Team 59

Case No. 13-01234

IN THE

United States Court of Appeals
For the Twelfth Circuit

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee
v.
SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee

STATE OF PROGRESS
Plaintiff-Appellant, Cross-Appellee
and
SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee,
v.
JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

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

BRIEF OF
PLAINTIFF-APPELLANT, CROSS-APPELLEE, JACQUES BONHOMME

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 5

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. Bonhomme Can File a Citizen Suit Under Section 505 of the Clean Water Act. 7

A. The Broad Definition of "Citizen" Unambiguously Encompasses Foreign Nationals Who Are Adversely Affected by Another's Noncompliance with the Clean Water Act. 8

B. Congress Intended to Make Citizen Suits Available to Anyone Adversely Affected by Another's Noncompliance with the Clean Water Act. 9

C. Preventing Foreign Nationals From Filing Citizen Suits Would Undermine the Purpose of the Clean Water Act. 10

D. The District Court's Interpretation Would Render Section 505 of the Clean Water Act Unconstitutional. 11

II. Bonhomme Is A "Real Party in Interest" Because He Has Constitutional Standing Under the Clean Water Act. 13

A. Bonhomme Has Suffered an Injury In Fact from Maleau's Failure to Comply with the Clean Water Act's Effluent Limitations. 13

B. Bonhomme's Injury is Traceable to Maleau. 15

C. Bonhomme's Injury is Redressable Via the Remedies Available to Him Under the Clean Water Act. 16

III. Maleau's Mining Waste Piles Are Point Sources and Thus Are Regulated Under the Clean Water Act. 16

A. "Collected or Channeled" Storm Water Is a Point Source Under *Abston*. 17

B. *Rapanos* Has Not Altered *Abston* Precedent. 20

C. U.S. EPA Regulations Encompass Maleau's Waste Piles. 21

IV. Reedy Creek and Ditch C-1 are "Navigable Waters" Under the Clean Water Act. 21

A. Background and Current State of Interpretation 21

B. Reedy Creek and Ditch C-1 Are "Waters of the United States" and "Navigable Waters" Under Both *Rapanos* Tests. 25

1. Reedy Creek and Ditch C-1 Are "Navigable Waters" Under the Kennedy Test in *Rapanos*. 25

a. Reedy Creek Is a "Navigable Water." 26

b. Ditch C-1 Is a "Navigable Water." 27

2. Reedy Creek and Ditch C-1 Are Both "Waters of the United States" Under the Plurality's Test in *Rapanos* 27

a. Reedy Creek Is a Water of the United States. 28

b. Ditch C-1 Is a Water of the United States 29

C. The Clean Water Act's "Navigable Waters" Encompass Reedy Creek and Ditch C-1. 30

V. Bonhomme Is Not Subject to Clean Water Act Regulation Because Maleau is the But-For Cause of Contamination. 31

A. Maleau's Indirect Discharge of Pollutants Should Be Regulated—Even If Ditch C-1 Is Not a Navigable Water. 31

B. Bonhomme's Actions Are Not Prohibited Because He Has Not "Added" Pollutants to Jurisdictional Waters Under the Unitary Waters Theory. 32

C. Bonhomme's Activity Is Not Prohibited Because *Rapanos* Adds a Proximate Causation Prong to Jurisdictional Inquiry under the Clean Water Act, Implicating Maleau. 32

D. Equitable Factors Counsel Against Finding Bonhomme Liable Under the Clean Water Act 34

CONCLUSION 35

TABLE OF AUTHORITIES

Supreme Court Cases

Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or.,
515 U.S. 687 (1995) 33, 34

City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 16

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 8

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 12

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000) 13, 14, 15

Graham v. Richardson,
403 U.S. 365 (1971) 11

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987) 10, 11

Hampton v. Mow Sun Wong,
426 U.S. 88 (1976) 7, 11

Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.,
133 S.Ct. 710 (2013) 32

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 14, 15

Marks v. United States,
430 U.S. 188 (1977) 24

Mathews v. Diaz,
426 U.S. 67 (1976) 11

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n,
453 U.S. 1 (1981) 10, 13

Rapanos v. United States,
547 U.S. 715 (2006) ..... *passim*

Sierra Club v. Morton,
405 U.S. 727 (1972).....9, 10

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, (*"SWANCC"*),
531 U.S. 159 (2001).....8, 23, 26

Summers v. Earth Island Inst.,
555 U.S. 488 (2009).....16

The Daniel Ball,
77 U.S. 557 (1870).....22

United States v. Appalachian Elec. Power Co.,
311 U.S. 377 (1940).....22

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985).....8, 22

Federal Appellate Court Cases

Avoyelles Sportsmen's League, Inc. v. Marsh,
715 F.2d 897 (5th Cir. 1983).....19

Bilyeu v. The Daily Oklahoman,
159 F. App'x 825 (10th Cir. 2005).....5

Bonner v. City of Pritchard,
661 F.2d 1206 (11th Cir. 1981).....18

Concerned Area Residents for the Env't v. Southview Farm,
34 F.3d 114 (2d Cir. 2009).....19

Cordiano v. Metacon Gun Club, Inc.,
575 F.3d 199 (2d. Cir. 2009).....20, 25

Deerfield Plantation Phase II-B Prop. Owners Ass'n, v. U.S. Army Corps of Eng'rs,
501 F. App'x 268 (4th Cir. 2012).....24

Ecological Rights Found. v. Pac. Gas & Elec. Co.,
713 F.3d 502 (9th Cir. 2013).....20

Fishermen Against Destruction of the Env't, Inc. v. Closter Farms, Inc.,
300 F.3d 1294 (11th Cir. 2002).....5

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.,
204 F.3d 149 (4th Cir. 2000) 15

Friends of the Everglades v. S. Fla. Water Mgmt. Dist.,
570 F.3d 1210 (11th Cir. 2009) 32

Greater Yellowstone Coal. v. Lewis,
628 F.3d 1143 (9th Cir. 2010) 20

HB Gen. Corp. v. Manchester Partners, L.P.,
95 F.3d 1185 (3d Cir. 1996)..... 13

Jean v. Nelson,
711 F.2d 1455 (11th Cir. 1983) 10

Johnson v. Priceline.com,
711 F.3d 271 (2d Cir. 2013)..... 5

Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.,
630 F.2d 250 (5th Cir. 1980) 13

N. Cal. River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007) 24

Nat'l Wildlife Fed'n v. Gorsuch,
693 F.2d 156 (D.C. Cir. 1982)..... 18

Natural Res. Def. Council, Inc. v. U.S. EPA,
542 F.3d 1235 (9th Cir. 2008) 5

Natural Res. Def. Council, Inc. v. Watkins,
954 F.2d 974 (4th Cir. 1992) 15

Parker v. Scrap Metal Processors, Inc.,
386 F.3d 993 (11th Cir. 2004) 18, 19

Peconic Baykeeper v. Suffolk Cnty.,
600 F.3d 180 (2d Cir. 2010)..... 18, 31, 32

Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty.,Md.,
268 F.3d 255 (4th Cir. 2001) 15

Sierra Club v. Abston Constr. Co.,
620 F.2d 41 (5th Cir. 1980) 6, 17, 18, 19

Sierra Club v. Cedar Point Oil Co.,
73 F.3d 546 (5th Cir. 1996) 14

Sierra Club v. El Paso Gold Mines, Inc.,
421 F.3d 1133 (10th Cir. 2005) 18, 31, 32

Tr. for Alaska v. U.S. EPA,
749 F.2d 549 (9th Cir. 1984) 18

United States v. Allegheny Ludlum Corp.,
366 F.3d 164 (3d. Cir. 2004) 34

United States v. Agosto-Vega,
617 F.3d 541 (1st Cir. 2010) 18, 33

United States v. Alvarez,
710 F.3d 565 (5th Cir. 2013) 5

United States v. Bailey,
571 F.3d 791 (8th Cir. 2009) 24

United States v. Cundiff,
555 F.3d 200 (6th Cir. 2009) 24, 34, 35

United States v. Donovan,
661 F.3d 174 (3d. Cir. 2011), *cert. denied mem.*, 132 S.Ct. 2409 (2012) 24

United States v. Earth Sciences, Inc.,
599 F.2d 368 (10th Cir. 1979) 18

United States v. Gerke Excavating, Inc.,
464 F.3d 723 (7th Cir. 2006) 24

United States v. Johnson,
467 F.3d 56 (1st Cir. 2006) 23, 24, 30

United States v. Law,
979 F.2d 977 (4th Cir. 1992) 18

United States v. Lucas,
516 F.3d 316 (5th Cir. 2008) 18, 24

United States v. Lue,
134 F.3d 79 (2d Cir. 1998) 11, 12

United States v. Moses,
496 F.3d 984 (9th Cir. 2007) 30

United States v. Robinson,
505 F.3d 1208 (11th Cir. 2007) 24

Youssef v. Halcrow, Inc.,
504 F. App'x 5 (2d Cir. 2012) 15

Federal District Court Cases

United States v. Brink,
795 F. Supp. 2d 565 (S.D. Tex. 2011) 28

United States v. Costello,
CIV.A. RDB 06-329, 2006 WL 3781708 (D. Md. Dec. 20, 2006) 28

