

C.A. No. 13-01234

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT**

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,
vs.

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee.

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee,
and

SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee,

vs.

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the District of Progress
The Honorable Romulus N. Remus, District Judge, Nos. 155-CV-2012 & 165-CV-2012

BRIEF FOR STATE OF PROGRESS
Plaintiff-Appellant, Cross-Appellee

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STATEMENT OF JURISDICTION

This case concerns an appeal following the Order issued on July 23, 2012 by the United States Court for New Union. The Order granted Shifty Maleau’s motion to dismiss and denied Jacques Bonhomme’s motion to dismiss the cross-claim brought by Shifty Maleau and State of Progress. The district court had proper subject matter jurisdiction to hear the case under 28 U.S.C. § 1331 (2012). The order of the district court is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (2012) (providing for “jurisdiction of appeals form all final decisions of the district courts of the United States . . .”).

STATEMENT OF THE ISSUES

1. Whether a foreign citizen is a proper plaintiff under the citizen suit provision of the Clean Water Act when the foreign citizen has no private right of action, his domestic employer incurs all litigation-related expenses, he stands to benefit from the outcome, and he has a substantive right to bring the case.
2. Whether waste piles of gold mining overburden that are eroded by rainwater runoff constitute point sources under the Clean Water Act.
3. Whether Reedy Creek, which travels from State of Union to State of Progress and is involved in commerce in both states, is navigable water when the EPA interprets “waters of the United States” to include interstate waters and water that substantially effects interstate commerce.
4. Whether Ditch C-1 is a tributary of Reedy Creek as it sustains a relatively permanent water flow and is physically connected to navigable water.
5. Whether Bonhomme may be held liable for discharges of pollutants through the culvert on his property, over which he is owner and operator, even when he himself did not add the pollutants to the water.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union, granting Shifty Maleau’s (Maleau) motion to dismiss and denying Jacques Bonhomme’s (Bonhomme) motion to dismiss. R. at 8, 10.

Initially, Bonhomme filed a complaint against Maleau alleging violations of the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2012), relying upon the citizen suit provision of the CWA (*Id.* at § 1365) to do so. R. at 4. The complaint alleged that Maleau was in violation of CWA § 402, 33 U.S.C. § 1342 (2012), as a result of mining activities in the State of Progress (Progress). R. at 4-5.

Later, Progress filed a separate claim against Bonhomme, alleging that he discharged arsenic into Reedy Creek in violation of CWA § 402, 33 U.S.C. § 1342 (2012). R. at 5. Maleau intervened in this later action as a matter of right under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B) (2012), and subsequently moved to consolidate the action with the suit filed by Bonhomme. R. at 5. The district court granted the motion to consolidate, R. at 5, and both Bonhomme and Maleau filed motions to dismiss the actions against them. R. at 5.

The district court granted Maleau's motion to dismiss, while denying Bonhomme's motion for relief. R. at 8, 10. In so doing, the court held that: (1) Bonhomme was not a real party in interest, (2) As a foreign citizen Bonhomme had no statutory right to bring a claim under the "citizen suit" provision of the CWA, (3) Maleau's mining overburden piles were not point sources under the CWA, (4) Ditch C-1 was not a "navigable water of the United States", (5) Reedy Creek was a "navigable water of the United States", and (6) that Bonhomme was liable for the discharge of arsenic into Reedy Creek. R. at 8-10.

All three parties filed a Notice of Appeal. R. at 1. Bonhomme challenges all holdings of the district court. R. at 1-2. Maleau appeals the court's holding that Reedy Creek is a navigable water of the United States. R. at 2. Progress contests the decision of the lower court that Ditch C-1 is not a navigable water of the United States. R. at 2.

STATEMENT OF THE FACTS

Maleau operates a gold mine next to the navigable Buena Vista River and trucks the overburden and slag to his property in Jefferson County. R. at 5. He places the waste into piles located near Ditch C-1. *Id.* The Ditch was constructed in 1913, and is protected by restrictive covenants that run with the property requiring owners to maintain the Ditch. *Id.* Ditch C-1 is permanent, though water flow may be interrupted for several weeks to three months by annual periods of drought. *Id.*

Rain water runoff has created natural channels flowing away from the base of the piles near Ditch C-1. *Id.* When it rains, water filters through the piles, flows through the channels along the ground, and eventually discharges into Ditch C-1. *Id.* The water flows through the Ditch and away from Maleau's property for three miles, passing through several agricultural properties, which also drain into the Ditch. *Id.* The Ditch then enters Bonhomme's property, and discharges into Reedy Creek through a culvert on Bonhomme's property. *Id.*

Reedy Creek starts in New Union, flowing for fifty miles through the State of Progress, and ultimately ending in Wildman Marsh. R. at 5-6. It serves as a permanent water source for Bounty Plaza, a service area along Interstate Highway 250 (I-250). R. at 5. The water is used for agricultural purposes in both Progress and New Union, and the agricultural products from both states are sold in interstate commerce. *Id.*

Wildman Marsh is located primarily inside the Wildman National Wildlife Refuge, which is owned and maintained by the U.S. Fish and Wildlife Service. R. at 6. The Marsh is a major destination for duck hunters, with many coming from surrounding states, and some coming from international destinations. R. at 6. This interstate tourism adds twenty-five million dollars to the local economy. *Id.*

Despite the presence of arsenic in Ditch C-1, Reedy Creek, Wildman Marsh, and three birds in Wildman Marsh, there have been no notable changes in flora and fauna surrounding the Marsh. *Id.* Even still, Bonhomme alleges that the arsenic negatively impacts the Creek, Marsh, and visiting fauna, making him afraid to continue his hunting activities in those areas. *Id.*

Bonhomme is a French national employed by Precious Metals International, Inc. (PMI), R. at 8, which is a domestic entity headquartered in New York and incorporated in Delaware. R. at 6. In addition to serving as PMI's President and a member of the board, Bonhomme is the largest shareholder, owning three percent of outstanding shares. R. at 7. While PMI owns no property in Progress or New Union, *Id.*, Bonhomme owns a lodge in Progress, R. at 6, which he uses exclusively for hunting parties comprised largely by business clients and associates of PMI. R. at 7-8. PMI has incurred all litigation expenses, paying for Bonhomme's attorney, expert witness fees, and conducting or purchasing analysis to support Bonhomme's claim. R. at 7.

STANDARD OF REVIEW

This is an appeal from an order granting a motion to dismiss under 33 U.S.C. § 1311, 1362, 1362. Also on appeal is the district courts findings of law as they relate to the CWA §§ 1251 -1387. When ruling on a motion to dismiss all factual allegations in the complaint will be accepted as true. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The standard of review for all relevant issues is *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988).

