Team Number 61

No. 13-01234

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
Case No. 155-CV-2013, 165-CV-2013
The Honorable Judge Romulus N. Remus

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

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JURISDICTIONAL STATEMENT

The district court and this Court have subject matter jurisdiction over this case pursuant to 28 U.S.C. Section 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1291(a)(1) in that this is an appeal from a from a district court's final decision.

The district court entered the order from which appeal No. 13-01234 was taken on July 23, 2012. Plaintiff/appellant Jacques Bonhomme (hereinafter "Bonhomme") timely filed his Notice of Appeal.

QUESTIONS PRESENTED

1. Is a business owner who suffers both personal and business-related injuries precluded from maintaining a citizen suit under the Clean Water Act in an individual capacity?

2. Is United States citizenship a prerequisite to bringing a "citizen suit" under section 505 of the Act, authorizing private suits by any "person or persons having an interest which is or may be adversely affected" by a violation of the Act?

3. Does the Act's prohibition on "point source" pollution extend to identifiable piles of mining refuse that leach arsenic-laden water into adjacent streams?

4. Did the court below err in finding a tributary of a creek unprotected by the Act while nonetheless recognizing that the creek itself was protected?

5. Can a property owner be held liable under the Act for pollution introduced miles upstream from his property merely because the polluted waterway flows into a non-polluted waterway on his property?

STATEMENT OF THE CASE

Appellee, Shifty Maleau, operates a gold mine in Jefferson County, Progress. Record (hereinafter "R.") p. 5. His mine produces a significant amount of arsenic-heavy waste known as "slag." Id. Maleau collects the slag into piles near a channel of water known as "Ditch C-1." Id. When it rains, these piles collect rainwater. Id. As rainwater percolates through the refuse, it absorbs arsenic. Id. This arsenic-laden water then flows down erosion gullies and into Ditch C-1. Id. Ditch C-1, in turn, carries this polluted water some three miles before entering appellant Jacques Bonhomme's property. Id.

On Bonhomme's property, Ditch C-1 terminates in a culvert emptying into Reedy Creek. Id. Reedy Creek is itself an interstate waterway that begins in the neighboring State of New Union. Id. Before crossing into Progress, Reedy Creek is used extensively by agricultural and service industries engaged in interstate commerce. Id. It then crosses the New Union-Progress border just upstream of Bonhomme's property. Id. After receiving arsenic-laden water from Ditch C-1, Reedy Creek flows several miles before feeding into Wildman Marsh, an extensive wetland that attracts duck hunters the world over. Id. at 5-6.

Elevated levels of arsenic in the Marsh can be traced directly back to Maleau's refuse piles. Id. at 6. Significant levels of arsenic in Reedy Creek are present just downstream of the culvert connecting Ditch C-1 and Reedy Creek, while arsenic is undetectable upstream of the culvert. Id. Similarly, in Ditch C-1 high concentrations of arsenic are present just downstream of Maleau's refuse piles, but undetectable upstream. Id.

In the past, Bonhomme has enjoyed duck hunting in Wildman Marsh; he has even built a hunting lodge on the edge of the marsh where he hosts hunting trips for friends and business associates. Id. But since learning of the elevated levels of arsenic in the Marsh, Bonhomme has

significantly reduced his use of the wetlands. Id. Where he once hosted hunting parties eight times a year, he now hunts only twice a year. Id. Bonhomme instituted an action against Maleau to abate the pollution problems in Wildman Marsh. Id. at 4.

The suit, however, appears to have raised the ire of certain Progress residents. The state's attorney general filed a citizen suit under the Act against Bonhomme. Id. at 5. Under his understanding of the law, Bonhomme is liable for the "discharge of a pollutant" as he owns the land where Ditch C-1 empties into Reedy Creek. Id. Maleau intervened as a matter of right in Progress's suit. Id. On Maleau and Progress' unopposed motion, the district court consolidated the suits into the present action. Id.

The parties filed cross motions to dismiss. Id. The court granted Progress's and Maleau's motions but was unclear on precisely what grounds. It began its discussion by summarily ruling that Bonhomme's shareholder interest in one of Maleau's competitors precluded him from bringing the suit. Id. at 8. The court's analysis did not stop there, however. It also determined that a citizen suit was unavailable to Bonhomme as he was not an actual citizen of the United States. Id.

Despite purporting to rest its decision on procedural grounds, the court then moved to the merits of the case. Id. It determined that Maleau's refuse piles did not constitute "point sources" under the Act—defined therein as "discernible, confined and discrete conveyance[s]," 33 U.S.C. § 1362 (2013)—resting its decision on the fact that "[p]iles are not normally considered to be conveyances." Id. at 9. While acknowledging Reedy Creek is indeed a navigable water, it ultimately determined that Ditch C-1 was not. Id. at 10. The court explained this decision by noting that "ditches are listed as point sources in [the Act] and a ditch cannot be simultaneously two elements in the water pollution offense." Id. at 9. Because, then, in the court's view, arsenic

only entered the "waters of the United States" at the culvert on Bonhomme's property, it opined that it "would find for Maleau on all issues, except that Reedy Creek is a water of the United States." Id. at 9-10.

This appeal followed.