United States v. Vierstra,
803 F. Supp. 2d 1166 (D. Idaho 2011), *aff'd*, 492 F. App'x 738 (9th Cir. 2012) 30

State Court Cases

Palsgraf v. Long Island R. Co.,
162 N.E. 99 (N.Y. 1928) 35

Constitutional Provisions

U.S. Const. amend. V 7, 12

U.S. Const. art. I., § 8, cl. 3 22

Statutes

28 U.S.C. § 1291(2006) 1

28 U.S.C. § 1331 (2006) 1

33 U.S.C. § 1251 (2006) ..... *passim*

33 U.S.C. § 1311 (2006) 17

33 U.S.C. § 1362 (2006) ..... *passim*

33 U.S.C. § 1365 (2006) 1, 2, 7, 8, 16

Federal Regulations

40 C.F.R. § 122.2 25

40 C.F.R. § 122.26 21

40 C.F.R. § 328.3 25

Other Authorities

Fed. R. Civ. P. 12 ..... 1, 5

Fed. R. Civ. P. 17 ..... 1, 13

Lawrence R. Liebesman, et al., Rapanos v. United States*: Using Proximate Causation and Forseeability Principles to Save a CWA Flawed Jurisdictional Process*, SS005 Am. L. Inst. 13, 19 (2010) 33

S. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776 9

JURISDICTIONAL STATEMENT

Federal question jurisdiction exists under 28 U.S.C. § 1331 because Bonhomme's claim arises under the Federal Water Pollution Control (Clean Water) Act of 1972 §§ 101-607; 33 U.S.C. §§ 1251-1387 (2006). This Court has appellate jurisdiction because a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a final, appealable order under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether § 505 of the Federal Water Pollution Control (Clean Water) Act of 1972 § 505; 33 U.S.C. § 1365 (2006), allows foreign nationals the right to file citizen suits, thus allowing Bonhomme to obtain relief from the harm that Maleau causes.

2. Whether Bonhomme is a "real party in interest" under Rule 17 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 17(a), because he has standing to sue Maleau under § 505 of the CWA, 33 U.S.C. § 1365.

3. Whether Maleau's arsenic-laden mining waste piles, which are configured to create discrete channels into Ditch C-1, constitute a point source under § 502(12), (14) of the CWA, 33 U.S.C. § 1362(12), (14).

4. Whether Reedy Creek, a body of water which crosses state lines, is important for interstate commerce, and flows continuously for over fifty miles, is a "navigable water" within the meaning of the CWA, 33 U.S.C. § 1362(7), (12).

5. Whether Ditch C-1—a long-existing body of water important for interstate commerce and flowing most of the year for over three miles before flowing into Reedy Creek—is a "navigable

water" within the meaning of the CWA, 33 U.S.C. § 1362(7), (12).

6. Whether Maleau, rather than Bonhomme, violates the CWA by allowing the arsenic derived from mining waste piles to flow into Reedy Creek through Ditch C-1, even though Bonhomme owns the culvert by which Ditch C-1 flows into Reedy Creek.

STATEMENT OF THE CASE

This case originated when Jacques Bonhomme sought relief under the citizen suit provision, § 505 of the Clean Water Act ("CWA"), for harm from arsenic pollution caused by defendant Shifty Maleau. Federal Water Pollution Control (Clean Water) Act of 1972 § 505; 33 U.S.C. § 1365 (2006); R. at 4-5. Bonhomme's property is downstream from Maleau, and Bonhomme alleges Maleau violates the CWA by discharging arsenic from piles of mining waste into navigable waters. R. at 4-5. Bonhomme also alleges that arsenic pollution in the wildlife of the marsh bordering his property has caused him to significantly reduce the number of hunting trips that he hosts. R. at 6. Subsequently, the State of Progress filed suit alleging that Bonhomme violated the CWA because arsenic is discharged through a culvert on Bonhomme's property and into Reedy Creek. R. at 5. Maleau intervened in Progress' action, and the cases were consolidated. R. at 5.

By Order dated July 23, 2012, the District Court for the District of Progress dismissed Bonhomme's complaint. R. at 10. The court found that Precious Metals International ("PMI") is the real party in interest, rather than Bonhomme, and that the case could not proceed without PMI. R. at 8. Additionally, the court found that Bonhomme could not commence a citizen suit because Bonhomme is a foreign national, R. at 8, 10; that Maleau's waste piles are not a point source because "[p]iles are not normally considered to be conveyances," that Ditch C-1 is not a

navigable water because it is a point source; and that Bonhomme conveyed arsenic to Reedy Creek through the culvert on his property. R. at 9. However, the court found for Bonhomme that Reedy Creek is a water of the United States. R. at 10.

STATEMENT OF THE FACTS

Jacques Bonhomme is a landowner in Jefferson County and owns a hunting lodge that abuts Wildman Marsh. R. at 6. A French national, R. at 8, he used to enjoy hunting ducks and other waterfowl in the marsh. R. at 6. In the past, he hosted eight hunting parties a year with friends and acquaintances, some of whom have business connections with Precious Metals International ("PMI")—a company for which Bonhomme serves as president and owns three percent of shares. R. at 6-7. However, he has reduced his hunting parties by seventy-five percent, to two outings per year, because of concerns over arsenic contamination. R. at 6.

Shifty Maleau causes arsenic to pollute the marsh and Reedy Creek through his placement of mining waste piles near Ditch C-1. R. at 5-6. Ditch C-1 flows into Reedy Creek, which in turn flows into Wildman Marsh. R. at 5. Maleau operates a gold mine in Lincoln County that is adjacent to a navigable river and has Clean Water Act ("CWA") permits at that site. R. at 5. He trucks mining wastes from that operation about fifty miles into Jefferson County. R. at 5, 7. Maleau dumps the wastes onto his property alongside Ditch C-1. R. at 5. The mining waste piles are configured in such a way that storm water, laden with arsenic, flows from the piles and into the ditch. R. at 5. Downstream from Maleau's property, the ditch runs through several agricultural properties before reaching Bonhomme's property. R. at 5. Upstream of Maleau's property, arsenic is undetectable, but is found in high concentrations immediately downstream. R. at 6. Similarly, Reedy Creek has no detectable arsenic levels upstream of Ditch C-1; but

arsenic is present in significant concentrations immediately after water from Ditch C-1 flows into Reedy Creek. R. at 6.

Ditch C-1 is a man-made water body over three miles long, averaging three feet across, and one foot deep. R. at 5. It was created by an association of landowners about one hundred years ago to facilitate agricultural use of the land. R. at 5. The ditch still serves its agricultural purpose, and goods produced from its waters are sold in commerce. R. at 5. Both Maleau and Bonhomme are required to maintain Ditch C-1 through restrictive covenants. R. at 5. The water in the ditch comes from rainwater and the surrounding soil. R. at 5. Water flows regularly through Ditch C-1, except for annual dry periods that range from several weeks to up to three months. R. at 5.

Reedy Creek flows continuously year-round, is about fifty miles long, and crosses from the State of New Union into the State of Progress. R. at 5. Reedy Creek's waters are used for agriculture in both states, and the agricultural products are sold in interstate commerce. R. at 5. Reedy Creek also supplies water to Bounty Plaza, an Interstate 250 service area selling food and gasoline to travelers. R. at 5. Whether Reedy Creek has floated a boat in the past, or could be reasonably improved to do so, has not been asserted at this stage in the proceedings. R. at 9. Reedy Creek flows into extensive wetlands, named Wildman Marsh, an essential stopover for over a million waterfowl during semi-annual migrations. R. at 5-6. Part of the marsh composes the Wildman National Wildlife Refuge. R. at 6. Interstate and international hunters visit the marsh, contributing more than $25 million to the local economy. R. at 6. Recent testing in the marsh revealed that multiple Blue-wing Teal—a popularly hunted duck species—have arsenic in their systems. R. at 6.

In the absence of action by either the federal government or the state to enforce the CWA, Bonhomme filed a citizen suit to hold Maleau accountable for illegally polluting the marsh and

the creek. R. at 4. Progress' Attorney General then initiated a lawsuit attempting to enforce the CWA against Bonhomme, rather than Maleau, on the basis of arsenic pollution. R. at 5. Progress' Attorney General said part of the motivation of the state's suit was to protect Maleau, one of the region's largest employers and a competitor of PMI. R. at 6. Maleau is a major contributor to the Attorney General's campaign. R. at 6.

STANDARD OF REVIEW

All issues on which the lower court granted the motion to dismiss under Rule 12(b)(6) are reviewed *de novo*. Fed. R. Civ. P. 12(b)(6); *see United States v. Alvarez*, 710 F.3d 565, 567 (5th Cir. 2013) ("This court reviews motions to dismiss *de novo*."); *Bilyeu v. The Daily Oklahoman*, 159 F. App'x 825, 826 (10th Cir. 2005) ("We review de novo a district court's dismissal of a complaint for failure to state a claim upon which relief can be granted.") In its review, the Court must "accept[] as true all material factual allegations in the complaint and draw[] all reasonable inferences in [Bonhomme's] favor." *Johnson v. Priceline.com*, 711 F.3d 271, 275 (2d Cir. 2013).