SUMMARY OF THE ARGUMENT

The district court was correct in holding that Bonhomme was not a proper plaintiff, that Maleau's overburden piles are not point sources, that Bonhomme is liable for discharges occurring on his property, and that Reedy Creek is a navigable water of the United States. The district court erred in holding Ditch C-1 is not a navigable water of the United States.

Bonhomme is not a proper plaintiff because only citizens of the United States may bring suits under section 505 of the CWA, and he is not a real party in interest. Additionally, Maleau's overburden piles are not point sources under the CWA because they are not discrete conveyances, and are nonpoint sources unregulated by the Act. Ditch C-1 is a water of the United States both because it is a relatively permanent body of water and because it is a tributary of navigable water. Finally, Bonhomme is liable for the addition of arsenic to Reedy Creek because landowners are liable for the pollutants they discharge.

Bonhomme is not a proper plaintiff under § 505 of the CWA and Federal Rule of Civil Procedure 17. The citizen suit provision of the CWA broadly defines "citizen" but the use of the term itself cannot be ignored. By interpreting citizen to encompass any person or entity residing in any nation, this Court would be ignoring the Congressional intent behind the provision. The district court correctly held that § 505 of the CWA does not provide Bonhomme, a French national, with a statutory right of action. Even if Bonhomme were able to maintain the action, he is not a real party in interest. Bonhomme does not have a significant interest in the litigation because his employer has incurred all litigation expenses and nearly all litigation benefits would accrue to his employer. As this issue was timely raised and the real party in interest has not been joined, the district court correctly dismissed Bonhomme's complaint.

Maleau's overburden piles are not point sources because they are not discernible, confined and discrete conveyances. *See* 33 U.S.C. § 1362(14). Although several courts have noted that the CWA's provisions relating to point sources should be construed broadly (*Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991), holding that piles of rock that do not channel or collect the polluted water would be to effectively eliminate the point source requirement from the CWA. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 218 (2d Cir.

2009). Defendant Maleau's waste piles, if they are subject to regulation at all, should be regulated by the State of Progress as nonpoint sources. Un-channeled rainwater runoff or percolation that carries manmade pollutants to nearby waters has repeatedly been classified as nonpoint source pollution (*Cordiano*, 575 F.3d at 220-21), and such pollution is not due to be controlled by the CWA. *Abston Constr. Co.*, 620 F.2d at 43.

Reedy Creek is navigable water under the CWA. Reedy Creek travels from New Union to Progress and sustains a relatively permanent water flow. In both New Union and Progress Reedy Creek is used to irrigate crops that are sold in interstate commerce. It is also used as a water source by Bounty Plaza which supplies I-250, an interstate highway. Reedy Creek feeds into a wetland that is also the site of a federal wildlife preserve. Pursuant to the EPA and 40 C.F.R. 122.2 interstate water is defined as waters of the United States. Reedy Creek is also subject to the CWA as it substantially effects interstate commerce. Finally, pursuant to the Property Clause of the U.S. Constitution, water in the wildlife preserve is also water of the United States. While the regulations reflect the EPA's interpretation of the CWA, each of these interpretations are reasonable and should be subjected to *Chevron* deference. Therefore Reedy Creek is navigable water subject to the authority of the CWA.

Ditch C-1 is navigable water pursuant to the CWA. Ditch C-1 is a relatively permanent irrigation ditch that is protected by permanent restrictive covenants in the deeds of the properties that the ditch runs through. Tributaries are streams of water which contributes its flow to a larger stream. Ditch C-1 is physically connected to Reedy Creek and sustains water flow except in times of annual draught. Ditches may be listed as possible point sources, but ditches are not confined to only being point sources. When a ditch sustains a relatively permanent water flow

like Ditch C-1, it may be defined as a tributary under the CWA. Therefore Ditch C-1 is navigable water subject to the authority of the CWA.

Bonhomme must be held liable for any discharges of pollutants because they are discharged through the culvert on his property. Owners and operators of point sources are liable for the pollutants they discharge, regardless of whether the owner or operator took any affirmative action to add the pollutant or channel the polluted water. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104-05 (2004).

ARGUMENT

I. BONHOMME IS NOT A PROPER PLAINTIFF AND THEREFORE THE DISTRICT COURT CORRECTLY DISMISSED HIS COMPLAINT

To be a proper plaintiff, a party must hold an enforceable legal right entitled to maintain an action. Fed. R. Civ. P. 17. To be enforceable, the right or interest must be legally protectable and created by substantive law. *Donaldson v. United States*, 400 U.S. 517 (1971). The Clean Water Act provides a substantive remedy for citizens harmed by violations of the Act. Clean Water Act (CWA) § 505, 33 U.S.C. § 1365 (2012). Bonhomme argues that CWA § 505 provides a substantive remedy for all persons, regardless of citizenship. The language and intent of the Act dictate otherwise. Section 505 of the CWA limits the substantive remedy to American citizens. Recognizing this, the district court properly dismissed Bonhomme's complaint.

To maintain a cause of action as a proper plaintiff, a party must also be a real party in interest. A real party in interest must have a substantive legal right and a significant interest at stake in the litigation. *New Orleans Pub. Serv. v. United Gas Pipe Line*, 732 F.2d 452, 464 (5th Cir. 1984). Bonhomme asserts that he is the real party in interest where the hunting parties he organizes may be impacted by discharges into Wildman Marsh. The district court disagreed, correctly holding that the real party in interest and beneficiary of the litigation is PMI.

A. Bonhomme's suit was properly dismissed because he has no statutory right to bring suit under section 505 of the Clean Water Act, as he is not a citizen of the United States.

Bonhomme has no substantive right to maintain any action under section 505 of the CWA, as the Act only enables claims by American citizens. “[A]ny citizen” may commence an action under the “Citizen suits” section of the Clean Water Act. Clean Water Act § 505, 33 U.S.C. § 1365 (2012). The section was enacted to “encourage citizen participation” in enforcing the Clean Water Act. *Minnesota v. Callaway*, 401 F. Supp. 524, 528 n.4 (D. Minn. 1975) *rev'd on other grounds sub nom. Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976).

