal. The court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory. *Ecological Rights Foundation v. Pacific Gas and Elec. Co*., 713 F.3d 502, 511 (9th Cir. 2013). The lower court plainly did not err in finding that Maleau's over burden piles did not constitute a point source.

Congress has deliberately distinguished between point source and nonpoint source discharges and only given the EPA authority to regulate the former. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). The overburden piles on Maleau's property do not discharge pollutants directly, but pollutants reach Ditch C-1 through the application of stormwater. "Stormwater runoff is a 'nonpoint or point source...depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts channels, and similar conveyances (and is thus a point source)." *Ecological Rights Foundation*, 713 F.3d at 508. The runoff from the piles on Maleau's property ran off naturally. There was no effort by Maleau to direct, store, or impede the flow of water. The stormwater runoff in this case is a nonpoint source.

a. No conveyance or collection of water has taken place, thus no point source is present.

Bonhomme will likely argue that channels exist between the piles, conveying the water to the ditch. The facts here though consist of natural erosion, or flow, caused by the rainwater, again we mention *Sierra Club v. Abston Const. Co. Inc.* and its holding that simple erosion does not constitute a point source discharge, absent some effort to change the surface. *Sierra Club v. Abston Const. Co. Inc.*, 620 F.2d at 44. Broad though the definition of "point source" may be the Ninth Circuit has offered the opinion that it does not include unchanneled and uncollected surface waters. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Furthermore, "gravity flow, resulting in discharge, may be part of a point source discharge *if the miner at least initially collected or channeled the water*." *Sierra Club v. Abston Const. Co. Inc*., 620 F.2d at 45. Bonhomme has not alleged, nor do the facts show that Maleau has in any way channeled or collected water.

Additionally, the placement of the word "channels" following "ditches," and "culverts" by the court in *Ecological Rights Foundation,* tends to show that the court is referring to man-made conveyances. *Ecological Rights Foundation* at 509. The same grouping of words happens by the court in *Appalachian*. The use of the words, "unchanneled and uncollected," imply intent or effort by an individual to control the water. As was simply put by the Ninth Circuit "Congress intended 'runoff caused primarily by rainfall around activities that employ or create pollutants' to be a nonpoint source." *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010).

The courts have furthered this thought by citing that "diffuse runoff, such as rainwater that *is not channeled through a point source*, is considered nonpoint source pollution and is not subject to federal regulation." *Trustees for Alaska v. EPA,* 749 F.2d 549, 558 (9th Cir. 1984) *emphasis added*. In the case at bar there is no discrete conveyance of the stormwater so the piles are not subject to EPA regulation.

b. The facts here are similar to those of *Ecological Rights Foundation*, this court should also find that no point source has been established.

As in the case of *Ecological Rights Foundation* the allegations of general stormwater run off here do not establish a "point source" discharge, as there is no "discernible, confined or discrete conveyance." *Ecological Rights Foundation*, 713 F.3d 503.

The court in *Ecological Rights* mentions that "stormwater presents a unique problem under the CWA because it is a source of water pollution but is not 'inherently a nonpoint or point source." *Id.* at 505. The facts of the case allege that rain fell on and around the defendants utility poles and became contaminated with wood preservatives. The preservative, a pollutant, was "carried by storm water runoff discharged from the poles to San Francisco Bay." *Id*. at 509.

The court reasons that, contrary to the plaintiff's argument, solid wood utility poles were not things specifically mentioned by the CWA as point sources, they were not constructed for the express purpose of storing pollutants, or moving them from one place to another, and were not undisputed point sources. The court then concluded that in the

absence of guidance from the EPA "utility poles simply are not 'discernible, confined, and discrete conveyances' that channel and control stormwater." *Id.* at 510 "Allegations of generalized stormwater runoff do not establish a "point source" discharge absent an allegation that the stormwater is discretely collected and conveyed to waters of the United States." *Id*. at 509

In the present case the waste piles are not something specifically identified by the CWA as point sources, nor were they constructed for the express purpose of storing or moving pollutants. Finally, there is no allegation that the stormwater from Maleau's property was discretely collected and conveyed by the waste piles. This court should hold that the waste piles are not point sources.

c. Maleau's waste piles cannot be a point source because the definition specifically provides an exclusion for them as a part of agricultural stormwater discharge.

Under the Clean Water Act's definition of "point source" specific language says that, "this term does not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). This exception is mirrored in the Code of Federal Regulations which provides an exception from the NPDES permit requirement for "any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands…"40 C.F.R. § 122.3(g).