Further, this Court's review of the district court's interpretation of the Clean Water Act ("CWA") is *de novo*. *E.g.*, *Natural Res. Def. Council, Inc. v. U.S. EPA*, 542 F.3d 1235, 1241, 1249 (9th Cir. 2008) ("[W]e review the district court's interpretation of the CWA de novo."); *Fishermen Against Destruction of the Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1296 (11th Cir. 2002) ("The district court's interpretation of the [CWA] is an issue of law that this court reviews de novo."); *see* Federal Water Pollution Control (Clean Water) Act of 1972 §§ 101-607; 33 U.S.C. §§ 1251-1387 (2006).

SUMMARY OF THE ARGUMENT

Jacques Bonhomme is a conscientious landowner in Progress who continues to suffer from an upstream corporate neighbor's environmental noncompliance. Defendant Shifty Maleau has repeatedly dumped arsenic-contaminated mining wastes on his upstream property. His actions have polluted the waterways, including a nearby wildlife refuge and marsh where Bonhomme used to regularly enjoy hunting. State and federal authorities have turned a blind eye to Maleau's actions, so Bonhomme brought a citizen suit to stop Maleau from polluting.

The court below erred in granting Maleau's motion to dismiss, because it construed the Clean Water Act ("CWA") too narrowly. Bonhomme is a "citizen" under the CWA because he has been adversely affected by Maleau's noncompliance; any other interpretation would run afoul of the plain reading, history, and purpose of the CWA, possibly rendering the citizen suit provision unconstitutional. Bonhomme is the "real party in interest" under the CWA because he has established the key elements of standing: namely, that Bonhomme's reduced hunting trips constitute an injury caused by Maleau redressable by the remedies available under the CWA.

The district court erred when it found that the CWA does not apply to Maleau's unpermitted discharge of arsenic. Maleau's mining waste piles are well within the spectrum of point sources encompassed by the CWA and confirmed in *Sierra Club v. Abston*. Additionally, the waterways into which Maleau's contaminated wastes flow are properly considered "waters of the United States" and "navigable waters" under the CWA because both Ditch C-1 and Reedy Creek meet the criteria of either prevailing opinion of the Supreme Court in *Rapanos v. United States*.

Finally, if this Court decides that Maleau is not legally accountable under the CWA for his arsenic discharges, Bonhomme should not be forced to remediate Maleau's pollution. Maleau is the but-for cause of arsenic contamination, and equitable factors strongly counsel against forcing

Bonhomme to abate Maleau's pollution. Bonhomme brought this lawsuit to bring a recalcitrant corporate actor into compliance with the law, and should not now be penalized for having brought his concerns to the attention of regulators. Maleau should be held responsible for the pollution he discharges and the harm that it causes.

ARGUMENT

I. Bonhomme Can File a Citizen Suit Under Section 505 of the Clean Water Act.

The district court erred in dismissing Bonhomme's suit because it misconstrued "citizen" under § 505 of the Clean Water Act ("CWA") as excluding foreign nationals from filing citizen suits. Because the CWA's § 505 term "citizen" includes foreign nationals, the district court decision should be reversed and Bonhomme's suit against Maleau should be maintained. *See* Federal Water Pollution Control (Clean Water) Act of 1972 § 505; 33 U.S.C. § 1365 (2006). Analysis of the CWA's text, legislative history, and express purpose reveals that foreign nationals, like Bonhomme, are "citizens" under § 505. Moreover, disallowing aliens from commencing citizen suits would violate the equal protection guarantee of the Fifth Amendment's Due Process Clause and, as a result, would render this provision of the CWA unconstitutional. *See* U.S. Const. amend. V ("No *person* shall . . . be deprived of life, liberty, or property, without due process of law . . . .") (emphasis added); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976) (establishing that the federal government may not "arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). Even though he is a foreign national, Bonhomme must be a "citizen" under § 505 of the CWA, and the district court's opinion should be reversed accordingly.

A. *The Broad Definition of "Citizen" Unambiguously Encompasses Foreign Nationals Who Are Adversely Affected by Another's Noncompliance with the Clean Water Act.*

The statute is unambiguous; for purposes of § 505 of the CWA, Bonhomme is a citizen. When interpreting a statute, "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Section 505 of the CWA defines "citizen" as "a *person* or *persons* having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (emphasis added). Congress further defined "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). The CWA does not differentiate between American citizens and citizens of other countries.

The district court, holding that foreign nationals cannot commence citizen suits, based its conclusion on the Supreme Court's interpretation of "navigable waters." Section 502 of the CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). In *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, (SWANCC)*, the Supreme Court held that "Congress' separate definitional use of the phrase 'waters of the United States'" does not "constitute[] a basis for reading the term 'navigable waters' out of the statute." 531 U.S. 159, 172 (2001). The district court used this reasoning to guide its interpretation of "citizen," ultimately deciding that this term precludes foreign nationals from filing citizen suits.

The district court, however, failed to recognize that the Supreme Court has repeatedly acknowledged that the term "navigable waters" encompasses "at least some waters that would not be deemed 'navigable' under the classical understanding of the term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); *see Rapanos v. United States*, 547 U.S. 715, 731 (2006) (plurality opinion) (noting that the "term 'navigable waters' includes something more than traditional navigable waters"). Hence, if the district court actually followed

the Supreme Court's analysis of "navigable waters," it would have ascribed a less rigid meaning to the term "citizen." Moreover, the structure of the statute suggests that Congress intended for "citizen" to differentiate between persons generally and persons who have been adversely affected by another's CWA violations. *See Rapanos*, 547 U.S. at 722–23 (reviewing the CWA's structure to discern the meaning of "navigable waters"). In short, the district court's interpretation of "citizen" is both inconsistent with the Supreme Court's interpretation of "navigable waters" and the plain reading of the statute. Thus, this Court should reverse the district court's order granting Maleau's motion to dismiss.

B. Congress Intended to Make Citizen Suits Available to Anyone Adversely Affected by Another's Noncompliance with the Clean Water Act.

The CWA's legislative history shows that Congress intended the broad definition of "citizen" to encompass anyone adversely affected by another's failure to comply with the statute. In the CWA's original bill, the Senate explained that the citizen suit provision would allow "[*a*]*nyone* . . . [to] initiate a civil suit against any person who is alleged to be in violation of an effluent limitation." S. Rep. 92-1236 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822-23 (emphasis added). The House of Representatives proposed one amendment to this provision, suggesting that the right to bring citizen suits should be limited "to persons directly affected by a violation" and "groups who have participated in the administrative proceedings of the case." *Id.* After conference, the two houses compromised and decided that "citizen" simply "means a person or persons having an interest which is or may be adversely affected." *Id.* The conferees explained further that "the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*." *Id.*

In *Sierra Club v. Morton*, the Supreme Court held that, to establish standing, plaintiffs must, among other things, demonstrate a particularized "injury in fact." 405 U.S. 727 (1972).

Expanding on *Morton*, the Supreme Court later announced explicitly that Congress "intended . . . to allow suits by all *persons* possessing [constitutional] standing." *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) (emphasis added). Alienage, in and of itself, does not affect one's ability to establish constitutional standing in the United States. *See, e.g.*, *Jean v. Nelson*, 711 F.2d 1455, 1506-07 (11th Cir. 1983) (recognizing that undocumented aliens had constitutional standing to sue after suffering injury). Hence, it is clear that Congress did not intend for someone's citizenship status to affect his or her right to commence a citizen suit. Thus, the district court's interpretation of "citizen" is a clear, unabashed departure from the CWA's legislative history and the Supreme Court's interpretation thereof.

C. Preventing Foreign Nationals From Filing Citizen Suits Would Undermine the Purpose of the Clean Water Act.

Allowing foreign nationals to commence citizen suits furthers the purposes and goals of the CWA. By enacting the CWA, Congress aimed to "restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Supreme Court has recognized that citizen suits "supplement . . . governmental action" by allowing "private attorneys general" to enforce the CWA's effluent limitations when the government has chosen not to act. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987). The larger the pool of private attorneys general, the greater the potential for enforcement via citizen suits and, in turn, better protection of the Nation's waters. In light of these policy considerations, the definition of "citizen" should not be unduly constricted as the district court suggests.

Here, Progress has elected not to enforce the CWA against Maleau. R. at 5-7. Incidentally, Maleau has contributed large sums of money to the Attorney General's election campaign, giving the Attorney General strong incentive to ignore Maleau's noncompliance. R. at 6-7. Regardless of Progress' motivation, CWA § 505 was designed to circumvent this sort of

governmental inaction. *See Gwaltney*, 484 U.S. at 60. Yet the district court decided, contrary to congressional intent, that the CWA discriminates against foreign nationals. R. at 8. The district court's tenuous interpretation undermines the purpose of the Act—restoring and maintaining the "integrity of the Nation's waters"—and should not be affirmed. *See* 33 U.S.C. § 1251(a).