The statutory language defining the citizen suit provision does not support Bonhomme's limitless interpretation of citizen. In creating the private right of action under section 505, Congress defined “citizen” as “a person . . . having an interest which . . . may be adversely affected.” 33 U.S.C. § 1362 (2012). It further defined “person” as any “individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body.” *Id.*

By defining the narrow phrase “citizen” to include a broader range of potential plaintiffs, the court did not deprive the term “citizen” of all meaning. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172 (2001). In *SWANCC*, the Supreme Court interpreted the narrow phrase “navigable waters” under the CWA. *Id.*; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Congress had broadened “navigable waters” by defining it as including “waters of the United States.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). Upon review, the Court rejected the plaintiff's argument that the broader interpretation should include “all waters of the United States. *SWANCC*, at 172 (emphasis added). It held that Congress did not deprive the narrower

“navigable waters” of all meaning, but rather the narrower definition imposed navigability requirements on those regulated waters of the United States. *Id.*

SWANCC guides the court’s interpretation here. Just as in *SWANCC*, Congress has given a narrow concept under the Clean Water Act a broad definition. Bonhomme argues that “citizen” encompasses any individual, regardless of nationality. Such a definition would deprive the term of all meaning, and would challenge the precedent set forth by the Supreme Court. Here, *SWANCC* counsels that “citizen” constrain “all persons”, limiting the section 505 private right of action to American citizens. The district court, using the *SWANCC*’s interpretive guidance, correctly held that the narrower term imposes outer limits on the broader definition.

Allowing foreign citizens to bring section 505 claims is against the policy and legislative intent of the section. Congress intended for the citizen suit provision of the CWA to be a tool to abate ongoing and continuous pollution. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61, (1987). At the same time, Congress saw section 505 as a way to increase citizen participation in government and lawmaking. S. Rep. No. 1196 at 36 (1970) (section 505 facilitates citizen participation in CAA enforcement); 116 Cong. Rec. 33, 102-03 (1970) (Sen. Muskie supporting bill as increasing public participation through enforcement process). Allowing foreign nationals to participate in domestic policymaking and enforcement will not serve to increase opportunities for American citizens to play the role envisioned by Congress when it passed section 505. Congress’ focus on citizens participating with their government strongly suggests an intent to limit the private right of action to American citizens. Broadening the term would run counter to this intent, deprive “citizen” of its meaning, and run counter to the Supreme Court’s holding in *SWANCC*. As the Act only contemplates citizens of

the United States as plaintiffs under section 505 of the CWA, Bonhomme has no statutory right of action.

B. Bonhomme is not a real party in interest where only his employer has a substantive right to maintain the action, his employer has incurred all expenses related to the litigation, and nearly all benefits of litigation would accrue to his employer.

Bonhomme is not a real party in interest as he has no substantive right at issue in the litigation and his interest in the infrequent hunting trips is not substantial. Every action in federal court must be asserted by the real party in interest. Fed. R. Civ. P. 17(a)(1); *See Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990); *Certain Interested Underwriters at Lloyd's v. Layne*, 26 F.3d 39, 42 (6th Cir. 1994). Real parties in interest are those persons possessing the right or interest to be enforced in the litigation, *Hanna Mining Co. v. Minn. Power & Light Co.*, 573 F. Supp. 1395, 1397 (D. Minn. 1983), *aff'd*, 739 F.2d 1368 (8th Cir. 1984), and who have significant interest in the litigation. *Stichting Ter Behartiging v. Schreiber*, 407 F.3d 34, 48 n.7 (2d Cir. 2005); 4-17 James W. Moore et al., *Moore's Federal Practice – Civil* § 17.10 (3d ed. 1997). Significant interests are direct, and substantial. *New Orleans Pub. Serv. v. United Gas Pipe Line*, 732 F.2d 452, 464 (5th Cir. 1984); *See also Heyman v. Exchange Nat'l Bank*, 615 F.2d 1190, 1194 (7th Cir. 1980) (suggesting that low probability of success, affecting expected payout of proceeding, could render interest insubstantial); *Donaldson v. United States*, 400 U.S. 517 (1971).

A party lacking a substantive legal right is not the real party in interest as to enforcement of that right. *Virginia Elec & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973). Upon timely objection, dismissal of action is proper once a reasonable time has been allowed to join the real party in interest. Fed. R. Civ. P 17. Bonhomme enjoys no substantive right under section 505 of the Clean Water Act (*See supra* subsection A) and therefore cannot be

a real party in interest under Rule 17. Even if Bonhomme was entitled to a right enforceable under the citizen suit provision, he has no substantial interest in the litigation.

An agent acting solely for the interests of others is not a real party in interest. *In Airlines Reporting Corp.*, the Second Circuit found a corporate agent working on behalf of airlines to be an improper plaintiff where it advanced a claim that would solely benefit the airlines. *Airlines Reporting Corp. v. S & N Travel, Inc.*, 58 F.3d 857 (2d Cir. 1995). The agent did not suffer any pecuniary loss from the litigation, and all potential benefits flowed to the airlines. *Id.* at 862. As the benefits of litigation accrued to the airlines, and the agent had suffered minimal loss, the court held the agent to be a ‘mere conduit’ for a remedy owned by others. *Id.* The court refused to allow the airlines to “enlist” their representative to maintain the action when the actual losses had been suffered by the airlines themselves. *Id.*

Where an agent maintains an interest in the subject of litigation, the agent may be the real party in interest. In *Hollander*, the court found an investment bank to be a proper plaintiff when it litigated a prior transaction and had retained 11.53% of the paper involved. *Oscar Gruss & Son Inc. v. Hollander*, 337 F.3d 186, 192 (2d Cir. 2003). The court recognized that the bank had suffered a pecuniary loss, and that ownership of the 11.53% of the paper gave the company a “valid stake” in the litigation. *Id.* at 194. The court considered the facts that bank had pressed the litigation itself and had been involved in the underlying transaction in concluding that the bank was more than a “mere conduit.” *Id.*

Bonhomme is not a real party in interest because any potential benefits of this litigation will be enjoyed by his employer, Precious Metals International, Inc. Just as the benefits of litigation flowed through the airlines’ agent in *Airlines Reporting Corp.*, here any potential payoff will be enjoyed by PMI. Bonhomme uses the lodge exclusively to host hunting parties

for PMI's business clients and associates. While Bonhomme may gain some personal satisfaction from holding these business retreats, the overwhelming presence of PMI's business partners strongly suggests that the hunting parties are for the benefit of his employer, PMI. Much like the agent in *Airlines Reporting Corp.*, Bonhomme is "merely a conduit" to channel potential benefits of this litigation.

Bonhomme is not a real party in interest because he has little personal interest in the litigation. He has suffered little if any loss in this litigation. PMI has borne all litigation expense - providing Bonhomme's attorney and developing scientific evidence - freeing Bonhomme from the costs of this action. While Bonhomme is concerned about the health of the fauna in Wildman Creek, no negative effects on the wildlife have been observed. Bonhomme may argue that under *Hollander* his 3% stake in PMI constitutes a substantial interest. His degree of separation from the litigation and lesser interest suggest otherwise. The bank in *Hollander* retained 11.5% of the notes underlying the litigation – nearly four times as much as Bonhomme's interest in PMI. More important – the bank in *Hollander* was intimately involved in the subject of the litigation and controlled the litigation itself. Unlike the notes at the center of the controversy in *Hollander*, Bonhomme's interest in PMI is not affected or in dispute in this case. While the plaintiff in *Hollander* controlled and funded the litigation itself, here PMI, not Bonhomme, is undertaking the expense of litigation. Bonhomme's lack of involvement and PMI's domination of any benefits undermine Bonhomme's claim to a substantial interest in the litigation.