The Court has said that it is "reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the

impropriety of imposing, on 'any person,' liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 507 (2d Cir. 2005). Here it is questionable that the waste piles would even be point sources regardless of the exception they are sure to meet.

Ditch C-1 is a drainage ditch dug into saturated soils to drain them sufficiently for agricultural purposes. (Rec. 5) The maintenance of Ditch C-1 is required by a restrictive covenant on the several agricultural properties along it. (Rec. 5). The water in Ditch C-1 is agricultural stormwater runoff, collected in a ditch specifically designed for that purpose, and cannot be considered a point source. The ditch is designed for agricultural runoff therefore the exemption applies.

4. Ditch C-1 is not a "navigable water/ water of the United States" under 33 U.S.C § 1362(12), (14).

One of the main provisions of the CWA provides that a "discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12)(A). "Navigable waters" is defined as "waters of the United States." 33 U.S.C. §1362(7). Bonhomme alleges that Maleau is responsible for a "discharge of a pollutant" into Ditch C-1. (Rec. 4-5) Bonhomme further argues that Ditch C-1 is a "water of the United States" and therefore Maleau is in violation of the CWA . (Rec. 8). 33 U.S.C. §1362(12). Bonhomme is wrong because the Supreme Court has held

that ditches cannot be "navigable waters." *Rapanos v. United States*, 547 U.S. 715, 735 (2006). More precisely, the Court in *Rapanos* held that "waters of the United States" does not include drainage ditches that provide drainage for rainfall. *Rapanos*, 547 U.S. at 734. Ditch C-1 is a drainage ditch that provides drainage for rainfall. (Rec. 5).

Two definitions from the Act are pertinent to this discussion. 1) A "point source," is defined as "discernible, confined and discrete conveyance, including . . . ditch[es] . . . from which pollutants are or may be discharged." 33 U.S.C. §1362(14). 2) The "discharge of a pollutant," is defined as " any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). It was clear to the Supreme Court that "the separate classification of 'ditch[es]'. . .shows that [they are] by and large, *not* 'waters of the United States." *Rapanos*, 547 U.S. at 735. Thus, the Court held that the separate "definitions thus conceive of 'point sources' and 'navigable waters' as separate distinct categories" and therefore ditches cannot be at the same time, "point sources," and "waters of the United States." *Id*.

The Court in *Rapanos* held that "'waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as 'streams[,]. . .oceans, rivers, [and] lakes." *Rapanos*, 547 U.S. at 739 (Quoting Webster's 2nd 2882). Ditch C-1 does not fall under any of the categories of "geographic features" listed by the Court capable of being "waters of the United States" because it is a ditch that drains storm water from agricultural fields. (Rec. 5) Moreover, Ditch C-1 is not "relatively permanent" because it goes through periods of draught that last anywhere from several weeks to three months. (Rec. 5). Lastly, the Court stated that applying the definition of "waters of the

United States" to "man-made drainage ditches . . . stretched the term 'waters of the United States' beyond parody." *Rapanos*, 547 U.S. at 734. Ditch C-1 is such a man made drainage ditch because it was constructed by an association of landowners as a drainage ditch, to drain the soil for agricultural use. (Rec. 5).

In sum, Ditch C-1 is categorically different from "navigable water/ waters of the United States, and does not have any of the defining characteristics that would categorize it as such.

a. Ditch C-1 is not a "tributary."

Bonhomme and Progress' argue that Ditch C-1 is "water of the United States" by virtue of being a tributary. (Rec. 8-9). The CWA does not explicitly define tributary. However, it does state that tributaries subject to the CWA's jurisdiction are included within the definition of "*Waters of the United States."* 40 C.F.R. § 122.2. Ditch C-1 cannot be a tributary because it cannot be a "water of the United States." *Rapanos*, 547 U.S. at 736. Ditch C-1 is not a tributary because it is a ditch, and ditches are categorized as point sources. 40 C.F.R. § 122.2; 33 U.S.C. §1362(14).

Alternatively, if the Court finds that Ditch C-1 is a tributary they should follow the Fifth Circuit in *United States v. Needham*, holding that "[t]he CWA. . .[is] not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters." *United States v. Needham,* 354 F.3d 340, 345 (5th Cir. 2003). Ditch C-1 is not navigable because it is a mere 3 feet across and 1 foot deep, never floated a boat, and is too small to do so in the

future. (Rec. 9). Nor is Ditch C-1 adjacent to a navigable water, because even if this Court should find that Reedy Creek is a "navigable water," Bonhomme's culvert is between the ditch and the creek.