D. The District Court's Interpretation Would Render Section 505 of the Clean Water Act Unconstitutional.

Accepting the district court's interpretation of § 505 of the CWA, which discriminates based on alienage, would render the provision unconstitutional. Equal protection challenges to federal laws that discriminate based on alienage are subject to relaxed judicial scrutiny.[1] *See Hampton*, 426 U.S. at 100 (holding that agents of the federal government may not "arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). Nevertheless, such classifications must be "rationally related to a legitimate government interest" in order to "satisf[y] principles of equal protection . . . ." *United States v. Lue*, 134 F.3d 79, 87 (2d Cir. 1998) (citing *Mathews v. Diaz*, 426 U.S. 67, 83 (1976)).

In *Lue*, the court addressed whether the Hostage Taking Act—a federal law that "discriminate[d] against offenders on the basis of alienage,"[2] id. at 87—was "rationally related to a legitimate government interest." Id. at 86. The court explained that the United States government, as a signatory of the Hostage Taking Convention, passed this legislation to combat

---

[1] The equal protection guarantees in the Fifth and Fourteenth Amendments "are not always coextensive." *See Hampton*, 426 U.S. at 100. For example, while the Supreme Court ruled that a state cannot deny welfare benefits to noncitizens, *Graham v. Richardson*, 403 U.S. 365, 371 (1971), the Court upheld the federal Social Security Act's denial of Medicare part B supplemental coverage to resident aliens unless they met specific criteria, *Mathews v. Diaz*, 426 U.S. 67 (1976). The Supreme Court reasoned in *Mathews* that a state "has no apparent justification" to distinguish between citizens and aliens, "whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business." *Id.* at 84.

[2] "If the hostage-taking victim is a national, the Act criminalizes conduct by an alien that would not be sanctionable if undertaken by a United States citizen." *Lue*, 134 F.3d at 86.

"all acts of taking hostages as manifestations of international terrorism." *Id.* at 81 (internal quotations omitted). Ultimately, the court found that the Act did not violate the Fifth Amendment's equal protection guarantee, reasoning that the "connection between the [A]ct and its purpose [wa]s not so attenuated as to fail to meet the rational-basis standard." *Id.* at 87.

Section 505 of the CWA, as it is interpreted by the district court, fails this rational basis review. By making citizen suits unavailable to foreign nationals, the district court has subordinated the interests of an entire class of people in maintaining a livable environment. Neither Congress nor the district court provided a reason, legitimate or otherwise, for this classification. In fact, this classification undermines the CWA's purpose—restoring and maintaining the "integrity of the Nation's waters," 33 U.S.C. § 1251(a)—suggesting that this classification is invidious. Hence, absent a connection to a legitimate government interest, this classification is unconstitutional as a violation of the Fifth Amendment's equal protection guarantee. *See* U.S. Const. amend. V.

However, the Supreme Court has long held that "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Applied here, this Court should reject the district court's interpretation because it renders the provision unconstitutional and because allowing foreign nationals to commence citizen suits is entirely consistent with Congress' intent. See *infra* Part I.B. Hence, this Court should find that foreign nationals, like Bonhomme, can file citizen suits under § 505 of the CWA, thereby avoiding any constitutional complications.

II. Bonhomme Is A "Real Party in Interest" Because He Has Constitutional Standing Under the Clean Water Act.

Rule 17 does not inhibit Bonhomme from suing Maleau because Bonhomme is seeking to enforce his rights under the CWA. Rule 17(a) provides that "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). A "real party in interest" is a "party who, by the substantive law, has the right sought to be enforced." *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 256-57 (5th Cir. 1980). The Supreme Court recognized that, when passing the CWA and its citizen suit provision, Congress "intended . . . to allow suits by all persons possessing [constitutional] standing." *Middlesex Cnty. Sewerage Auth.*, 453 U.S. at 16. In other words, anyone who has constitutional standing to enforce the CWA has "the right sought to be enforced." *See Lubbock Feed Lots*, 630 F.2d at 256-57. Here, Bonhomme has standing to enforce his rights under the CWA and, therefore, is a "real party in interest." "There may be multiple real parties in interest for a given claim" and, because Bonhomme is "a real party in interest," "Rule 17(a) does not require the addition of other parties fitting that description." *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1196 (3d Cir. 1996); *see* Fed R. Civ. P. 17(a). Having standing to sue in his own right, Bonhomme need not join Precious Metals International ("PMI"), regardless of whether PMI may also have a cause of action against Maleau. Accordingly, this Court should reverse the lower court's order granting Maleau's motion to dismiss on Rule 17 grounds.

A. Bonhomme Has Suffered an Injury In Fact from Maleau's Failure to Comply with the Clean Water Act's Effluent Limitations.

Bonhomme has suffered an injury in fact because Maleau's continued discharge of arsenic adversely affects Bonhomme's ability to hunt in Wildman Marsh. R. at 4, 6. When analyzing standing under the CWA, "[t]he relevant showing . . . is not injury to the environment but injury to the plaintiff." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,

169 (2000). An injury in fact is an "invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Laidlaw*, 528 U.S. at 180. Yet that injury "need not be large[;] an identifiable trifle will suffice." *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996).

In *Laidlaw*, members of an environmental organization sued the owner of a hazardous waste incinerator for discharging pollutants into a river in violation of CWA effluent limitations. 528 U.S. at 182. Several members used the river regularly for recreational purposes. *Id.* One member testified that she lived two miles from the discharge point. *Id.* Before the incinerator polluted the river, "she picnicked, walked, birdwatched, and waded in and along the [river]," but she "no longer engaged in these activities . . . because she was concerned about harmful effects from [the defendant's] discharged pollutants." *Id.* The court found that these members had standing, reasoning that the incinerator's discharges, combined with the "members' *reasonable concerns* about the effects of those discharges, directly affected those [members'] recreational, aesthetic, and economic interests." *Id.* at 183-84 (emphasis added).

Here, Bonhomme hosts duck hunting parties at, and owns a lodge that abuts, Wildman Marsh. R. at 6. After Maleau began discharging the arsenic that eventually deposits in Wildman Marsh, arsenic was detected in the marsh's Blue-winged Teal population. R. at 6. Realizing that Maleau has compromised the integrity of the marsh and its wildlife, Bonhomme has reduced the number of hunting parties that he hosts per year by seventy-five percent. *See* R. at 6. Maleau's discharges and Bonhomme's "*reasonable concerns* about the effects of those discharges[] directly affect[]" Bonhomme's recreational use of, and interest in, Wildman Marsh. R. at 6; *Laidlaw*, 528 U.S. at 183-84 (emphasis added).

As the district court noted, Maleau contends that "the decrease in Bonhomme's hunting parties is more likely a result of the general decline of the economy." R. at 6. However, when considering a 12(b)(6) motion, courts must "accept[] all factual claims in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." *Youssef v. Halcrow, Inc.*, 504 F. App'x 5, 6 (2d Cir. 2012) (internal quotations omitted). Since Bonhomme averred that he would not have decreased the frequency of his hunting parties but for Maleau's discharges, Maleau's claims to the contrary are irrelevant at this stage of litigation. R. at 6. Therefore, like the members in *Laidlaw*, Bonhomme's injury is sufficiently "concrete and particularized, as well as actual or imminent." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000).

B. Bonhomme's Injury is Traceable to Maleau.

Testing of water upstream and downstream of Maleau's property demonstrates that Bonhomme's injury is traceable to Maleau's mining wastes. R. at 6. "Traceability does not mean that plaintiffs must show to a scientific certainty that [a] defendant's effluent . . . caused the precise harm suffered by the plaintiffs." *Piney Run Pres. Ass'n v. Cnty. Com'rs of Carroll Cnty., Md.*, 268 F.3d 255, 263–64 (4th Cir. 2001) (internal quotations omitted). Rather, Bonhomme merely is required to demonstrate that his injury is "fairly traceable" to Maleau's effluent violations. *Lujan*, 504 U.S. at 560 (internal quotations omitted). To show that his injury is "fairly traceable" to Maleau, Bonhomme must simply establish that Maleau "discharges a pollutant that causes or contributes to the kinds of injuries" that Bonhomme alleges. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) (internal quotations omitted). Here, the precise pattern of arsenic exposure that appears immediately downstream from Maleau's property indicates that Bonhomme's injury is traceable to the mining waste piles. R. at 6. Traceability, therefore, is established.

C. Bonhomme's Injury is Redressable Via the Remedies Available to Him Under the Clean Water Act.

Each of the remedies available to Bonhomme under the CWA would redress his injury. For standing purposes, an injury is redressable if "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. When a plaintiff seeks multiple remedies, the plaintiff must demonstrate that he or she "has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). Here, Bonhomme seeks to redress a single, ongoing injury that is traceable to Maleau's property. Bonhomme is requesting every remedy available to him—injunctive relief, civil penalties, and an award for the cost of litigation. R. at 4; 33 U.S.C. § 1365(a), (d). If any of these remedies would likely redress Bonhomme's injury, then Bonhomme has standing to sue.