As Bonhomme has no substantive right under CWA section 505 and has no substantial interest in the litigation, he is not a real party in interest. Under the Supreme Court's interpretive guidelines in *SWANCC*, Section 505 is properly read to require American citizenship to maintain a cause of action. The legislative history of Section 505 reinforces the limitation of the private

right of action to American Citizens. As Bonhomme is a French national, he has no remedy available to him under Section 505 of the Clean Water Act. Further, Maleau objected to Bonhomme's status as a real party in interest in his answer, and has provided Bonhomme and PMI opportunity to amend their complaints to include a real party in interest. Both Bonhomme and PMI have declined to do so, despite reasonable opportunity. As Bonhomme is not a proper plaintiff and failed to join a real party in interest despite reasonable opportunity, the district court correctly dismissed his complaint.

II. REEDY CREEK IS A PERMANENT FLOWING INTERSTATE BODY OF WATER THAT IS SUBSTANTIALLY INVOLVED IN INTERSTATE COMMERCE AND THEREFORE NAVIGABLE WATER AS DEFINED BY THE CWA

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (2012). The CWA also charges the EPA with the responsibility of issuing permits for the discharge of pollutants into navigable water from any point source. *Id.* §§ 1311, 1362. Most relevant here, the CWA defines navigable water as "waters of the United States, including the territorial seas." *Id.* §1362. Although Congress structured the CWA authority around "navigability," it has been held that this term is of limited import and "some waters would not be deemed navigable under the terms classical understanding." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The EPA interpreted navigability to include interstate waters. 40 C.F.R. § 122.2 (2012). Reedy Creek travels between New Union and Progress and is therefore navigable water under the CWA. The lower court properly held that Reedy Creek is navigable water.

A. Reedy Creek is a an interstate water with relatively permanent water flow that is a navigable water under the CWA

The CWA states the EPA has authority to issue permits for discharge of pollutants into navigable water. 33 U.S.C. § 1342 (2012). The real issue is how to define navigability, as the CWA only further defines navigability as “waters of the United States.” *Id.* §1362(7). Early in the CWA’s history the EPA and courts interpreted navigability narrowly to mean only navigable-in-fact. *The Daniel Ball*, 77 U.S. 557, 563 (1870). Since then the EPA has expanded the definition to include “interstate waters, including interstate wetlands.” 40 C.F.R. § 122.2. Essentially, the courts and EPA took notice that Congress meant for the CWA to reach more water than just those with the ability to support travel by water. Without additional guidance from Congress, the Supreme Court tried to settle the issue of navigability in *Rapanos*. *Rapanos v. United States*, 547 U.S. 715 (2006).

Justice Scalia and Justice Kennedy wrote plurality opinions in *Rapanos* setting forth two different tests expanding the reach of navigability in the CWA. Justice Scalia focused on a textual analysis founding that the CWA permit program only applied to “relatively permanent, standing or flowing bodies of water,” and not to “ordinarily dry channels through which water occasionally or intermittently flows.” *Id.* at 716. He was concerned with limiting the reach of navigability and stated “waters of the United States includes only those relatively permanent, standing or continuously flowing bodies of water.” *Id.* at 739. Justice Scalia adds an element of surface connection to a traditional navigable water to establish navigability for adjacent wetlands, but this element is irrelevant to the determination of navigability of Reedy Creek.

Justice Kennedy ultimately concurred in the judgment but disagreed with Justice Scalia’s relatively permanent requirement. *Id.* at 768. Justice Kennedy supported a significant nexus test and believed that the question of navigability must be determined in relation to the CWA’s goals

and purpose. *Id.* at 760. Although Justice Kennedy's test specifically related to the expansion of navigability to non-navigable wetlands, Justice Kennedy's opinion also supports a finding that Reedy Creek is navigable water.

Reedy Creek is a 50 mile long permanent body of water that starts in New Union. R. at 5. It then travels to Progress where it congregates in a wetland located within Progress. *Id.* Reedy Creek is a permanent source of water and is sufficient to be used as a water supply for Bounty Plaza along the I-250 interstate highway. *Id.* While Reedy Creek travels between two different states it squarely falls under the EPA's regulation that interstate waters are waters of the United States. Reedy Creek's flow of water obviously satisfies Justice Scalia's permanency or continuously flowing requirement. This interstate flow and Reedy Creek's involvement in interstate commerce, as will be discussed below, also helps balance Justice Scalia's federalism concerns.

It is also for the same reasons of permanency and interstate travel that Reedy Creek qualifies as waters of the United States per Justice Kennedy's opinion. Justice Kennedy believed that even the plurality was "unduly dismissive of the important public interest...served by the CWA in general." *Rapanos*, 547 U.S. 715 at 777. While the purpose of the CWA is to protect our nation's waters, including interstate water, under these facts it would be antithetical to the CWA to not define Reedy Creek as navigable water.

Navigability as defined in the CWA is clearly ambiguous as courts have struggled to define it, and Congress has not directly spoken to the issue. The EPA has interpreted this term to include interstate waters and wetlands that have a significant nexus to interstate waters. 40 C.F.R. § 122.2. Because the EPA interpretation almost systematically follows the *Rapanos*

relatively permanent test it is a reasonable interpretation and should be given *Chevron* deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

While Reedy Creek should be deemed navigable by virtue of its permanent nature and interstate characteristics, it may also be deemed navigable by its substantial effect on interstate commerce.

B. Reedy Creek is subject to the authority of the CWA because the creek substantially affects interstate commerce

Pursuant to the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress has the authority to regulate over anything that substantially effects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 584 (1995). *Rapanos* and *SWANCC* fail to completely address the effect of interstate commerce and its effect on defining water as navigable. *Earth Science* directly addressed the issue of the impact of interstate commerce and held “Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce.” *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979). Nothing in *Rapanos* disturbed or reversed this interpretation of the CWA.

Rapanos consisted of two consolidated cases dealing with the Corps designation of a wholly intermittent intrastate wetlands as navigable water. *Rapanos*, 547 U.S. 715 at 762-63. Justice Scalia took issue with authorizing federal action pursuant to the Commerce Clause without a “clearer statement from Congress.” *Id.* at 737. He believed this expansion would intrude into an area of traditional state authority of land use regulation. *Id.* at 716.