The trial court correctly held that Ditch C-1 is not a "water of the United States." This Court should uphold the decision of the trial court.

5. Reedy creek does not fit the traditional meaning of "navigable waters."

The term "navigable water" has been in use in the legal system long before the Clean Water Act was enacted.[2] For nearly a century prior to the CWA, courts had interpreted the phrase "navigable waters of the United States" to refer to interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *Rapanos*, 547 U.S. at 723. The Supreme Court at this time understood that "the legal concept of navigability embraced both public and private interests. It is not determined by a formula which fits every type of stream under all circumstances and at all times." *U.S. v Appalachian Elec. Power Co*., 311 U.S. 377, 404 (1940). In this case the Supreme Court recognized the Water Power Act's definition of "navigable waters" as "those which either in their natural or improved condition are used or suitable for use." *Id.*

In the case at bar, as was stated in the lower courts decision, no one has alleged that Reedy Creek is, or ever has been used for waterborne transportation, or could be so used with reasonable improvements. (Rec. 9). These are the attributes that define the traditional "navigable waters." *See Appalachian Electric Power Co*., 311 U.S. 377.

[2] *See Generally* Rivers and Harbors Act and the Federal Water Power Act

Within the Clean Water Act the definition given for "navigable water" is "waters of the United States." 33 U.S.C. §1362(7). The Corps of Engineers and the court systems have expanded the breadth of this definition. This has led to lengthy litigation, with case specific analysis, the most recent and developed of which is *Rapanos v. United States*. The United States Supreme Court notes the meaning of "navigable waters" in the Act is broader than the traditional understanding of that term, yet they also remind us of the emphasis that "the qualifier 'navigable' is not devoid of significance." *Rapanos,* 547 U.S. at 731.

"Waters of the United States" is a definition that requires a careful analysis but as the court below correctly stated, Reedy Creek has not been alleged to meet the traditional definition of navigability, which is a critical piece of the analysis and should hold water in this court's decision.

a. The portion of Reedy Creek downstream of the culvert, and the wetlands in Wildman Marsh are isolated and not included under the CWA definition of "navigable water"

Reedy Creek flows into the State of Progress just before it reaches Bonhomme's property; Reedy Creek then ends in Wildman Marsh. (Rec. 5). In Reedy Creek above the discharge point of Ditch C-1 arsenic is undetectable, yet below the discharge point—located on Bonhomme's property—there is arsenic present. *Id* at 6. Arsenic is detectable at lower levels in Wildman Marsh. These facts show what common sense demands, that

no arsenic is travelling upstream, or out of state, nor into any traditionally navigable water.

Congress passed the Clean Water Act in 1972; the Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). While navigability is not always required in the traditional sense it is one thing to give a word limited effect and quite another to give it no effect whatever. *SWANCC,* 531 U.S. at 172. There are times, such as this, when the traditional sense can provide guidance. Nonnavigable, isolated, intrastate waters, which do not actually abut on a navigable waterway, are not included as waters of the United States. *Rapanos v. U.S.*, 547 U.S. at 725. The portion of Reedy Creek that follows the discharge of Ditch C-1 is not navigable, nor is the wetland in Wildman Marsh. It stands then that this water, which only flows *towards* the marsh, is isolated from any other waters and should not be considered "water of the United States".

"When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." *Stillwater of Crown Point Homeowner's Ass'n, Inc. v. Kovich*, 820 F.Supp.2d 859, 898 (N.D. Ind. 2011). The court here was discussing Justice Kennedy's test set forth in *Rapanos.*

> The test he proposed is that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable water,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on the water quality are speculative or insubstantial, they fall outside the zone fairly

> encompassed by the statutory term 'navigable waters.' This test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases, though not in all because Justice Kennedy also said that "by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit application of the statute as far from traditional federal authority as are the waters it deems beyond the statute's reach."

Stillwater of Crown Point Homeowner's Ass'n, Inc, 820 F.Supp.2d at 898

This narrow test can thus be applied not only to the wetlands here but also to the portion of Reedy Creek which follows Bonhomme's property to its terminus. Based on the facts on record the water and wetland here have no effect on other covered waters as they both terminate in Wildman Marsh. The plaintiffs "must prove that the contaminant-laden waters ultimately reach covered waters." *Rapanos*, 547 U.S. at 745. The plaintiff here simply has not done so.

b. Wildman Marsh is a wetland and not in the realm of "waters of the United States" that could be considered navigable waters.