In *City of Los Angeles v. Lyons*, the Supreme Court held that a plaintiff who seeks injunctive relief lacks standing when he is unlikely to suffer the injury, from which he seeks reprieve, again in the future. 461 U.S. 95, 105 (1983). Here, Bonhomme's injury is ongoing and, unless Maleau's arsenic discharges cease, will exacerbate over time. Injunctive relief will redress Bonhomme's injury. *See id*. Similarly, the Supreme Court has recognized that imposing civil penalties on those who violate effluent limitations has a deterrent effect. *Laidlaw*, 528 U.S. at 186–87. In this case, imposing civil penalties on Maleau and awarding litigation costs to Bonhomme would also deter future discharges. Hence, Bonhomme has standing to sue and, therefore, is a "real party in interest."

III. Maleau's Mining Waste Piles Are Point Sources and Thus Are Regulated Under the Clean Water Act.

The district court's erroneous holding that Maleau's waste piles are not point sources should be reversed. Maleau's mining waste piles are point sources under the CWA because they discharge arsenic into navigable waters. Such discharges are legal only when permitted by state

and federal regulators. The CWA prohibits the unpermitted (1) addition of (2) pollutants into (3) navigable waters from (4) point sources. *See* 33 U.S.C. § 1311 (establishing that discharge of any pollutant by any person shall be unlawful); § 1362(12) (defining "discharge" as "addition").

The first three elements—"addition," "pollutant," and "navigable waters"—are assumed established for the purposes of this section. It is undisputed that arsenic detected downstream from Maleau's property is a "pollutant" under § 502(6) of the CWA, which is "added" to navigable waters via channels that have developed in the waste piles. R. at 8; 33 U.S.C. § 1362(6). Because Maleau's waste piles discharge arsenic into Ditch C-1, which flows into Reedy Creek, the "navigable water" prong is also assumed established. *See infra* Part IV.

Maleau's mining waste piles are well within the range of point source conveyances that are regulated under federal law. The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any . . . discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Maleau's waste piles contain "channels eroded by gravity from the configuration of the waste piles" into the nearby ditch. R. at 5. As the case law below indicates, Maleau's activities are in violation of the CWA. The district court erred in dismissing Bonhomme's suit.

A. "Collected or Channeled" Storm Water Is a Point Source Under Abston.

Sierra Club v. Abston Construction Co. is the most widely followed case discussing whether mining wastes are subject to the CWA. 620 F.2d 41 (5th Cir. 1980). A mining company's waste piles are point sources when the flow is "channeled or collected" by gravity into "a discrete conveyance." *Id.* at 45; 33 U.S.C. § 1362(14). In *Abston*, strip-mining operators collected industrial mining wastes into "highly erodible" piles. *Abston*, 620 F.2d at 43. "Rainwater runoff . . . carried the [mining waste] material to adjacent streams, causing siltation and acid deposits." *Id*. The court held that such piles constituted a point source, because the operators "at least

initially collected or channeled" the wastes such that "gullies and similar conveyances" allowed for rainwater discharge into nearby waters. *Id.* at 45. The *Abston* court further observed that a point source could be found "*even if* the miners have done nothing beyond the mere collection of rocks and other materials," and held that an operator is liable whether the "conveyances . . . formed . . . as a result of natural erosion or by material means." *Id.* (emphasis added). The *Abston* rule thus enables courts to find that a point source exists, even when a landowner acts passively by making no alterations to the property. *See also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) (rejecting mine owner's attempts to protect itself from liability for "purely passive" discharge). *Abston* has been followed in nearly all circuit courts.[3]

Maleau's piles of mining waste fall precisely into the category of point source liability to which the *Abston* court spoke. Like the *Abston* defendants, Maleau's mining wastes are laden with harmful pollutants. R. at 5-6. Further, the "configuration of [Maleau's] waste piles" has contributed to natural erosion from storm water "through channels eroded by gravity." R. at 5. Even if Maleau did "nothing beyond the mere collection of rocks and other materials," his waste

---

[3] The First, Second, Fourth, Fifth, Ninth, Tenth, Eleventh, and District of Columbia Circuits follow *Abston*. *United States v. Agosto-Vega*, 617 F.3d 541, 552 (1st Cir. 2010) (holding liable employees who disposed of raw sewage in nearby creek because they "create[d] the conditions" for improper discharge); *Peconic Baykeeper v. Suffolk Cnty.*, 600 F.3d 180, 188 (2d Cir. 2010) ("The 'definition of a point source is to be broadly interpreted' and 'embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.'") (internal quotations and citations omitted); *United States v. Law*, 979 F.2d 977, 980 (4th Cir. 1992) (citing *Abston* favorably); *United States v. Lucas*, 516 F.3d 316, 329, 336 (5th Cir. 2008) (citing *Abston* in holding that failed septic systems constitute a point source discharge under the CWA); *Tr. for Alaska v. U.S. EPA*, 749 F.2d 549, 558 (9th Cir. 1984) (citing to *Abston* for the proposition that mining activities require permits when they "release pollutants from a discernible conveyance"); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (holding that overflowing circulating or drainage system is a point source, even though overflows are caused by storm water); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 n.17 (11th Cir. 2004) (citing to *Abston*, which is binding in the Fifth Circuit under *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc)); and *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 n.58 (D.C. Cir. 1982) (citing *Abston* favorably).

piles are point sources under *Abston*. 650 F.2d at 45. However, Maleau has done more than "mere[ly] collect[]" his mining wastes on-site; he has trucked the contaminated wastes from his Lincoln County mining operations more than fifty miles, across county lines, to avoid the CWA liability that would surely arise there. R. at 5, 7. Maleau's actions thus surpass the passive operator standard set forth in *Abston*. Because Maleau's mining waste piles collect and channel contaminated storm water, the piles are properly considered point sources.

Channeled mining waste piles are well within the spectrum of conveyances that have been considered point sources by federal courts under § 502(14) of the CWA. 33 U.S.C. § 1362(14). Bulldozers, backhoes, piles of scrap metal debris, and vehicles used to spread manure have all been established by circuit courts to be point sources that channel pollutants.[4] In *Parker v. Scrap Metal Processors, Inc.*, a CWA case involving scrap metal debris, the court held that "[s]torm-water runoff does not, in all circumstances, originate from a point source, but several courts have concluded that it does when storm water *collects in piles of industrial debris* and eventually enters navigable waters." 386 F.3d 993, 1009 (11th Cir. 2004) (emphasis added) (internal citations omitted). Here, when the district court rejected the idea that "pile[s] of dirt and stone" could be considered point sources, it failed to properly consider that Maleau's wastes, like the industrial debris piles at issue in *Parker*, are configured to channel pollutants directly into nearby waters. R. at 4-5. Thus, the channels that run through Maleau's piles of mining waste are well within the spectrum of conveyances envisioned by the CWA's § 502(14).

---

[4] *See, e.g.*, *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983) (holding that bulldozer and backhoes are properly considered point sources when used to build piles of waste material that had potential to leach into waterway); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d at 1009 (interpreting point source "broadly" to include piles of scrap metal debris which "collected" water that flowed into a nearby stream); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 119 (2d Cir. 2009) (holding that manure spreading vehicles are point sources).

B. Rapanos *Has Not Altered* Abston *Precedent.*

While the district court was skeptical about whether pre-*Rapanos* cases are still good law, *Rapanos* was the opinion of a divided Supreme Court, and has not altered the *Abston* rule that requires point sources to collect or channel storm water. Further, *Rapanos* actually supports the argument that Maleau's waste piles are point sources: "[F]rom the time of the CWA's enactment, lower courts have held that the discharge . . . of any pollutant *that naturally washes downstream* likely violates" the law. *Rapanos*, 547 U.S. at 743 (plurality opinion).

Even after *Rapanos*, "[t]he text of [the CWA] and case law are clear that some type of collection or channeling is required to classify an activity as a point source." *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010). In *Greater Yellowstone*, the court held that permits were not required of a mining company that designed an elaborate storm water cover system which nearly eliminated rainwater exposure to its piled wastes. *Id.* at 1152. The small amount of seepage that "percolat[ed]" through the storm water cover did not qualify as a point source, because there was "no confinement or containment of the water." *Id.* at 1147, 1153. The mining company in *Greater Yellowstone* made a significant effort to prevent mining wastes from exposure to the elements. *Id*. at 1147. By contrast, Maleau piled up mining wastes with rampant disregard, making no attempt to prevent storm water exposure. *See* R. at 4–5.

Although some courts have been hesitant to declare that sources of pollution are point sources, such deliberation is based on the specific facts before those courts—not concerns about *Rapanos*. *See, e.g*., *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 223 n.7 (2d. Cir. 2009) (applying *Abston* but finding the evidence did not indicate that there were visible channels in the alleged point source); *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 510–11 (9th Cir. 2013) (declining to categorize contaminated utility poles as point sources because storm water is not "collected in channels [or] conveyed to waters of the United States"). The *Abston*

rule—requiring collection or channeling of storm water to establish a point source—continues to be applied by courts throughout the country even after *Rapanos*. *Abston* should be applied by this Court to establish that Maleau's piles are point sources.