SWANCC also dealt with a wholly intrastate abandoned gravel pit that the Corps tried to regulate using the Migratory Bird Rule rely on Congress’ commerce power. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The Court held that the

Migratory Bird Rule exceeded the authority granted to the Corps under the CWA. *Id.* at 684. However, *SWANCC* explicitly stated the court did not consider “whether Congress could exercise such authority consistent with the Commerce Clause.” *Id.* at 677-78.

Unlike *Rapanos* and *SWANCC*, this case involves a permanent interstate body of water, not an intrastate wetland. *R.* at 5. While expanding the authority of the CWA in the prior situations may have implicated federalism concerns, this case does not implicate the same issues as the water travels between two different states and substantially effects different areas of interstate commerce. Reedy Creek’s substantial effect on interstate commerce allows it to fall under the third prong of the *Lopez* test. *Lopez*, 514 U.S. 549 at 559.

Reedy Creek is used as a water source at Bounty Plaza for travelers on I-250, a major interstate highway. *R.* at 5. Without a reliable water source a store would not be able to operate and this store operates for the benefit of interstate travelers. Second, Reedy Creek is used for the irrigation of agriculture by farmers in two different states who sell their goods in interstate commerce. *Id.* Third, Reedy Creek supplies a wetland that attracts hunters from around the world and infuses approximately 25 million dollars into the economy. *R.* at 6. Sustaining the health of the wetland is critical to maintaining the ability to hunt and there is already evidence that some ducks in Wildman Marsh are contaminated with arsenic. *Id.* A contamination of the bird population would result in a destruction of this 25 million dollar recreational activity.

C. Under the Property Clause, Congress has the ability to regulate Reedy Creek

Reedy Creek may also be found to be a navigable tributary of the federal wildlife preserve. Pursuant to the Property Clause, U.S. Const. art. IV, § 3, cl. 2., the water in Wildman Marsh National Wildlife Refuge is waters of the United States. Because Wildman Marsh

National Wildlife Refuge is a federally owned wildlife refuge, the water is subject to Congress' control. Intuitively the ability to control the water on the wildlife would include the ability to control the waters connected to the wetland. *Cappaert v. U. S.*, 426 U.S. 128 (1976) (the Property Clause permits federal regulation of federal lands and encompasses rights in navigable and non-navigable streams). If Congress is not able to regulate Reedy Creek, any control over the wetland would be a fiction, as there would be no actual control over the wetland water. Therefore, the lower court was correct in findings that Reedy Creeks is navigable water.

III. PILES OF GOLD MINING OVERBURDEN, OVER WHICH RAINWATER RUNOFF NATURALLY FLOWS, ARE NOT POINT SOURCES UNDER THE CLEAN WATER ACT

The Clean Water Act ("CWA"), a revolutionary piece of legislation designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. § 1251 (2012)), imposes strict effluent limitations for the discharge of pollutants, and enumerates the circumstances under which the Environmental Protection Agency ("EPA") may issue permits for such discharges. *Id.* § 1311. While the CWA is admittedly broad and its provisions far reaching, its jurisdiction is not without bounds. The National Pollutant Discharge Elimination System ("NPDES"), under which the EPA has authority to issue permits for otherwise impermissible discharges, only regulates the "discharge of pollutants." *Id.* Congress took great care to define discharge of pollutants as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362. Courts have repeatedly held that Congress's language in the CWA clearly indicates that nonpoint source pollution (which most commonly occurs when rainwater runoff carries pollutants to nearby navigable waters), does not fall under the jurisdiction of the NPDES program (See *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998)); thus, Defendant Maleau's waste piles may only trigger liability under the CWA if they are classified as point sources. See *Karr v. Hefner*, 475 F.3d 1192, 1203 (9th Cir. 2007) ("To

identify a...discharge violation requires identifying a point source.”); *United States Pub. Interest Research Grp. v. Heritage Salmon, Inc.*, No. 00-150-B-C, 2002 LEXIS 2706, at *31 (D. Me. Feb. 19, 2002) (“The classification as a point source is crucial as the Act only prohibits discharges from a point source”).

The overburden piles are not point sources because they are not discernible, confined and discrete conveyances. *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.2 (2013). Although several courts have noted that the CWA’s provisions relating to point sources should be construed broadly (*Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991); *see also Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45-56 (5th Cir. 1980)), holding that piles of rock that do not channel or collect the polluted water would be to effectively eliminate the point source requirement from the CWA. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 218 (2d Cir. 2009); *United States v. Plaza Health Lab.*, 3 F.3d 643, 646 (2d Cir. 1993).

Defendant Maleau’s waste piles, if they are subject to regulation at all, should be regulated by the State of Progress as nonpoint sources. Un-channeled rainwater runoff or percolation that carries manmade pollutants to nearby waters has repeatedly been classified as nonpoint source pollution. *Cordiano*, 575 F.3d at 220-21. Such pollution is not due to be controlled by the CWA. *Abston Constr. Co.*, 620 F.2d at 43 (citing S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3744).

For the foregoing reasons, this court should affirm the decision of the Court below and hold that the piles of mining overburden are not point sources.

A. Piles of mining overburden waste are not discernible, confined and discrete conveyances.

The EPA’s jurisdiction under the NPDES program only extends to discharges of pollutants from a point source. 33 U.S.C. § 1311. A point source is any discernible, confined and

discrete conveyance that channels or collects the polluted water before it is discharged into a navigable water. 33 U.S.C. §1311; *Abston Constr. Co.*, 620 F.2d at 44-45; 40 C.F.R. § 122.2; Defendant Maleau’s waste piles of mining overburden are not point sources because they are not conveyances, and do not channel or collect the polluted water.

Interpretation of the CWA’s point source provisions must commence with the language of the statute itself. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Cordiano*, 575 F.3d at 218. In § 502 of the CWA, Congress very specifically defined point source as any “discernible, confined and discrete conveyance.” Courts have repeatedly stated that it should always be assumed that Congress purposefully chose to employ particular words in a statute; thus, this court should strongly consider Congress’s use of the word conveyance to define point sources. *IUE-CWA v. Visteon Corp. (In re Visteon Corp.)*, 612 F.3d 210, 220 (3d Cir. 2010); *Cordiano*, 575 F.3d at 218.