The traditional term "navigable waters"—even though defined as "the waters of the United States"—carries some of its original substance: "[I]t is one thing to give a word limited effect and quite another to give it no effect whatever." *Rapanos*, 547 U.S. at 734. It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States." *Id* at 756.

In *Rapanos,* the plurality opinion provides that "the 'waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] .. oceans, rivers, [and] lakes. The plurality then articulated a two-part test for determining when adjacent wetlands are covered by the CWA: 'First, that the adjacent channel contains a 'wate[r] of the United States,' ... and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Stillwater of Crown Point Homeowner's Ass'n, Inc*, 820 F.Supp.2d at 897 (Citations Omitted). The court in *Rapanos* recites more defined precedent that "the transition from water to solid ground is not necessarily or even typically an abrupt one, and that 'the Corps must necessarily choose some point at which water ends and land begins' [the Supreme Court] upheld the Corps' interpretation of 'the waters of the United States' to include wetlands that 'actually abut[ted] on' traditional navigable waters." *Rapanos*, 547 U.S. at 724. Here, Wildman Marsh is a wetland—traditionally defined as land consisting of marshes or swamps, also as saturated *lands*—so it is categorically not a water of the United States. Further it abuts Reedy Creek which is uncontested by the facts as not a "traditional" navigable water.

As noted in the opinion of the lower court, the wetland is located in Wildman National Wildlife Refuge; National Wildlife Refuge is owned and maintained by the United States Fish and Wildlife Service. (Rec 6). Bonhomme argues that because the refuge is federal property it is therefore a "water of the United States." This understanding is not found in precedent nor backed by legal argument.

Further, the EPA's definition includes tributaries of waters of the United States. *See* 40 CFR 122.2, Lower courts have reasoned it would be difficult or impossible to prevent pollution of a navigable stream without preventing pollution of its tributaries. Unlike the wetlands mentioned in *Rapanos*, Wildman Marsh is the terminus of Reedy Creek, while the standard definition of a tributary would be a river or stream flowing into a larger river or lake. *Merriam-Webster* merriam-webster.com, http://www.merriam-webster.com/dictionary/tributary (last visited October 19th 2013). Here, any water present in the marsh marks the end of its flow. Wildman Marsh should not be considered a tributary of Reedy Creek.

6. Bonhomme violates the CWA by adding Arsenic to Reedy Creek through a culvert on his property even when he is not the source of the arsenic in Ditch C-1.

The CWA prohibits, unless otherwise allowed by permit, "the discharge of any pollutant." 33 U.S.C. § 1311. The Act "defines the discharge of any pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). It is undisputed that arsenic is a pollutant. (Rec. 8). This issue is only reached if the court finds Reedy creek to be a navigable water. Therefore, for the sake of this argument it will be assumed that Reedy Creek is a "navigable water." As such, there are two issues potentially in dispute: 1) whether the culvert is a "point source" and 2) whether the flow of arsenic through the culvert into Reedy Creek constitutes an "addition."

a. The Culvert is a Point Source.

"The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, … from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The culvert under Bonhomme's road is a point source because it is a discernible, confined and discrete conveyance. Courts have held that "[t]he definition of a point source is to be broadly interpreted." *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) rev'd in part, 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449 (1992); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir.1979). In fact, the *Dague* court found that a culvert was a "point source" under the CWA. The culvert into Reedy Creek constitutes a point source under the CWA.

b. The flow of arsenic through the culvert into Reedy Creek Constitutes an "addition."

Bonhomme disputes his liability under the CWA because he is not the source of the arsenic. The Supreme Court addressed this in *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians* and stated that the definition point sources use of conveyance, "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians,* 541 U.S. 95, 105 (2004).