SUMMARY OF THE ARGUMENT

The lower court erred in finding that Bonhomme lacked standing to bring suit against Maleau. Bonhomme is a real party in interest under Rule 17(a)(1)(G) of the Federal Rules of Civil Procedure and the Clean Water Act. Rule 17(a)(1)(G) provides that a court has to look at the statute to determine whether a party has standing to bring a suit. Courts need to look at the definitions as provided for by the statute in question. The Clean Water Act allows "citizens" to bring suits against others. The Act defines "citizen" as "a person or persons having an interest in which is or may be adversely affected." The Act also defines "person" as an "individual." Because Bonhomme's personal property was damaged by Maleau discharging pollutants into Ditch C-1, Bonhomme has proper standing to bring a suit under the Clean Water Act.

The lower court also erred in finding that Maleau's refuse piles were not point sources under the Act. The Act prohibits the discharge of any pollutant from a point source. Congress intentionally embraced the broadest definition of point sources for purposes of preventing pollutants from entering the waters of the United States. Maleau's refuse piles are point sources as they constitute identifiable points to which pollution can be definitively traced. Alternatively, the channels running between Maleau's refuse piles and Ditch C-1 constitute point sources under the Act.

Additionally, the lower court erred in finding that Ditch C-1 was not a navigable water under the Clean Water Act. Using the test that the majority of courts have adopted, Justice Kennedy's significant-nexus test, Ditch C-1 is a navigable water as it fulfills all of Justice Kennedy's factors for determining what is a navigable water under the Act.

The lower court did properly find that Reedy Creek is a navigable water. Using Justice Kennedy's significant-nexus test, Reedy Creek meets all of the requirements necessary to be

found as a navigable water. Furthermore, Reedy Creek is closely connected to interstate travel, and, thus, should be found to be a navigable water and under the jurisdiction of the Clean Water Act.

Finally, the lower court erred in finding that Bonhomme violated the Clean Water Act. But for Maleau's refuse piles, the arsenic found in Bonhomme's property would not exist. Furthermore, the culvert connecting Ditch C-1 and Reedy Creek does not add a pollutant to the water of the United States because the arsenic was already present in jurisdictional waters. Alternatively, the culvert connecting Ditch C-1 and Reedy Creek does not add a pollutant because Ditch C-1 and Reedy Creek are constituent parts of a single body of water.

Therefore, the Court should find that Bonhomme had proper standing to bring a citizen suit under the Clean Water Act against Maleau, that Maleau's refuse piles are point sources as defined under the Clean Water Act, that both Ditch C-1 and Reedy Creek are navigable waters under the Clean Water Act, and that Bonhomme did not violate the Clean Water Act.

ARGUMENT

I. BONHOMME IS A REAL PARTY IN INTEREST UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND BECAUSE BONHOMME HAS A REAL INTEREST AT STAKE IN THE CASE.

The threshold constitutional question is if Bonhomme has standing. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 84 (1998). "The 'irreducible constitutional minimum of standing contains three elements': (1) injury-in-fact, (2) causation, and (3) redressability." Ass'n of Flight Attendants–CWA v. U.S. Dep't of Transp., 564 F.3d 462, 464 (D.C.Cir.2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. at 560–61 (1992) (quotation marks omitted)); Nat'l Ass'n of Home Builders v. E.P.A., 667 F.3d 6, 11 (D.C. Cir. 2011). These three questions are narrowed further by the definitions of the statute.

The federal rules of civil procedure allow a party authorized by statute to bring a suit. FRCP 17(a)(1)(G). This is because the Clean Water Act creates a definition of who may bring citizen suits pursuant to 33 U.S.C. § 1365 (2013). Citizen is later defined as "a person or persons having an interest in which is or may be adversely affected." Id. at § 1365(g). Person is later defined as "means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." Id. at § 1362(5).

Mr. Bonhomme is an individual person who has a personal interest in bringing this suit. Nothing in the statute forbids a French National from bringing the action under the Clean Water Act, so long as they have an interest which may be adversely affected. Mr. Bonhomme's interest in this case stems from the pollution in Ditch C-1.

Mr. Bonhomme tested the water and realized that arsenic is detectable in high concentrations directly downstream of the Maleau property, but not upstream of it. R. p. 6. This leads to the logical conclusion that the arsenic is coming from the Maleau property. Further

downstream tests show the levels in arsenic decrease as the flow of water increases, indicating no further arsenic polluted water is added. Id. This ditch then empties into Reedy Creek, which has no detectable arsenic levels upstream of Ditch C-1, but detectable in significant concentrations downstream of where Ditch C-1 empties into the creek. Id. Reedy Creek then empties into Wildman Marsh. Id. at 5.

Ditch C-1 happens to empty into Reedy Creek on Mr. Bonhomme's farm, which has led to the State of Progress to bring a citizen suit against Bonhomme. Id. In addition to Mr. Maleau's pollution opening Mr. Bonhomme up to legal action, the arsenic has fouled the waters in Wildman Marsh to the extent that Mr. Bonhomme is afraid to take hunting parties there. Id. at 6. Bonhomme has decreased his hunting parties from eight per year to only two per year. Id.

Therefore, Bonhomme has suffered the injury of losing his hunting parties, which is alleged to have been caused by the pollution stemming from Mr. Maleau's property, which is redressable by having the polluting stopped.

II. BONHOMME IS A CITIZEN PURSUANT TO 33 U.S.C. § 1365 WHO MAY BRING SUIT AGAINST MALEAU.

33 U.S.C § 1365 allows private individuals to bring citizen suits. Citizen is defined as "a person or persons having an interest which is or may be adversely affected." Id. at § 1365(g). Person is later defined as "means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." Id. at § 1362(5).