The term “conveyance” has a clear meaning, and this Court should find that Maleau’s waste piles do not fit into that definition. Multiple dictionaries define conveyance as a means of transportation that carries people or things from one place to another. *Conveyance Definition*, merriam-webster.com, <http://www.merriam-webster.com/dictionary/conveyance> (last visited 2013); *Conveyance Definition*, oxforddictionaries.com, http://www.oxforddictionaries.com/us/definition/american_english/conveyance (last visited 2013). This definition is clearly reflected by the list of example point sources provided by Congress in the CWA, which includes pipes, ditches, channels, tunnels, and conduits. 33 U.S.C. § 1362. Admittedly, this list is not exhaustive; however, the examples chosen by Congress all evoke images of physical structures specifically built to convey water. Defendant Maleau’s waste piles are completely dissimilar from any such structure and clearly outside the scope of

any logically conceivable definition of conveyance. R. at 5. The waste piles do not transport or carry the polluted water to Ditch C-1; rather, water naturally flows over them and is carried through naturally formed channels at the base of the piles to the ditch. R. at 5. Plaintiff Bonhomme has brought forth no evidence to suggest that Maleau positioned the waste piles in such a manner that they formed any sort of earthen channel. This Court should not put itself in the position of the legislature and instead rely on the clear definition of the words employed by Congress in the CWA. Even if this Court decides to approach the point source issue using a broader definition of the term, Maleau's waste piles cannot be classified as point sources because "simple erosion over the material surface, resulting in the discharge of water and other materials into navigable waters, does not constitute a point source discharge, absent some effort to change the surface, to direct the waterflow [sic], or otherwise impede its progress." *Abston Constr. Co.*, 620 F.2d 41, 44-45.

Whether a discharge occurred through a point source is a question of fact, and courts have consistently found that some kind of conveying structure or impediment to natural water flow must exist for a point source to be present. The CWA is not meant to prohibit naturally induced, random run-off pollutants. *Concerned Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1417 (W.D.N.Y. 1993).

The CWA's sweeping objective of restoring the Nation's waters has led many courts to abide by a broad interpretation of point source (*United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (stating in dicta that "the concept of a point source was designed to further this [permit regulatory] scheme by embracing the broadest possible definition of [point source]"); however, the term cannot be interpreted so broadly as to eliminate the point source requirement from the CWA. *Cordiano*, 575 F.3d at 219. Point source discharges occur when

some structure—whether naturally occurring or man-made—collects and channels polluted water before transferring it to a navigable water. The CWA is not meant to prohibit naturally induced, random run-off pollutants (*Concerned Residents for the Env't*, 834 F. Supp. at 1417), but instead contemplates regulation of “channelized” discharges. *Waterkeeper Alliance Inc. v. EPA*, 399 F.3d 486, 510 (2d Cir. 2005). *See also Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1152 (9th Cir. 2010) (The text of the CWA makes it clear that some type of collection or channeling is required to classify a discharge as being from a point source); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) (Point source discharges do not include unchanneled and uncollected surface waters). In order for the polluted waters to be channelized, there generally must exist some artificial system for moving water, waste, or other materials. *Froebel v. Meyer*, 217 F.3d 928, 937 (7th Cir. 2000). The court in *Rapanos v. United States* emphasized that the examples of point sources provided by Congress in the CWA are terms usually associated with “watercourses through which waters typically flow,” and states that the origin of a pollutant will not necessarily be a point source. *Rapanos v. United States*, 547 U.S. 715, 735; 743 (2006).

Pursuant to this well-established legal rule that a point source must be a discernible, confined and discrete conveyance that collects or channels water, the piles of overburden waste are not point sources under the CWA. In 1994, the EPA issued a technical resource document on gold mining that specifically stated, “Some discharges from mine sites do not meet the traditional definition of a ‘point-source discharge.’ Specifically, runoff from tailings piles, overburden and mine development rock piles, and other mine areas often is not controlled through a discrete conveyance. As a result, these types of discharges have frequently been considered nonpoint-source discharges.” Environmental Protection Agency, EPA 530-R-94-013,

Technical Resource Document: Extraction and Beneficiation of Ores and Minerals, 1-62 (1994). In *Dague v. Burlington*, the court found that pollutants transported by runoff from a landfill into a pond through a railroad culvert were point source discharges. The court, however, came to this conclusion because the culvert constituted a point source, not the landfill. *See Dague v. Burlington*, 935 F. 2d. The present case is very similar in that the waste piles, which are the pollutant's origin, are not also the point sources discharging those pollutants. Maleau's waste piles are not situated in a manner that forms a man-made channel for water. R. at 5. The waste piles do not collect or otherwise impede the natural flow of water. Neither are there channels running down the waste piles (according to the facts set out in Bonhomme's Complaint, water flows out through eroded channels at the bottom of the waste piles). R. at 5. The waste piles are not part of an artificial system for transporting waste or water, and they are entirely dissimilar to any and all of the point source examples provided by Congress. R. at 5. Such piles of rock are not comparable to the conveyances contemplated by the CWA.

Plaintiff Bonhomme will attempt to draw similarities between this case and *Sierra Club v. Abston Constr. Co.*, in which the court stated that, "a point source of pollution *may* also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances..." *Abston Constr. Co.*, 620 F.2d at 45. This case can easily be distinguished from the case at hand. In *Abston Constr. Co.*, the defendants spoil piles were part of a system meant to transfer and collect polluted water. The piles were designed and positioned so that they channeled polluted runoff water into nearby basins. *Id.* at 43. Contrastingly, Maleau's waste piles are isolated from his mining operation, and are not designed to channel or collect runoff rainwater. R. at 5. Although the rainwater that flows over

Maleau's waste piles is transported by naturally eroded channels to Ditch C-1, these channels are not embedded down the sides of the waste piles like those in *Abston Constr. R.* at 5.

Defendant Maleau's waste piles are not point sources because they are not discernible, confined and discrete conveyances. The waste piles are not part of a water or waste transportation system, and they do not channel or collect the polluted water. For these reasons, the piles of overburden waste cannot be classified as point sources. Instead, the piles are nonpoint sources and outside of the EPA's jurisdiction under the CWA.

B. Piles of mining overburden waste are nonpoint sources and are not regulated by the CWA.

Maleau's overburden waste piles are nonpoint sources and outside of the EPA's authority under the CWA because Congress has classified nonpoint source pollution as runoff primarily caused by rainfall around activities that employ or create pollutants. *Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998).

Nonpoint source pollution is not specifically defined in the CWA, but it is accepted to be any pollution that does not come from a point source. *Id.* The EPA elaborated on this by giving a non-exclusive list of possible nonpoint sources of pollution, which includes unchanneled runoff and acid drainage from mines. Request for Comments, 55 Fed. Reg. 35248 (Aug. 28, 1990). Nonpoint source pollution generally results from land runoff, rain, or percolation, and occurs when runoff picks up and carries away natural and man-made pollutants to navigable waters. *Cordiano*, 575 F.3d at 220. "Point and nonpoint sources are not distinguished by the kind of pollution they create or the activity causing the pollution, but rather by whether the pollution reaches navigable waters through a confined, discrete conveyance." *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984). Simple erosion over the surface is nonpoint source pollution,

as long as there was no attempt to direct or impede natural runoff. *See Abston Constr. Co.*, 620 F.2d at 44.