Any argument that Bonhomme is not in violation of the CWA necessarily rests on the premise that he is not liable because he is not the source of the contamination. There is a line of cases arguing that polluters that discharge pollutants indirectly, through an intervening channel, are in violation of the CWA. *See e.g. United States v. Ortiz*, 427 F.3d 1278, 1281 (C.A.10 2005); *Dague v. Burlington*, 935 F.2d 1343, 1354–1355 (C.A.2 1991), rev'd on other grounds, 505 U.S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118–119 (C.A.2 1994). However, these cases have been effectively overturned by the Supreme Court's holding in *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*. Particularly, the Court explicitly stated, "the definition of 'discharge of a pollutant' contained in § 1362(12) … includes within its reach point sources that do not themselves generate pollutants." *Miccosukee*, 541 U.S. at 105. Other circuits have addressed this issue more directly stating, "root causation [is] irrelevant" in determining CWA liability. *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 168 (4th Cir. 2010); *See also 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."); *Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (same). Therefore, regardless of the source of the pollutant, Bonhomme, as the owner of the point source, responsible for the pollutants entering navigable waters and is in direct violation of the CWA.

Several courts have found parties liable under the CWA for additions even if the pollutants discharged from a point source do not emit "directly into" covered waters but

pass first "through conveyances" and then into covered waters.[3] *United States v. Velsicol Chemical Corp*., 438 F.Supp. 945, 946–947 (W.D.Tenn.1976); *see Sierra Club v. El Paso Gold Mines, Inc*., 421 F.3d 1133, 1137, 1141 (C.A.10 2005); *C.f. Rapanos*, 547 U.S. at 743. However, in each of these cases the pollutants first originated from a point source. Such is not the case here. As demonstrated, Maleau's piles are not point sources, instead the culvert is the first point source the arsenic contamination passes through. Therefore, Bonhomme, not Maleau, is both the but-for and proximate cause of the contamination. But-for his culvert the arsenic may never have entered a navigable water.

Additionally, regulations promulgated by the EPA provide support for this interpretation. Specifically, the EPA regulation states, "[T]he phrase 'addition of any pollutant' is defined as 'surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances *owned by a ... person* which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works.'" 40 C.F.R. § 122.2 (*emphasis added*). "While not a substitute for the CWA's plain language, this regulation reinforces the view that ownership of a point source will trigger liability." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d at 1144.

[3] E.g. a municipal sewer system separating the "point source" and covered navigable waters. *See United States v. Velsicol Chemical Corp.*, 438 F.Supp. 945, 946–947 (W.D.Tenn.1976).

c. If Ditch C-1 is a Navigable water the Court should not apply the EPA's Water Transfer Rule.

If Ditch C-1 is considered navigable waters, then the above analysis does not change. Bonhomme may argue that the water being transferred from Ditch C-1 through Bonhomme's culvert is exempt under the EPA's Water Transfer Rule. *See* 40 C.F.R. § 122.3 (i). However, Bonhomme did not raise this issue in the lower court therefore it has not been preserved for examination by this court. *Ecological Rights Foundation*, 713 F.3d at 511. Additionally, the EPA's Water Transfer Rule is an illegal rule that should not be afforded any deference, much less *Chevron* deference.

The Water Transfer Rule is a final rule, was promulgated under proper rule making procedure; therefore, the rule will be entitled to *Chevron* deference if, and only if, the EPA's interpretation is a reasonable construction of an ambiguous statute. *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009). This rule operates under the EPA's "unitary waters" theory in which they put forth the idea that all waters of the United States are one unitary body. Under this theory, once a pollutant has entered the unitary body known as "navigable waters," it can be transferred to any other body of water that is navigable without being considered an "addition" under the CWA's definition of "discharge of a pollutant" because it has not left the unitary body known as waters of the United States. *See* 73 FR 33697-01. However, this statute is not ambiguous. Nor is the EPA's interpretation a reasonable one. Therefore, this rule is not entitled to *Chevron* deference.

i. The statute is not ambiguous.

The unitary waters theory has been asserted in a number of cases across the United States, and has not once been successful. *See, e.g., Catskill Mountains Ch. of Trout Unlimited Inc. v. City of New York*, (Catskills II), 451 F.3d 77, 83 (2d Cir.2006) (concluding that "[t]he City also reasserts the unitary-water theory of navigable waters. Our rejection of this theory in Catskills I, however, is ... not undermined" by *Miccosukee*, 541 U.S. 95, 124 S.Ct. 1537, 158 L.Ed.2d 264); *Dague*, 935 F.2d at 1354–55 (rejecting the idea that pollutants are "added" only on first entry into any navigable water). Some courts have even been very explicit in their rejection of the EPA's reading of the statute stating, "[s]uch an interpretation is inconsistent with the ordinary meaning of the word 'addition.'" *Catskill I*, 273 F.3d at 493; *see also Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir.1996) ("[T]here is no basis in law or fact for the district court's 'singular entity' [unitary waters] theory."). Even the Supreme Court has voiced skepticism towards the EPA's reading of the statute, stating in *Miccosukee* that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Miccosukee*, 541 U.S. at 107.