The Supreme Court noted that "citizen" was "intended by Congress to allow suits by all persons possessing standing under [The Supreme] Court's decision in Sierra Club v. Morton, 405 U.S. 727 (1972)". See S. Conf. Rep. No. 92-1236, p. 146 (1972) (reprinted as (No. 7 1972 U.S.C.C.A.N. 3776, 3823)). Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,

453 U.S. 1, 16 (1981). The congressional committee expressly accepted the Sierra Club v. Morton definition in their Senate Conference Report. Id. The Supreme Court went on to note that citizens include both plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "noneconomic" and probably noncompensable, and persons like respondents who assert that they have suffered tangible economic injuries because of statutory violations." Middlesex County Sewerage Auth., 453 U.S. at 16. The Supreme Court in Sierra Club v. Morton stated that the "interest alleged to have been injured may reflect aesthetic, conservational, and recreational as well as economic values." 405 U.S. at 738 (internal citations omitted).

As Bonhomme has an interest which has been adversely affected and continues to be adversely affected, specifically of the loss of his four hunting parties per year due to ongoing pollution, he does constitute a citizen under the statute. This type of interest was addressed by the Supreme Court as being acceptable interest alleged to have been injured because it reflects "conservational and recreational as well as economic values." Id. Therefore, Mr. Bonhomme is a citizen with an interest which has been adversely affected.

Maleau is attempting to protect himself by arguing a more narrow definition of "citizen" in the citizen suit statute. The statute clearly defines citizen as a person and person as meaning several entities. To suggest that you must be a United States citizen would fly in the face of the definition of "person" allowing for various associations to bring a suit. Bonhomme is bringing this suit to protect his constitutional liberty interests and protect his property from a statutorily recognized wrong.

III. MALEAU HAS DISCHARGED POLLUTANTS FROM A "POINT SOURCE" ACCORDING TO THE ACT'S EXPANSIVE DEFINITION OF THAT TERM.

The Clean Water Act prohibits the "discharge of any pollutant" from "a point source" unless authorized by an NPDES permit. 33 U.S.C. §§ 1311, 1342, 1362. Section 502 of the Act

further defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

This definition was "designed to further the [Act's] scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1978) (emphasis added). Accordingly, courts interpreting the term do so "broadly." Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1009 (11th Cir. 2004); see also United States v. West Indies Transport, Inc., 127 F.3d 299, 309 (3d Cir. 1997) ("Congress intended a broad definition of 'point source'").

A. Maleau's Refuse Piles Are Themselves Point Sources, as They Constitute Identifiable Points to Which Pollution Can Be Definitively Traced.

Thus, "the ability to identify a discrete facility from which pollutants have escaped" is "the touchstone for finding a point source." Washington Wilderness Coal. v. Hecla Mining Co., 870 F. Supp. 983, 988 (E.D. Wash. 1994). This comports with Congress' intended statutory scheme. Where the Act's prohibitions bear "on a broad range of ordinary industrial and commercial activities," Rapanos v. U.S., 547 U.S. 715, 721 (2006), liability must only attach where "runoff [can] be traced to an[] identifiable point of discharge." Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 220 (2d Cir. 2009). Though congress explicitly recognized "that non-point sources of pollution are a major contribution to water quality problems," it focused on point sources "because they c[an] be identified and regulated more easily tha[n] nonpoint source[s]." Oregon Natural Dessert Ass'n v. Dombeck, 172 F.3d 1092, 1097 (9th Cir. 1998) (quoting Natural Resources Defense Council v. EPA, 915 F.2d 1314, 1316 (9th Cir. 1990)).

While Congress saw no "workable method" of regulating non-point sources, it "contravenes the intent . . . and the structure of the [Act] to exempt from regulation any activity that emits pollution from an identifiable point." Earth Sciences, 599 F.2d at 373.

Hewing then to this framework, this Court can dispose of any argument that respondent's refuse piles are beyond the ambit of the Act. That the pleadings and opinion below refer to the sources as "piles" confirms that they are "discernible, confined, and discrete"—in other words, that they are identifiable and pollutants issuing therefrom can be traced back to them. Because "[d]ischarges from a . . . refuse pile can easily be traced to their source," a pile that "acts to collect and channel contaminated water" is a point source under the Act. Hecla, 870 F. Supp. at 9; see also Parker, 386 F.3d at 1009 ("when storm water collects in piles of industrial debris and eventually enters navigable waters . . . the pile piles of debris [are] point sources within the meaning of the CWA").

Though the district court surmised that "pile[s] of dirt and stone . . . are not normally considered to be conveyances," R. p. 9, this is a gross narrowing of the Act's scope. The Act explicitly includes certain vehicles and agricultural operations within the definition, despite the fact that they are hardly considered conveyances under the court's reading. Rather, where Congress intends the definition be "broadly interpreted," this court need not stray from the everyday definition of "conveyance:" anything that causes the transportation of pollutants from one place to another. Where, as here, refuse piles collect water that then "percolates through them, eventually discharging" into a waterway, those piles are the but-for cause of the transfer of pollutants into the waters of the United States and thus "conveyances" under the Act. See Sierra Club v. Abston Constr. Co., 620 F2d 41 (5th Cir. 1980) (finding point source discharge "where

miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges").