Defendant Maleau's waste piles neatly fit into the established rule regarding nonpoint sources. Rainwater flows naturally over the waste piles, percolates through them, and discharges at the base of the piles into Ditch C-1. R. at 5. This is exactly the type of pollution Congress did not intend to encompass in the NPDES program. The pollutants from Maleau's overburden piles arrive in Ditch C-1 not by way of a discrete conveyance, but through natural rainwater runoff. This is the quintessential example of nonpoint source pollution.

For these reasons, this Court should find that Defendant Maleau's waste piles are nonpoint sources and outside of the scope of the CWA's NPDES program.

IV. DITCH C-1 IS A NAVIGABLE WATER OF THE UNITED STATES AND IS SUBJECT TO THE CWA AS IT IS A RELATIVELY PERMANENT WATER SOURCE THAT MAY BE DEFINED AS A TRIBUTARY OF REEDY CREEK

Ditch C-1 is not precluded from being classified as navigable water because it is listed as a *possible* point source under the CWA. 33 U.S.C. § 1362(14) (*emphasis added*). It is not suggested that Ditch C-1 is navigable-in-fact or capable of being rendered so. Rather, Ditch C-1 is a tributary of Reedy Creek and therefore navigable water as defined by the CWA. 40 C.F.R. § 122.2. As described above, the CWA defines navigable water as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The regulations further define waters of the United States to include tributaries of interstate waters. 40 C.F.R. § 122.2. There is nothing in *Rapanos* that "state[s] that every channel must either be a point source or a navigable water for all purposes." *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1174 (D. Idaho 2011) *aff'd*, 492 F. App'x 738 (9th Cir. 2012) (internal quotations omitted). Instead, there are situations where a ditch may be defined as a water of the United States. Due to the fact that Ditch C-1 is a tributary

of Reedy Creek and properly defined as a water of the United States, the lower court erred in finding that Ditch C-1 was not navigable water.

A. Ditch C-1 is a tributary of the navigable Reedy Creek and therefore must be defined as navigable under the CWA

A tributary is a “stream which contributes its flow to a larger stream or other body of water.” *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). In *Rapanos* all the justices agreed that the term “waters of the United States” encompasses some waters that are not navigable in the traditional sense. *Rapanos*, 547 U.S. 715 at 730–31, (plurality opinion); *Id.* at 759 (Kennedy, J., concurring in the judgment); *Id.* at 787 (Stevens, J., dissenting). Continuing this theme, the regulations extend the authority of the CWA to tributaries of interstate water. 40 C.F.R. § 122.2. Water flow need not be permanent and the pollutant need not immediately or continuously reach navigable water for a water to be designated a tributary. *Vierstra*, 803 F. Supp. 2d 1166 at 1170.

Ditch C-1 is a relatively permanent water that is protected by restrictive covenants that require landowners to maintain its integrity on their property. R. at 5. The Ditch travels through multiple properties where it is used for agricultural purposes, yet it still has enough water flow to discharge water into Reedy Creek. *Id.* Although Ditch C-1 has interrupted water flow during times of annual drought this only lasts a few weeks to few months. Justice Scalia specifically noted that a relatively permanent standard does “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.” *Rapanos* 547 U.S. 715 at 733. He also did not “exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* Although the plurality did not differentiate between intermittent and seasonal, Ditch C-1 has a flow of water that is more constant than any seasonal water. *Vierstra*, 803 F. Supp. 2d 1166 at 1169. (“non-navigable

tributary with a direct surface water connection to navigable water six to eight months of the year constitutes waters of the United States”) (internal quotes omitted); *United States v. Moses*, 496 F.3d 984 (9th Cir. 2007) (man-made intermittent seasonal creek that flowed into navigable water was a tributary as defined by the CWA).

There is disagreement about whether Justice Kennedy’s analysis even applies to non-navigable tributaries or whether his analysis is confined to wetlands. See *Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210 (D.Or.2009) (holding “Justice Kennedy’s significant nexus test is inapplicable to determining the jurisdictionality of tributaries to waters of the United States.... Justice Kennedy limits the applicability of his legal standard to wetlands adjacent to jurisdictional waters”); but see *Environmental Protection Information Center v. Pacific Lumber Co.*, 469 F.Supp.2d 803, 823 (N.D.Cal.2007) (using the significant nexus test to analyze CWA jurisdiction over of a non-navigable tributary). However, even if Justice Kennedy’s significant nexus test was applied, Ditch C-1 is physically connected to navigable Reedy Creek and is relatively permanent water. There is also evidence showing that arsenic, carried by water from Ditch C-1, is being transported to Reedy Creek. R. at 6. Finding a significant nexus for a non-navigable tributary connected to navigable water again furthers Justice Kennedy’s overall theory of interpreting the CWA in light of the purpose of the Act.

It is the purpose of the CWA to protect the waters of the United States. 33 U.S.C § 1251. This may only be done by allowing the EPA to enforce authority over waters that directly affect navigable water. The EPA’s interpretation that waters of the United States includes tributaries of interstate water, furthers the purpose and applicability of the CWA. It is also consistent with the interpretations set forth in *Rapanos*. Even if there were inconsistencies, *Rapanos* should be confined to analysis regarding expansion of navigability to wetlands as split opinions should be

viewed “on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977).

Therefore, the EPA interpretation that a tributary of an interstate water is navigable water is reasonable and should be subjected to *Chevron* deference. *Chevron*, 467 U.S. 837.

Ditch C-1 supports a water flow that is present for almost the entire year and is physically connected to Reedy Creek. R. at 5. There is also evidence that arsenic from Ditch C-1 is polluting Reedy Creek. R. at 6. Therefore, Ditch C-1 is a tributary of waters of the United States and is navigable water subject to the CWA.

B. Ditch C-1 can be a tributary of the CWA because the CWA only lists ditches as an example of a possible point source

The CWA defines point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel....” 33 U.S.C. § 1362. The lower court relies on *Rapanos* to claim that Ditch C-1 cannot be navigable water because it is listed as a point source. R. at 9. Justice Scalia stated, “The separate classification of “ditch[es], channel[s], and conduit[s] which are terms ordinarily used to describe the watercourses through which intermittent waters typically flow—shows that these are, by and large, not waters of the United States.” *Rapanos* 547 U.S. 715 at 735-36 (internal quotes omitted). However, *Rapanos* does not explicitly hold that ditches may never be waters of the United States. Instead, ditches are not confined to being identified as a point source when they support a relatively permanent water flow and are connected to navigable water. *United States v. Vierstra*, 803 F. Supp. 2d at 1168.