C. U.S. EPA Regulations Encompass Maleau's Waste Piles.

Maleau's mining wastes are covered by U.S. Environmental Protection Agency ("EPA") storm water regulations, and therefore fall within federal regulatory authority. The EPA requires permits for all point source storm water discharges "associated with industrial activity," and Maleau's mining wastes are associated with industrial activity at his Lincoln County mine.[5] 40 C.F.R. § 122.26; and R. at 5. Although federal authorities are not currently involved in Bonhomme's citizen suit, this Court should recognize that declining to regulate Maleau's waste piles as point sources under the CWA is inconsistent with federal storm water regulations.

IV. Reedy Creek and Ditch C-1 are "Navigable Waters" Under the Clean Water Act.

This Court should find that Reedy Creek and Ditch C-1 are "waters of the United States" and "navigable waters" under the CWA. While "navigable waters" are defined by the CWA simply as "the waters of the United States," 33 U.S.C. § 1362(7), the CWA does not further define the term. History of the judicially and congressionally understood meaning of these terms, as well as approaches taken by circuit courts post-*Rapanos*, demonstrate that Reedy Creek and Ditch C-1 are both "waters of the United States" and "navigable waters."

A. Background and Current State of Interpretation

Prior to the enactment of the CWA, the Supreme Court acknowledged that the Commerce

---

[5] Specifically, 40 C.F.R. § 122.26(b)(14) defines "[s]torm water discharge associated with industrial activity" as "the discharge from *any* conveyance that is used for collecting and conveying storm water." (emphasis added). Further, § 122.26(a)(2)(i) exempts from permits only facilities where storm water will "not come into contact with any . . . raw material . . . byproduct, or waste products [of the mining process]." Maleau's piles are exposed to the elements, with discrete and identifiable channels that collect and convey storm water into nearby waters.

Power[6] allowed for federal jurisdiction over bodies of water that were "navigable in fact" or could be so rendered—"traditionally navigable waters." *See The Daniel Ball*, 77 U.S. 557, 563 (1870) (defining navigable waters as navigable in fact, with the potential to be "highways for commerce"); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 403-04 (1940) (noting the Commerce Clause allows regulation of navigable waters). Congress enacted the CWA with the purpose "to restore and maintain . . . "the Nation's waters." 33 U.S.C. § 1251(a). The Supreme Court recognized that "[i]n adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' . . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 133.

Federal regulations define "waters of the United States" broadly, finding jurisdiction over many forms of waters well outside of the traditionally navigable waters—sometimes even intrastate, isolated, mostly dry channels. *See Rapanos*, 547 U.S. at 724-26 (plurality opinion) (discussing jurisdiction asserted over "virtually any land feature over which rainwater or drainage passes and leaves a visible mark" and "dry arroyos connected to remote waters through the flow of groundwater over 'centuries . . . .'"). In *Rapanos*, the Supreme Court considered whether wetlands located "near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States.'" *Id.* at 729. The Court split on the issue, with most Justices remanding for factual development. *Id.* at 757. However, the entire Court found that "navigable waters" meant something more than waters that are navigable-in-

---

[6] The "Commerce Power" refers to Congress' legislative power derived from the Commerce Clause of the Constitution. *See* U.S. Const. art. I., § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States.").

fact. *Id.* at 730-31 (plurality opinion) ("[T]he [CWA]'s term 'navigable waters' includes something more than traditional navigable waters."); *id.* at 768 (Kennedy, J., concurring) ("Congress intended to regulate at least some waters that are not navigable in the traditional sense."); *id.* at 792-93 (Stevens, J., dissenting) (including waters not traditionally navigable).

The plurality found 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[,] . . . rivers, [and] lakes."' *Id.* at 739 (plurality opinion) (referring to a dictionary for the definition of "waters").[7] Justice Kennedy concurred, finding the plurality's limits unnecessary, in part because they "give insufficient deference to Congress' purposes in enacting the [CWA] . . . ." *Id.* at 778 (Kennedy, J., concurring). Kennedy found that wetlands must possess a "significant nexus" to navigable waters to be within the jurisdiction of the CWA. *Id.* at 759, 779, 787 (Kennedy, J., concurring) (citing *SWANCC*, 531 U.S. at 167, 172). The divided decision means the definition of the CWA's terms "navigable waters" and "waters of the United States" are still open to interpretation.

In the wake of *Rapanos*, the federal circuits have split on deciding which test applies. There are two main views that circuit courts have adopted: the "either-or" test and the "narrowest grounds" test. The "either-or" test allows courts to use *either* the plurality test *or* the Kennedy test to determine that waters bodies are waters of the United States. *See United States v. Johnson*, 467 F.3d 56, 60 (1st Cir. 2006). Applying the "either-or" test, a circuit court ruling will be decisive, because a majority of the Supreme Court Justices would affirm the outcome. *Id.* at 64. The dissent endorsed the use of the "either-or" test as the most practical method for circuit courts

---

[7] The plurality also found wetlands must have a "continuous surface connection" to 'waters of the United States" to be '"adjacent to' such waters and covered by the [CWA]." *Id.* at 742.

to follow *Rapanos*. 547 U.S. at 810 (Stevens, J., dissenting). "Given that all four Justices who have joined this [dissenting] opinion would uphold the Corps' jurisdiction . . . in all other cases in which either the plurality's or Justice Kennedy's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met." *Id.* The First, Third and Eighth Circuits explicitly use the "either-or" test. *Johnson*, 467 F.3d at 60; *United States v. Donovan* 661 F.3d 174, 176 (3d. Cir. 2011), *cert. denied mem.*, 132 S.Ct. 2409 (2012); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).[8]

The "narrowest grounds" test arises from an interpretation of *Marks v. United States*, stating that when "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." 430 U.S. 188, 193 (1977) (internal quotations omitted). The circuits using this test generally apply the Kennedy test, finding it to be the narrowest because it would find CWA jurisdiction in more cases than the plurality's test. *See, e.g., United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (finding the Kennedy test is narrower). Circuits adopting the "narrowest grounds" test include the Seventh, Ninth, and Eleventh Circuits. *Id.* at 724; *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Robinson*, 505 F.3d 1208, 1221 (11th Cir. 2007). Other circuits have not yet ruled on which test controls.[9]

After *Rapanos*, federal agencies continue to interpret the meaning of "waters of the United

---

[8] The Fourth Circuit has used the "either-or" test as well. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n, v. U.S. Army Corps of Eng'rs*, 501 F. App'x 268, 273, 274-75 (4th Cir. 2012) (upholding lower court's decision to apply either-or test).

[9] *See, e.g.*, *United States v. Cundiff*, 555 F.3d 200, 210-13 (6th Cir. 2009) (finding both plurality and Kennedy test satisfied); *United States v. Lucas*, 516 F.3d 316, 325-27 (5th Cir. 2008) (finding all *Rapanos* tests met); *Cordiano*, 575 F.3d at 215-16 (declining to decide which test controls).

States" broadly. *See* 40 C.F.R. § 328.3 (U.S. Army Corps of Engineers); 40 C.F.R. § 122.2 (U.S. EPA). The policy and purpose of the CWA provides further support that an expansive reading of these terms is warranted. *See* 33 U.S.C. § 1251(a) ("The objective of this [Act] is to restore and maintain the . . . integrity of the Nation's waters."). While *Rapanos* attempted to clarify the limits of the CWA's jurisdiction by defining "waters of the United States," the Supreme Court's inability to reach a consensus leaves lower courts without clear guidance.

B. Reedy Creek and Ditch C-1 Are "Waters of the United States" and "Navigable Waters" Under Both Rapanos *Tests.*

The district court's ruling that Reedy Creek is a water of the United States should be affirmed, but its ruling that Ditch C-1 is not a navigable water should be reversed. Reedy Creek is a lengthy interstate water, and is important for interstate commerce. R. at 5. Ditch C-1 is important for interstate commerce, and flows into Reedy Creek. R. at 5. Because both Reedy Creek and Ditch C-1 meet the requirements of any *Rapanos* tests, or the tests adopted by the circuit courts, they are "waters of the United States" and therefore "navigable waters" as defined in the CWA.[10]

1. Reedy Creek and Ditch C-1 Are "Navigable Waters" Under the Kennedy Test in *Rapanos*.

Under the Kennedy test, both Reedy Creek and Ditch C-1 are "navigable waters." In *Rapanos*, Justice Kennedy stated that waters within the CWA's jurisdiction must form a "significant nexus" with navigable waters. 547 U.S. at 759, 779, 787 (Kennedy, J. concurring). Kennedy specified that "a water or wetland must possess a 'significant nexus' to waters that are

---

[10] While the plurality argued the word "navigable" in the CWA had not lost all meaning, it did not define what meaning "navigable" has. *Rapanos*, 547 U.S. at 731 (plurality opinion). Because the plurality defined the limits of "waters of the United States," this test would likely satisfy the plurality that "waters of the United States" are "navigable waters" under the CWA. *Id.* at 730-31 (noting the CWA's definition as "simply 'the waters of the United States'").

or were *navigable in fact* or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring) (emphasis added) (citing *SWANCC*, 531 U.S. at 167, 172) (internal quotations omitted). However, in the last line of his opinion, he stated the question as: "whether the specific wetlands at issue possess a significant nexus with *navigable waters*." *Id.* at 787 (emphasis added). It is likely Justice Kennedy did not intend to restrict the test to waters forming a "significant nexus" with traditionally navigable waters.[11] Therefore, waters may fall within the scope of the CWA's jurisdiction when they are important for interstate commerce and regulation of such waters furthers the purpose of the CWA.

a. Reedy Creek Is a "Navigable Water."