Advocates for the ambiguity of the statute often cite to *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir.1988), and *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir.1982) as evidence of ambiguity. However, these cases differ factually in that they both dealt with dammed rivers in which the water was being removed from the river and then placed back into the same river via the dam. "The fact

that those decisions found the statute ambiguous as applied to different factual situations is of little help." *Friends of Everglades*, 570 F.3d at 1221.

Lack of ambiguity can also be found in context of the statute as a whole. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132 (2000). Congress uses "navigable waters" many times in many statutes, and it has never been used to indicate navigable waters as one unit. Proponents of the unitary waters theory, at times, point to the lack of the word "any" before "navigable waters" in 33 U.S.C. § 1362(12)(A) as evidence that Congress contemplated the unitary waters theory. However, the use of navigable waters in other statutes makes it clear that Congress did not intend it to be used or considered as a unitary whole. "The Act discusses the states' creation of water-body-specific quality standards based on 'the designated uses of the navigable waters involved.' 33 U.S.C. § 1313(c)(2). In that context 'the navigable waters' must refer to many individual water bodies—exactly what the Friends of the Everglades contend that it means in 33 U.S.C. § 1362(12)." *Friends of Everglades*, 570 F.3d at 1225.

The Clean Water Act is not concerned with maintaining some aggregate, national quantum of pollutants in all "waters of the United States," but instead is concerned with the pollution in each specific body of water. *See Rapanos*, 547 U.S. at 732 (plurality opinion) ("The use of the definite article ('the') and the plural number ('waters') shows plainly that § 1362(7) does not refer to water in general."); *see also* 33 U.S.C. § 1362(6) (definition of "pollutant" includes "heat").

In the context of the CWA as a whole and the plain language of the statute indicate that the EPA's rule is an interpretation of an unambiguous statue, and therefore should be afforded no deference and the intent of Congress should be honored.

ii. The EPA's interpretation is not a reasonable one.

If the court decides that the statute is ambiguous, the unitary waters theory – transferring pollutants between navigable waters is not an "addition ... to navigable waters," – must also be a permissible construction of that language. It is clear that the EPA's interpretation "is manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

The traditional cannons of statutory interpretation do not allow a reading such as the one suggested by the EPA. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n. 9. Using the EPA's interpretation of "addition," in the context of the CWA as a whole, would have an absurd and uncharacteristic result. The CWA does not focus on where the water came from before the point source except in one very clearly defined exception. *See* 33 USCA 1362(14) (Agricultural runoff exception). In all other circumstances, all that is required to incur liability under the CWA is an addition of pollutants of from a point source into waters of the United States. The fact that congress has chosen to clearly and expressly define these exceptions based on the source of the water indicates their intent to limit this exception based on the water's source before the point source.

It is clear that Bonhomme is in violation of the CWA. Bonhomme's culvert is a point source that is adding arsenic to the waters of Reedy Creek, as such he is "discharging a pollutant" in violation of all the relevant criteria of 33 USCA § 1311 and 33 U.S.C. § 1362(12). Courts have rejected the idea that pollutants are "added" only on first entry into any navigable water. Therefore, if the court finds Ditch C-1 to be a navigable water then Bonhomme is in violation of the CWA. Additionally, the EPA's Water Transfer Rule does not apply in this case because it was not argued in the lower court. The EPA's interpretation of the statute is not entitled any deference, because the statute is not ambiguous. Furthermore, if the statute is ambiguous, the EPA's reading was impermissible. In fact, congressional intent as to the meaning of "addition" is clear, and this court should not subscribe to the EPA's "unitary body" theory. The Court should hold Bonhomme liable for his addition of the pollutant arsenic to Reedy Creek.

CONCLUSION

For the foregoing reasons, this court should find that (1) Precious Metals International is the real party in interest. (2) That Bonhomme is not a "citizen" under the Clean Water Act. (3) The waste piles on Maleau's property do not constitute point sources. (4) Ditch C-1 is not a "navigable water/water of the United States." (5) Reedy Creek is not a "navigable water/water of the United States." (6) Bonhomme is liable for the arsenic present in the creek because he owns the culvert/point source.