Similarly, the district court's reliance on Consolidated Coal Co. v. Costle, 604 F.2d 239, 249 (4th Cir. 1979), and Appalachian Power Co. v. Train, 545 F.2d 1351 (4th Cir. 1976), is misplaced and, frankly, confounding. In both cases, petitioners sought facial review of EPA regulations related to mining operations. In Costle, the Fourth Circuit explicitly noted that regulation of "coal refuse piles and coal storage piles" is valid in as much as it applies to "point sources." 604 F.2d at 249-50. In Train, the court similarly upheld the regulations to the extent they covered "contaminated runoff discharges from coal storage . . . areas." 545 F.2d at 1373. It only struck regulations that purported to regulate the nebulously-defined "rainfall runoff from 'any construction activity.'" Id. By their own terms, neither opinion lends support to the respondents' position.[1]

And inasmuch as Congress has left any ambiguity in the definition of point source, deference to EPA interpretations under Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984), wholly resolves the matter. See Cordiano, 575 F.3d at 221 (according EPA interpretations Chevron deference in determining whether berm on shooting range constituted a point source). The EPA's own regulations define "discharge of a pollutant" as including "surface runoff which is collected or channeled by man." 40 C.F.R. § 122.2. More to the point, the EPA has informally defined "point source" to include "any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.)"—a definition to which at

[1] Moreover, to the extent that either Train or Costle ever stood for the proposition that refuse piles are categorically non-point sources of pollution, this approach is no longer followed even within the Fourth Circuit. See Southern Appalachian Mount. Stewards v. Penn Va. Operating Co., 2013 WL 57648, *2 (W.D. Va. 2013) (a "pile of waste" adjacent to a stream "is itself a point source [when] it releases pollutants into the stream").

least one federal court has deferred. Hecla, 870 F. Supp. at 988-89. Additionally, the EPA's Environmental Appeals Board has affirmatively adopted the position that "a point source . . . may also be present where miners design spoil piles from discarded overburden . . . even if miners have done nothing beyond the mere collection of rock and materials." In The Matter Of: Shee Atika, Inc., 2 E.A.D. 487, 490 (1988) (citing Abston Construction, 620 F.2d at 45). In applying this rule, the Board has found that a point source exists where an identifiable storage area collects rainwater that subsequently, as runoff, carries pollutants into jurisdictional waters. Id.

Finally, it must be noted that "the question whether a discharge occurred from a point source is fact-laden," and in so answering "the court must consider evidence of the 'precise nature' of the Defendant's facility." Hecla, 870 F. Supp. at 989 (citing Abston Construction, 630 F.2d at 47); accord Idaho v. Hanna Mining Co., 699 F. Supp. 827, 832 (D. Idaho 1987); Concerned Area Residents v. Southview Farm, 834 F. Supp. 1410, 1417 (W.D.N.Y. 1993). At such an early stage in litigation, dismissal was certainly premature.

B. Alternatively, the Channels Running Between the Refuse Piles and Ditch C-1 Constitute Point Sources Under the Act.

There is no requirement that "conveyances" be man-made. By its own terms, the Act defines conveyances as including "fissures," 33 U.S.C. § 1362 (2013), and courts have found that naturally-occurring channels through which runoff flows can constitute point sources under the Act. See Southview Farm, 834 F. Supp. at 1419 (natural streams and ditches); Abston Construction, 620 F.2d at 45-45 (naturally occurring ditches).

The Eleventh Circuit's opinion in Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004), is particularly illustrative. The defendant in that case owned piles of scrap metal from which several "erosion gullies leading downhill to a stream" carried pollutant-laden runoff.

In finding the defendants had discharged from a point source, the court noted that "[w]hether the erosion gullies from which the water flowed into the stream were constructed by the defendants is irrelevant." Id. at 1009 n.17.

Similarly, in this case, the pleadings and opinion below make clear that the rainwater runoff "discharg[es] through channels eroded by gravity from the configuration of the waste piles into Ditch C-1." R. p. 5. That those channels were eroded by gravity makes no difference under § 1362. As such, they constitute "conveyances" under the Act, and the point at which they meet Ditch C-1 constitutes a point source under the Act.

IV. DITCH C-1 IS A NAVIGABLE WATER OF THE UNITED STATES UNDER THE CLEAN WATER ACT.

The proper test to determine whether a body of water is a navigable water under the Clean Water Act is Justice Kennedy's significant-nexus test. The significant-nexus test is the test that the majority of courts have found to be the appropriate test in determining what is a navigable water under the Clean Water Act. See U.S. v. Gerke, 464 F.3d 723 (7th Cir. 2006); Northern California River Watch v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007); U.S. v. Robinson, 521 F.3d 1319 (11th Cir. 2008). Additionally, Justice Roberts, in his concurring opinion in Rapanos, laid down the precedent that lower courts have used in adopting Justice Kennedy's significant-nexus test. See Rapanos, 547 U.S. at 758. Thus, this Court should find that the lower court erred in finding that Ditch C-1 is not a navigable water under the Clean Water Act.

Even if the Court determines that Justice Kennedy's significant-nexus should not be the sole test used in determining what a navigable water is, then the Court should adopt both tests from Rapanos. If the Court determines that the record does not contain enough facts to determine

whether Ditch C-1 is a navigable water, then this case should be remanded for further fact finding.

A. The Proper Test to Determine What is a Navigable Water Under the Clean Water Act is Justice Kennedy's Significant-Nexus Test.