Reedy Creek meets Justice Kennedy's "significant nexus" test, as long as Reedy Creek or the wetland it flows into is navigable. *Id.* at 759. While it is not established that Reedy Creek or Wildman Marsh is traditionally navigable or can be reasonably so made,[12] R. at 9, Reedy Creek should be considered a navigable water under Justice Kennedy's test because it is an interstate water important for interstate commerce. Moreover, its regulation furthers the goal of the CWA to restore and maintain the nation's waters. Reedy Creek provides irrigation for crops sold in interstate commerce, is the source of water for people travelling on I-250, and flows into federally protected wetlands frequented by interstate and foreign hunters. R. at 5-6. Also, Wildman Marsh is of national economic and ecological importance because it hosts over a

---

[11] Justice Kennedy may have conceived of the traditional understanding of "navigable waters" to mean "waters susceptible to use in interstate commerce." *Rapanos*, 547 U.S. at 760. He states that "[i]mportant public interests are served by the [CWA] in general and by the protection of wetlands in particular." *Id.* at 777. Further, "[t]he required nexus must be assessed in terms of the statute's goals and purposes." *Id.* at 779. And "the [CWA] contemplates regulation of certain "navigable waters" that are not in fact navigable." *Id.* at 779.

[12] However, if this Court determines that navigability-in-fact must be established, Reedy Creek and/or Wildman Marsh still qualify as "navigable waters" because they could reasonably be made navigable. Therefore, Reedy Creek is still covered by the CWA's jurisdiction under the Kennedy test.

million waterfowl and people come from out of state to visit the marsh, contributing over $25 million annually to the local economy. R. at 6.

If the Court determines that Reedy Creek is not a navigable water, the purpose of the CWA to restore and maintain the integrity of the nation's waters would be undermined. *See Rapanos*, 547 U.S. at 722, 759 (Kennedy, J., concurring). Further, Justice Kennedy acknowledges the important function of the CWA in protecting "downstream States from out-of-state pollution that they cannot themselves regulate." *Id*. at 777. Should this Court find that Reedy Creek is not regulated by the CWA, the neighboring state of New Union would have little incentive to care for the Creek's water quality beyond its borders. To be consistent with the purpose of the CWA, Reedy Creek—an interstate water with significant impact on the economy in the State of Progress—should be a "navigable water."

b. Ditch C-1 Is a "Navigable Water."

Because Ditch C-1 has a "significant nexus" to Reedy Creek, a navigable water, it meets the Kennedy test for "navigable waters." It is undisputed that Ditch C-1 flows directly into Reedy Creek. R. at 5. Further, arsenic from Ditch C-1 is detectable in Reedy Creek, and wildlife in the marsh test positive for arsenic. R. at 5-6. Therefore, Ditch C-1 is a navigable water under the Kennedy test because its physical and ecological connection with Reedy Creek is undisputed.

2. Reedy Creek and Ditch C-1 Are Both "Waters of the United States" Under the Plurality's Test in *Rapanos*.

Under the plurality's test, both Reedy Creek and Ditch C-1 are "waters of the United States." According to the plurality, "waters of the United States" are relatively permanent bodies of water, which include "at bare minimum, the ordinary presence of water," *Rapanos*, 547 U.S. at 732-34 (plurality opinion), and form geographic features described as "'streams . . . , rivers,

[and] lakes.'" *Id.* at 739.[13] Reedy Creek and Ditch C-1 are both relatively permanent bodies of water, and form geographic features. Therefore, they meet the plurality's test.

a. Reedy Creek Is a Water of the United States.

Reedy Creek meets—and actually exceeds—the requirements for a water of the United States set forth in the plurality's test. Reedy Creek is a relatively permanent body of water because it flows continuously, year-round, and runs over fifty miles. R. at 5. Farmers in both Progress and New Union, and travelers at Bounty Plaza service area along Interstate 250 all rely on water from Reedy Creek, further indicating that it is "relatively permanent." R at 5.

Reedy Creek forms a geographic feature in the same category as rivers and streams. A "creek" falls within this definition of "geographic features" because it is defined as "a natural stream of water normally smaller than . . . a river." *United States v. Brink*, 795 F. Supp. 2d 565, 578 (S.D. Tex. 2011) (internal quotations omitted). Also, courts have found that waters called "creeks" are "navigable waters." *See, e.g.*, *id.* at 795 (finding a seasonal creek to be within CWA jurisdiction); *United States v. Costello*, CIV.A. RDB 06-329, 2006 WL 3781708 (D. Md. Dec. 20, 2006) (stating Whitehall Creek is a navigable water). Further, the plurality states that when waterways hold water permanently, they are usually referred to "as rivers, *creeks*, or streams." *Rapanos*, 547 U.S. at 736 n.7 (emphasis added) (internal quotations omitted). This shows the plurality accepts "creeks" as one of the forms of "waters of the United States." Therefore, because Reedy Creek is a relatively permanent body of water, flows continuously, and forms a

---

[13] The *Rapanos* plurality reasoned that for wetlands to qualify as "waters of the United States" they must have a "surface connection" to adjacent channels that are "'waters of the United States' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)." *Id.* at 742. Because the surface connection test applies only to waters that create a boundary-drawing problem, and neither the boundaries of Reedy Creek nor Ditch C-1 are in dispute, the surface connection test does not apply to determining whether Reedy Creek or Ditch C-1 are "waters of the United States."

geographic feature, it exceeds the minimal requirements of the plurality's test.

b. Ditch C-1 Is a Water of the United States.

Ditch C-1 is a relatively permanent body of water that ordinarily contains the presence of water, so it satisfies the test of the plurality and is a water of the United States. The ditch is a historic, continually maintained water body, containing water most of the year, and therefore meets the plurality's test for a "relatively permanent body of water." Ditch C-1 contains water approximately 275 to 350 days of the year. *See* R. at 5. The plurality suggests that waters experiencing periods of seasonal drought, "which contain continuous flow during some months of the year but no flow during dry months" may be included in the definition of "relatively permanent." *Rapanos*, 547 U.S. at 732 n.5.[14] Because the plurality suggests that the ordinary presence of water is a minimal requirement for "waters of the United States," *id.* at 734-35, the plurality may require other findings that a water is relatively permanent. Here, Ditch C-1 is also "relatively permanent" because it has flowed into Reedy Creek for one hundred years, and its maintenance is legally required. R. at 5, 6. It aids agricultural production, and crops that benefit from it are sold in interstate commerce. R. at 5. Therefore, Ditch C-1 is relatively permanent.

Further, Ditch C-1 is a geographic feature—it is over three miles long, three feet wide and one foot deep, on average. It flows through multiple properties, and is a tributary of Reedy Creek. R. at 5. While it does not always contain water, many rivers and streams have periods of drought that cause them to run dry as well. *See Rapanos*, 547 U.S. at 732 n.5. Ditch C-1 is not an overlooked nameless water of little importance—rather, it is a lengthy and significant water body whose waters join with the waters of Reedy Creek and eventually flow into Wildman Marsh. R. at 5. Therefore, Ditch C-1 is a water of the United States under the plurality's test because it is a

---

[14] The ditch is similar to "the 290-day, continuously flowing stream" that the plurality would consider meets its requirement. *See id.*

relatively permanent body of water and forms a geographic feature.[15]

C. The Clean Water Act's "Navigable Waters" Encompass Reedy Creek and Ditch C-1.

Because Reedy Creek and Ditch C-1 are "waters of the United States" under either *Rapanos* test, this Court should affirm the district court's ruling that Reedy Creek is a water of the United States, and reverse the district court's ruling on Ditch C-1. This Court need not decide which *Rapanos* test is controlling, because both tests are met. However, if this Court finds that either the plurality or the Kennedy test is satisfied, but not both, this Court should join the First, Third and Eighth Circuits in holding that the "either-or" test is the proper test for determining the result under *Rapanos*. The "either-or" test is the most practical way to decide whether a water body is within the jurisdiction of the CWA.[16] Therefore, this Court should hold that Reedy Creek and Ditch C-1 are "waters of the United States" consistent with *Rapanos*, and are "navigable waters."

---

[15] Further, the Ninth Circuit confirmed that even a man-made, "seasonally intermittent, non-navigable tributary can fall within the definition of 'waters of the United States.'" *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170-71 (D. Idaho 2011) *aff'd*, 492 F. App'x 738 (9th Cir. 2012) (quoting *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007)).

[16] Using the "either-or" test ensures that courts will find waters are covered under the CWA in any case in which the Supreme Court would also do so. "If Justice Kennedy's test is satisfied . . . Kennedy plus the four dissenters would support jurisdiction. If the plurality's test is satisfied . . . the four plurality members plus the four dissenters would support jurisdiction." *Johnson*, 467 F.3d at 64. If a district court finds that a water fails both tests, both the plurality and Justice Kennedy would similarly reject CWA jurisdiction.