Justice Scalia justified part of his permanency test by finding that the CWA separated out relatively permanent waters as navigable water and intermittent channels as point sources. *Rapanos*, 547 U.S. 715 at 735. It was the issue of intermittent flow, rather than the name of the water, that would result in the designation as a point source. Justice Scalia never stated that a

ditch may not be a water of the United States, but rather it is the necessity of statutory interpretation and distinction of navigable water and intermittent water that precludes intermittent water from designation as a point source. *Id.* at 737.

Cases decided after *Rapanos* have concluded that ditches may be tributaries of waters of the United States. *National Assn. of Home Builders* analyzed *Rapanos* and found that a ditch, though included in the definition of a point source, may, under the certain circumstances, otherwise qualify as waters of the United States. *National Assn. of Home Builders v. United States Army Corps of Engineers*, 699 F.Supp.2d 209. Later *Vierstra* held that a Low Line Canal was a non-navigable tributary even though it may be properly categorized as a point source. *United States v. Vierstra*, 803 F. Supp. 2d at 1167. This Low Line Canal carried seasonal water six to eight months of the year and was connected to a ditch, which was then connected to navigable river. *Id.* at 1168-69. *Vierstra* held that the Low Line Canal was part of a tributary system that included the ditch. *Id.* at 1168.

Therefore, although Ditch C-1 may be termed a point source, it is not precluded from also being defined as water of the United States. Due to the ditch's permanency, as discussed above, Ditch C-1 does not implicate the issues raised by Justice Scalia of separating intermittent and navigable waters for interpreting the CWA. Ditch C-1 is not the same sort of intermittent water he believed would create issues of expanding the CWA and infringing on state regulation power. This interpretation abides by his statutory interpretation and the necessity of distinct sections of the CWA. Therefore, this court should hold that Ditch C-1 is navigable water.

V. OWNERS AND OPERATORS OF POINT SOURCES THAT DISCHARGE POLLUTANTS ARE LIABLE FOR THE DISCHARGE EVEN WHEN THEY THEMSELVES DID NOT ADD THE POLLUTANT

Plaintiff Bonhomme must be held liable for any discharges of pollutants because they are discharged through the culvert on his property. Owners and operators of point sources are liable for the pollutants they discharge, regardless of whether the owner or operator took any affirmative action to add the pollutant or channel the polluted water. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104-05 (2004).

Point source owners may be liable for pollutant discharges occurring on their land, regardless of whether they acted in some way to cause the discharge. *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005). To base liability on whether the operator or owner of the point source added the pollutant, or on whether the pollutant originated with the point source would be untenable and not in keeping with the goals of the CWA. *S. Fla. Water Mgmt.*, 541 U.S. at 104-05. Individuals are not relieved from liability merely because they themselves did not construct the point source or did not add pollutants to it. *El Paso Gold Mines, Inc.*, 620 F.2d 41 at 45. Although the term “addition” implies affirmative conduct, contemporaneous introduction of pollutants through a point source is sufficient to satisfy this element. *See generally El Paso Gold Mines, Inc.*, 421 F.3d 1133. As the court in *El Paso Gold Mines, Inc.* so aptly stated, “if you own the leaky faucet, you are responsible for its drips.” *Id.* at 1145.

Based on the rule stated above, Plaintiff Bonhomme should be held liable for the discharges of pollutants coming from his culvert. It is irrelevant that Bonhomme did not add the pollutant to his culvert, and it is equally irrelevant that the pollutant did not originate in the

culvert. *See S. Fla. Water Mgmt.*, 541 U.S. at 104-05. The language in the CWA relating to discharges of pollutants consistently refers to “owners and operators” of point sources, which strongly suggests that the CWA is more concerned with not the impetus of the pollutants entering the water, but rather the means by which they eventually reach the water. *See generally S. Fla. Water Mgmt.* In furtherance of its sweeping goals, the CWA intends to cast a net of liability that catches as many potential responsible individuals as possible. Bonhomme owns the culvert and must be held liable for any polluted substance that it emits. The case *Froebel v. Meyer*, which stated that affirmative action was required to establish liability, does not apply here because it dealt with § 404 violations. Section 402, which regulates the discharge of pollutants, focuses on the point source, that is, the means by which the pollutants are conveyed into navigable water; contrastingly, § 404 focuses on the actor causing the pollution.

Bonhomme may attempt to point out *Sakonnet v. Dutra*, in which the court states that liability must lie with the person causing the addition of the pollutant. *Sakonnet v. Dutra*, 738 F. Supp. 623, 630 (D.R.I. 1980). This opinion, which emphasized the importance of the person controlling the pollutants, is clearly superseded by the much more recent and binding *S. Fla. Water Mgmt.* opinion. Even though Bonhomme was not in control of the pollutant itself, he did control the point source discharging it; under *S. Fla. Water Mgmt.*, this is sufficient to establish liability under the CWA.

Even if this court held that Defendant Maleau’s waste piles were point sources (Progress argues that they are not; see section III, *supra*) that discharged into the navigable water Ditch C-1, Bonhomme still could not escape liability because his culvert would still be a point source. Intervening channels such as Bonhomme’s culvert are point sources under the CWA. *See United States v. Ortiz*, 427 F.3d 1278, 1281 (10th Cir. 2005); *Dague*, 935 F.2d at 1355.

As a side note, the agricultural stormwater discharge provisions of the CWA do not cover the discharges from Bonhomme's culvert. In its definition section, the CWA states that agricultural stormwater discharges are not point sources. 33 U.S.C. § 1362. Although Bonhomme may try to argue that he cannot be liable for discharges coming out of his culvert because they result from agricultural runoff (several farms feed into the culvert that discharges from Bonhomme's property) (R. at 5), this argument does not hold water—once the agricultural runoff is collected and channeled by the culvert, it becomes point source pollution. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011).

The culvert on Bonhomme's property is the instrumentality through which pollutants are discharged into Reedy Creek. The fact that Bonhomme did not construct the culvert and had no control over the addition of the pollutants flowing through it is irrelevant to the issue of liability for the discharge. This court should affirm the lower court's decision and hold Bonhomme liable for the discharge of pollutant in violation of the CWA.

CONCLUSION

For the foregoing reasons this court should affirm the lower court's decisions that Bonhomme is not a proper plaintiff, that Maleau's waste piles are not point sources, that Bonhomme is liable for discharges that occur on his property, and that Reedy Creek is a navigable water of the United States. This should court reverse the district court's holding, and find that Ditch C-1 is a navigable water of the United States.