In his concurring opinion, Justice Kennedy found that a body of water is a navigable water under the Clean Water Act if the body of water possessed a significant-nexus to another body of water that was actually navigable or that could be made actually navigable in a reasonable manner. Rapanos, 547 U.S. at 759. In order to determine what the proper significant nexus is for a body of water to be considered a navigable water, a court should look at each case on a case-by-case ecological determination. Id. at 779. Justice Kennedy also gave different factors for courts to consider when determining whether a significant nexus exists. One of the biggest factors to consider when determining whether a significant nexus exists is whether the purpose of the Clean Water Act is fulfilled in allowing a body of water to be a navigable water. Id. Another factor is whether a sufficient hydrological connection exists between the waters. Id. at 786.

1. In This Case, One of the Goals of the Clean Water Act is Satisfied as a Finding That Ditch C-1 is a Navigable Water Would Prevent Pollutants From Being Discharged Into Ditch C-1.

Congress has stated that one of the purposes for the Clean Water Act is to prevent "the discharge of pollutants into . . . navigable waters[.]" Clean Water Act, 33 U.S.C. § 1251 (2013). Furthermore, Congress has also stated that "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source . . .." Id. § 1362 (2013).

In this case, it is undisputed that arsenic is a pollutant. The fact that arsenic was dumped into Ditch C-1 from Maleau's refuse piles constitutes discharging pollutants into a body of water.

This is the exact type of pollutant discharge that Congress intended to prevent when enacting the Clean Water Act. Id. § 1251. Therefore, in determining whether Ditch C-1 has an adequate significant nexus to an actually navigable water, in this case, Reedy Creek, the purpose of the Clean Water Act would be met in finding Ditch C-1 as a navigable water.

2. Another Factor to for This Court to Consider is Whether There is a Sufficient Hydrological Connection Between the Actually Navigable Water and the Body of Water in Question.

Another factor that Kennedy offered was whether the hydrological connection is strong enough to establish a significant nexus. Rapanos, 547 U.S. at 786. Although Justice Kennedy warns that a hydrological connection "may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters[,]" he never goes so far as to say that just a hydrological linkage is insufficient to establish a significant nexus. Id. at 784.

In the current case, the hydrological connection from Ditch C-1 to Reedy Creek does not appear in the record. However, the lower court did not consider these factors when determining whether Ditch C-1 is a navigable water. Regardless of the hydrological connection between Ditch C-1 and Reedy Creek, Ditch C-1 is still a navigable water due to satisfying the significant-nexus test.

If the Court requires that a determination must be made as to the hydrological connection from Ditch C-1 to Reedy Creek, then this case should be remanded for further fact-finding.

B. The Majority of Courts Have Found That Justice Kennedy's Significant-Nexus Test is the Proper Test to Determine Whether a Body of Water is a Navigable Water.

The majority of federal circuit courts have found that Justice Kennedy's significant-nexus test is the proper test. See Gerke, 464 F.3d 723; Northern California River Watch, 496 F.3d 993; Robinson, 521 F.3d 1319. These courts have done so by following Chief Justice Roberts's advice and invoking Marks v. U.S. 430 U.S. 188 (1977). Additionally, no federal circuit court has found

that the Rapanos plurality's test is the sole test to determine what is a navigable water under the Clean Water Act.

1. By Invoking Marks, the Majority of Federal Courts Have Found That the Significant-Nexus Test is the Proper Test.

In Rapanos, Chief Justice Roberts wrote a concurring opinion lamenting Justice Kennedy's decision to not side with the reasoning of the conservative justices of the Supreme Court. In his concurring opinion, the Chief Justice stated that "[l]ower courts and regulated entities would have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (discussing Marks, 430 U.S. 188)." 547 U.S. at 758 (internal citations omitted). Lower courts have used this portion of Chief Justice Roberts' opinion to invoke Marks.

In Marks, the Supreme Court of the United States held that "[w]hen [the Supreme] Court decides a case and 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. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976) (plurality opinion)).

2. Besides One Federal District Court, No Federal Court Has Ever Found That the Rapanos Plurality's Test is the Sole Test to be Applied.

No federal circuit court has found that the plurality's test is the sole test to determine what is a navigable water under the Clean Water Act. Notwithstanding the three circuits that have solely adopted the significant-nexus test, two federal circuits have successfully avoided having to answer the issue, U.S. v. Lucas, 516 F.3d 316 (5th Cir. 2008) (finding that evidence presented in case was sufficient to satisfy either test); U.S. v. Cundiff, 555 F.3d 200 (6th Cir. 2009) (finding that the case was adequate to support a finding of "navigable water" under either

test), and two federal circuits have found that both tests are controlling. U.S. v. Johnson, 467 F.3d 56 (1st Cir. 2006); U.S. v. Bailey, 571 F.3d 791 (8th Cir. 2009).

Both the First Circuit and the Eighth Circuit found that either Justice Kennedy's significant-nexus test or the Rapanos plurality's test could be used to determine whether a body of water was a navigable water. Id. Both circuits found that neither test was actually narrower, and, therefore, Marks would not apply. Id.

Additionally, both circuits also chose to follow a statement from the Rapanos dissent where the dissent states that they would adopt both Rapanos tests. See Johnson, 476 F.3d at 59-60; Bailey, 571 F.3d at 798.