Further, this Court need not give any weight to the *Rapanos* dissent's endorsement of the "either-or" test—the logic of using the "either-or" test is self-evident. The "narrowest grounds" test is inapplicable to this Court's decision on the definition of "waters of the United States," because the plurality test and the Kennedy test are independent and do not overlap, rendering the analysis of which one is narrower a futile endeavor. Also, the "narrowest grounds" test as applied, in some cases, will result in the test of the plurality being satisfied, while the Kennedy test is not. In those cases, the plurality's test would be the narrower holding, because it would find CWA jurisdiction while the Kennedy test would not. Further, applying only the Kennedy test in this type of case would mean that on appeal, the Supreme Court would reverse, because the *Rapanos* plurality and dissent would join to find jurisdiction, leaving Justice Kennedy as the lone dissenter.

V. Bonhomme Is Not Subject to Clean Water Act Regulation Because Maleau is the But-For Cause of Contamination.

Maleau discharges pollutants (arsenic) from a point source (channeled piles of mining waste) into navigable waters (Ditch C-1 and Reedy Creek) without permits in violation of the CWA. *See infra*, Parts III-IV. However, even if this Court does not agree with that analysis, Bonhomme is not subject to regulation under the CWA on four alternative grounds: (1) the CWA encourages enforcement against polluters like Maleau who indirectly discharge pollutants; (2) Ditch C-1 and Reedy Creek are part of the same water body, meaning that Bonhomme's actions are not prohibited because he has not "added" pollutants; (3) Bonhomme is not a proximate cause of the arsenic contamination, and (4) equitable factors counsel against requiring Bonhomme to remediate Maleau's pollution.

A. Maleau's Indirect Discharge of Pollutants Should Be Regulated— Even If Ditch C-1 Is Not a Navigable Water.

Even if this Court decides that Ditch C-1 is not a navigable water as argued in *infra* Part IV, it is still possible to require that Maleau's arsenic contamination be regulated. The CWA allows a finding of liability against individuals who have indirectly contributed pollutants without permits: "Exempting point source owners . . . from the requirement to obtain . . . permits for discharges occurring on their land would undermine a primary objective of the [CWA]." *El Paso Gold Mines*, 421 F.3d at 1146. In *El Paso Gold Mines*, the court held that a defendant mine owner could be held liable under the CWA even though more than two miles of channeled waters separated the point source from the unpermitted discharge—as long as the pollutants were traceable to the defendant. *Id*. at 1137, 1149. *See also Peconic Baykeeper, Inc. v. Suffolk Cnty*., 600 F.3d 180, 188-89 (2d. Cir 2010) (affirming liability against aerial pesticide sprayer for indirect discharge from helicopters through air and into jurisdictional waters). Here, chemical tests performed above and below Maleau's property line establish that pollutants are flowing

from the mining waste piles; thus, Maleau owns the point source. *See infra*, Part III. If this Court decides that Ditch C-1 is neither a navigable water nor a water of the United States, this Court can still hold that Maleau is liable under the CWA—assuming the facts alleged are found to be true—because the arsenic flows indirectly from the waste piles into Reedy Creek through an intermediate pathway, just as in *El Paso Gold Mines* and *Peconic.* The indirect flow of pollutants does not preclude a later finding against Maleau.

B. Bonhomme's Actions Are Not Prohibited Because He Has Not "Added" Pollutants to Jurisdictional Waters Under the Unitary Waters Theory.

This Court should recognize an argument in the alternative that Ditch C-1 and Reedy Creek are part of the same water body—and therefore, that Bonhomme's actions are not prohibited because he has not "added" pollutants to jurisdictional waters. Section 502 of the CWA defines the "discharge" of pollutants to mean "any *addition* of any pollutant to navigable waters from any point source." *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc*., 133 S.Ct. 710, 713 (2013) (citing 33 U.S.C. § 1362(12)). However, "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." *Id*. *See also Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009) (accepting EPA's "unitary waters" theory in holding that addition occurs under CWA "only when pollutants first enter navigable water from a point source"). Bonhomme's actions are not prohibited here because the pollutants merely flow past the culvert on his property, and he does not add them to the water body. Under the unitary waters theory, Maleau's unpermitted addition of arsenic to the ditch violates the CWA.

C. Bonhomme's Activity Is Not Prohibited Because **Rapanos** *Adds a Proximate Causation Prong to Jurisdictional Inquiry under the Clean Water Act, Implicating Maleau.*

Bonhomme should not be required to remediate Maleau's contamination because Justice

Kennedy's "significant nexus" test in *Rapanos* is best interpreted as adding a proximate causation prong to the jurisdictional inquiry of navigable waters. 547 U.S. 715, 759-787 (Kennedy, J., concurring). Proximate cause is defined as "[t]hat which, in a natural and continuous sequence . . . produces the injury, and without which the result would not have occurred." Black's L. Dictionary 1391 (4th ed. 1968). The CWA contains an implicit proximate causation prong under Justice Kennedy's "significant nexus" test, because the "question of how far the jurisdictional reach extends away from [navigable waters] . . . cannot be addressed in isolation from the act of 'discharging' a pollutant." Lawrence R. Liebesman, et al., Rapanos v. United States*: Using Proximate Causation and Forseeability Principles to Save a CWA Flawed Jurisdictional Process,* SS005 Am. L. Inst. 13, 19 (2010). *See also United States v. Agosto-Vega*, 617 F.3d at 552 (holding liable the employees who disposed of raw sewage in nearby creek because they "create[d] the conditions" for improper discharge).

A number of other environmental statutes, including the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–44, and the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370(d), have been interpreted by the courts to retain the basic principle of proximate causation. Liebesman, et al., at 19. Justice O'Connor noted in one prominent ESA case that she saw "no indication that Congress . . . intended to dispense with ordinary principles of proximate causation" under that statute—and compared the ESA with the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675, which, by contrast, is widely recognized for its "express[] abrogat[ion]" of the causation requirement. *Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or.*, 515 U.S. 687, 712 (1995) (O'Connor, J., concurring); Liebesman, et al., at 19. Here, Bonhomme is not contributing any pollutants to Ditch C-1; thus he cannot be found to "produce" the injury that has been alleged under Black's

Law Dictionary's definition of the term. Because Maleau is the proximate cause of the presence of arsenic, Maleau's activity—not Bonhomme's—is prohibited under the CWA.

D. Equitable Factors Counsel Against Finding Bonhomme Liable Under the Clean Water Act.

Maleau is the but-for cause of arsenic contamination. Indeed, this was the very reason that Bonhomme sought a citizen suit—to enforce the law against an environmental violator. Progress has retaliated against Bonhomme because Maleau is a major campaign contributor to the state's Attorney General, and a regional employer. R. at 6. The State may have strong incentives to ignore Maleau's noncompliance—but its decision to counter-sue goes too far.

Even if this Court does not find persuasive any of Bonhomme's prior arguments, Bonhomme should not face the prospect of liability under the CWA as a matter of equity. "Strict liability relieves the government of the obligation to show *mens rea*, not the *actus reus.*" *United States v. Allegheny Ludlum Corp*., 366 F.3d 164, 174 (3d. Cir. 2004). The *Allegheny Ludlum* court further observed: "Although the CWA operates under a regime of strict liability . . . , we do not believe that a[n equitable] defense . . . is inconsistent with this regime," "nor do we infer from the CWA that such was Congress'[] intent." *Id*. at 168, 175. The arsenic originates from Maleau's property—and Maleau has committed the original *actus reus*. This Court must carefully consider whether the State's enforcement against Bonhomme would fulfill the congressional intent behind the CWA.

When weighing CWA enforcement, the government should pursue matters that "confer maximum environmental benefits"—and violations that are not "intentional, flagrant, egregious, . . . [or] openly defiant" allow the court substantial discretion to make "equitable considerations." *United States v. Cundiff*, 555 F.3d 200, 216 (6th Cir. 2009). Bonhomme's actions are neither "intentional, flagrant, egregious, [nor] . . . openly defiant" of environmental laws; indeed, he is

the original plaintiff in this case. *Id*. Bonhomme brought this citizen suit because the arsenic that originates from Maleau's property is causing environmental harm and has reduced Bonhomme's enjoyment of his property and surrounding area. Maleau is the original source of the arsenic, and equity demands that Maleau—and *not* Bonhomme, an innocent landowner—be required to remediate this contamination. After all, "[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting). Bonhomme is neither the source nor the cause of arsenic contamination, and as such, he should not be subjected to regulation under the Clean Water Act.

CONCLUSION

This Court should hold that Bonhomme is a "citizen" within the meaning of the CWA, and that Bonhomme can maintain his citizen suit as the "real party in interest." Further, this Court should interpret the CWA to hold that Maleau's waste piles are a "point source," and that both Reedy Creek and Ditch C-1 are "navigable waters." Finally, this Court should interpret the CWA to regulate the source of pollution: Maleau's piles of mining waste, not Bonhomme's culvert.

For all of the foregoing reasons, Jacques Bonhomme respectfully requests this Court to reverse the district court's motion to dismiss, and remand the case for trial with instructions for the district court to interpret the CWA consistent with this Court's opinion.

Respectfully submitted,

_____

Counsel for Jacques Bonhomme