These opinions are incorrect for one simple reason: the significant-nexus test is narrower than the Rapanos plurality's test. The significant-nexus test requires more than just a geographical connection between bodies of water. Both the significant-nexus test, and the plurality's test, are already discussed within this brief, but to reiterate, Justice Kennedy creates a narrower test by looking, on a case-by-case basis, at different, narrower factors to determine whether a body of water has a significant nexus to an actually navigable water. Rapanos, 547 U.S. at 779, 786. Thus, Marks should apply and the significant-nexus test is the only applicable test to determine what is a navigable water under the Clean Water Act.

3. If the Court Determines That Both Rapanos Tests Should Be Used, Then Ditch C-1 is Still a Navigable Water Under the Jurisdiction of the Clean Water Act.

If the Court chooses to follow in the footsteps of the First and Eighth Circuits and adopt both Justice Kennedy's significant-nexus test and the plurality's test, then Ditch C-1 is still a navigable water under the Clean Water Act because, as previously discussed within this brief, Ditch C-1 is a navigable water under Justice Kennedy's significant-nexus test.

4. The Lone District Court That Has Only Adopted the Plurality's Test Did Not Fully Examine the Significant-Nexus Test When Issuing Its Decision.

One district court has found that only the plurality's test should be used in determining what is a navigable water under the Clean Water Act. U.S. v. Chevron Pipe Line Co., 437 F.Supp.2d 605 (N.D. Texas 2006). The Northern District of Texas made its decision on the basis that Justice Kennedy's significant-nexus test was too ambiguous in order to be applied. Id. at 613. However, that court did not even attempt to discuss, let alone apply, any of the factors that Justice Kennedy discussed in Rapanos.

Furthermore, the Fifth Circuit, the controlling circuit over the Northern District of Texas, has heard this same issue since the holding in Chevron Pipe Line Co. The Fifth Circuit avoided ruling on this same issue due to the facts in their respective cases fulfilling either Rapanos test. See U.S. v. Lucas, 516 F.3d 316 (5th Cir. 2008). Although the Northern District of Texas's decision has not yet been overturned, its decision has not been affirmed by any federal circuit court within the United States.

C. The Plurality Opinion's Test in Rapanos Disregards Precedent Established in SWANCC and Also Disregards Congress's Intentions in Enacting the Clean Water Act.

The plurality opinion in Rapanos disregards Supreme Court precedent by ignoring the language originally used in SWANCC v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001). See Rapanos, 547 U.S. at 774, 126 S.Ct. at 2244-45. The Rapanos plurality also disregards Congress's intent in enacting the Clean Water Act, and, instead, bases its decision on the differences between the dictionary definitions of "water" and "waters." Id. at 768-69.

1. The Rapanos Plurality Opinion, By Ignoring the Language Used in SWANCC, Disregards Supreme Court Precedent.

As Justice Kennedy points out, the plurality opinion's test is not consistent with the Supreme Court's prior holding in SWANCC. See Rapanos, 547 U.S. at 774. In SWANCC, the

Supreme Court first developed the "significant nexus" language in regards to determining what is a navigable water under the Clean Water Act. 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in Riverside Bayview Homes").

Although Kennedy's concerns deal more with the constitutional implications of expanding the scope of the Clean Water Act, that does not change the fact that the Rapanos plurality, in creating its test, ignores the "significant nexus" language in SWANCC. By ignoring the language in SWANCC, and creating a "surface-connection" requirement into the Clean Water Act, the plurality opinion in Rapanos reads nonexistent, and unnecessary, requirements into the Clean Water Act.

2. The Plurality Opinion Disregards Congress's Actual Intent and, Instead, Focuses on the Differences Between "Water" and "Waters" Within the Clean Water Act.

Although the plurality opinion correctly found that Congress intended to regulate more than just actually navigable waters, the plurality, through a single definition in a Webster's New International Dictionary, interprets "navigable waters" as consisting of only "relatively permanent, standing or flowing bodies of water[.]" Rapanos, 547 U.S. at 732. If this were true, "[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not." Id. at 769. This seems to be a ridiculous interpretation of the Clean Water Act, and if Congress had wanted to define "navigable waters" in such a way, it would have done so.

D. If the Court Determines That the Plurality Opinion is the Proper Test, This Case Should Be Remanded for Further Fact Finding.

If the Court determines that the plurality's test in Rapanos should be solely enforced in this case, then the Court should remand this case for further fact finding to determine whether

Ditch C-1 is a navigable water. The record is silent as to the geographical features of Ditch C-1 and, therefore, it would be in the best interest of all parties for those facts to be brought out on the record.

V. REEDY CREEK IS A NAVIGABLE WATER OF THE UNITED STATES UNDER THE CLEAN WATER ACT.

The Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas." Clean Water Act, 33 U.S.C. § 1362 (2013). Under controlling United States law, Reedy Creek is a navigable water of the United States, and, thus, the lower court did not err in finding against Maleau.

As discussed previously, the leading case on what is a navigable water is Rapanos. Although two tests arose out of Rapanos to determine what is a navigable water, either test will determine that Reedy Creek is a navigable water under the Clean Water Act.

A. Justice Kennedy's Significant-Nexus Test Would Find That Reedy Creek is a Navigable Water, as the Test, Although Narrower, Allows for an Actually Navigable Water to be Considered a Navigable Water.

Justice Kennedy was very clear in his opinion that an actually navigable water would qualify as a navigable water under the Clean Water Act. Rapanos, 547 U.S. at 767 (noting that "in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense"). Kennedy also recognized that although "the significant-nexus requirement may not align perfectly with the traditional extent of federal authority[,]" it is not an unreasonable, or unprecedented, interpretation of the Clean Water Act. Id. at 782.

When applying the significant-nexus test to the current case to determine whether Reedy Creek is a navigable water under the Clean Water Act, one can see that Reedy Creek is a navigable water. The record shows that Reedy Creek has a sufficient connection to interstate travel as it is used directly as a water supply for interstate travelers on I-250. R. pp. 5-6, 9-10. It

is also worthy to note that Reedy Creek crosses state lines. Id. at 5. Reedy Creek is also directly connected to Wildman Marsh, which the lower court deemed to be "necessary for the interstate migration of birds, supporting interstate commerce in duck hunting." Id. at 5, 9-10. The Code of Federal Regulations states, in part, that the "Waters of the United States . . . means: . . . (c) All [] waters such as intrastate . . . streams (including intermittent streams) . . . [of which] the use, degradation, or destruction of which would affect or could affect interstate . . . commerce including any such waters: (1) Which are or could be used by interstate . . . travelers for recreational or other purposes[.]" 40 C.F.R. § 122.2. If following the Code of Federal Regulations, this alone would be sufficient to find Reedy Creek as a navigable water.

B. The Plurality Opinion's Test, When Applied, Also Finds Reedy Creek as a Navigable Water Under the Clean Water Act.

In determining what a navigable water is, the Rapanos plurality focused on the language of the Clean Water Act. While doing so, the plurality found that "'the waters' refers more narrowly to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.'" Rapanos, 547 U.S. at 732 (citing Webster's New International Dictionary 2882 (2d ed. 1954)). The plurality then went further and found that "navigable waters" included "only relatively permanent, standing or flowing bodies of water." Id. at 732.

Reedy Creek is a navigable water under the Clean Water Act. A creek, by nature, is a flowing stream of water. Additionally, creeks are also formed, geographical features that which consist of flowing water. Therefore, using either the significant-nexus test or the plurality's test, Reedy Creek is a navigable water and the lower court's finding as such should be affirmed.

C. If the Court Finds That the Issue of Whether Reedy Creek is a Navigable Water is a Question of Fact, Then This Case Should Be Remanded.

If the Court finds that the record does not provide enough information to determine whether Reedy Creek is a navigable water under the Clean Water Act, then this case should be remanded for further fact finding.

VI. BONNHOME HAS NOT VIOLATED THE ACT BECAUSE THE CULVERT CONNECTING DITCH C-1 AND REEDY CREEK DOES NOT ADD A POLLUTANT TO THE WATERS OF THE UNITED STATES

The Act prohibits the "discharge of any pollutant" into navigable waters unless authorized by an NPDES permit. 33 U.S.C. § 1331 (2013). But this deceptively simple prohibition has engendered no dearth of disagreement—particularly in cases, such as this one, where polluted water moves between navigable waters. Since the Supreme Court's decision in South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) ("Miccosukee"), two alternative interpretations of the "discharge of any pollutant" are currently recognized and explained below: (1) the "unitary waters" or "outside world" theory and (2) the "natural flow" theory. See Jon Maurer, Exempting Water Transfers: Watering Down Clear Statutory Protections, 27 J. Land Use & Envtl. L. 383, 386-38 (2012).

Progress and Maleau claim that the culvert from which Ditch C-1 flows into Reedy Creek is a point source that discharges pollutants into a jurisdictional body of water. R. p. 9. The discharge from the culvert connecting Ditch C-1 and Reedy Creek, however, does not constitute a discharge under either of the competing theories above. Indeed, Maleau's argument to the contrary relies on a theory expressly rejected by the Supreme Court on two occasions.

The Act defines a "discharge of a pollutant" as the "addition of any pollutant" to jurisdictional waters. 33 U.S.C. § 1362 (2013). Congress' use of the term "addition" is not without consequence: a point source that does not add a pollutant to jurisdictional waters is not

"discharging" in violation of the Act. Miccosukee, 541 U.S. at 1109. As the Supreme Court has explained, "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." Id. at 1110 (quoting Catskill Mtns. Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481, 492 (2d Cir. 2001)).

A. The Culvert Does Not Add a Pollutant Because Arsenic was Already Present in Jurisdictional Waters.

Miccosukee expressly left open the question of what constituted "the pot" in this metaphor. The Court noted that it was at least "a single water body," but also suggested that the pot might represent the entire, collective corpus of jurisdictional waters. 451 U.S. at 105-06. After all, Congress defined discharge as "any addition of any pollutant to navigable waters"—not, as some courts have noted "to any navigable waters." 33 U.S.C. § 1362 (emphasis added). Thus under the "unitary waters theory," a discharge occurs the first time a pollutant is introduced to the collective "waters of the United States" from "the outside world," and a pollutant is only "discharged" once.

Since Miccosukee, the EPA has vigorously endorsed this theory. A 2004 memorandum, a 2006 proposed rule, and a 2008 final rule all adopt this "unitary waters" theory. See, respectively, Memorandum from EPA to Regional Administrators, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005), available at http://www.epa.gov/ogc/documents/water_transfers.pdf; National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,699 (June 13, 2008). In the final rule, the agency concluded that it lacked jurisdiction over any transfer of pollutants from one navigable water to another. See, generally, id. Specifically, the agency exempted from the NPDES permit program any "activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or

commercial use." 40 C.F.R. § 122.3(i). At least one court has held that Congress has left room for the agency to interpret the Act accordingly. See Friends of the Everglades v. South Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009) ("Friends of the Everglades II"). Even if Congress has not explicitly authorized the EPA to make such a determination, its interpretation is derived from "a body of experience and informed judgment to which courts . . . may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Under the EPA's theory, Bonhomme's culvert cannot be said to "add" any pollutants to the waters of the United States. As Ditch C-1 is a protected water under the Act, see IV supra, the only "addition" occurred when Maleau's refuse piles leached arsenic into the Ditch. That arsenic passed through the culvert on its way to another segment of the unitary "waters of the United States" is inapposite.

B. Alternatively, the Culvert Does Not Add a Pollutant Because Ditch C-1 and Reedy Creek are Constituent Parts of a Single Body of Water.

While the Miccosukee did not pass on the "unitary waters" theory, it definitively held that the "pot" in its "ladle of soup" metaphor was at least "a single water body." 451 U.S. at 1109. Under this theory, a discharge occurs when a point source first introduces pollutants into a single body of water. Thus, "the transfer of polluted water between 'two parts of the same water body' does not constitute a discharge of pollutants under the CWA." L.A. County Flood Control Dist. v. Natural Resources Defense Council, 133 S. Ct. 710, 713 (2013) (quoting Miccosukee, 541 U.S. at 109-112).

In determining whether a transfer of pollutants crosses between distinct bodies of water or is simply a transfer between parts of the same body, courts look to whether the pollutants are carried by the water's "natural flow" or by an artificial flow pattern wrought by human intervention. See Dubois v. U.S. Dept. of Agriculture, 102 F.3d 1273, 1298 (1st Cir. 1996); Trout

Unlimited, 273 F.3d at 491; see also Miccosukee, 541 U.S. at 110-11 (recognizing that District and Circuit Courts rested their decisions on the fact that the water's flow "would not occur naturally"). Thus, where the natural flow of water runs from an already-polluted area to a receiving area, the transfer of pollutants consistent with that flow is no "discharge" under the Act.[2] Stated otherwise, where "water . . . wound up where it would have gone anyway," the metaphorical soup is moved from one part of the pot to another. Friends of the Everglades II, 570 F.3d 1210, 1221 (11th Cir. 2009).

There can be no question but that Ditch C-1 and Reedy Creek are merely constituent parts of the "same water body." The water in Ditch C-1 flows naturally into Reedy Creek, and the two entities share an intimate hydrological connection. It is not the case, as it was in Miccosukee, that pumps have controlled the flow of water in a manner that may have altered its natural flow. 541 U.S. at 111. This is simply an instance of soup being moved from one area of the pot to another.

Even if it was not clear from the record that Ditch C-1 and Reedy Creek are constituent parts of the same "pot," the Miccosukee warned Courts of disposing of this issue "prematurely." Id. The inquiry is heavily fact-laden. Id. at 110-11. By dismissing the claim at this stage of litigation, the District Court has abnegated its duty to allow any "plausible claim for relief" to proceed to discovery. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). There will be a time to

[2] Some courts have even held that a sufficiently intimate "hydrological connection" between water bodies may be sufficient to declare them parts of the same "pot," even if the purportedly "discharging" body does not naturally flow into the receiving body. See Friends of the Everglades, Inc. v. South Fla. Water Mgmt. Dist., 64 ERC (BNA) 1914 (S.D. Fla. 2006) ("Friends of the Everglades II"); see also Miccosukee, 541 U.S. at 110 (noting that two entities "share a common underlying aquifer"). Because Ditch C-1 and Reedy Creek meet the significantly narrower "natural flow" test, the two bodies would likewise meet the "hydrological connection" test employed elsewhere.

determine once-and-for-all the exact relationship between Ditch C-1 and Reedy Creek, but that time is after the parties have an opportunity for further factual development.

C. Maleau's Contention That Bonhomme Has Himself Violated the Act is Squarely Precluded by Binding Supreme Court Precedent.

For all the questions left open by Miccosukee, it certainly closed book on this much: the Act is not triggered every time a pollutant flows through a point source and into protected water. Instead, it must be shown that a pollutant is added at the point source in question. 541 U.S. at 109-10. To hold otherwise, a court would read out Congress' plain directive that a "discharge" occurs only where there has been an "addition" of pollutants." L.A. Flood Control Dist., 133 S. Ct. at 713.

Accordingly, to show that the culvert on Bonhomme's property has "added" a pollutant to protected waters, Maleau must demonstrate that arsenic passing through this culvert was either (a) not yet introduced into any jurisdictional water or (b) not already present in the body of water of which Reedy Creek is a constituent part. This he cannot do. As demonstrated above, the Act's protection of Ditch C-1 certainly precludes the contention that arsenic had not already been introduced into protected waters. Even were the EPA's adoption of the "unitary waters theory" not controlling, the fact that Ditch C-1 naturally flows into Reedy Creek and shares an intimate hydrological connection with the Creek precludes any contention that Bonhomme's culvert introduces arsenic into a body of water not already tainted by Maleau's refuse piles.

CONCLUSION

For the reasons stated above, the Court should remand, in part, the lower court's holdings that Bonhomme had no standing to bring suit against Maleau, that Maleau's mining waste piles were not "point sources" under the Act, that Ditch C-1 is not a navigable water under the Act,

and that Bonhomme violated the Act. Additionally, the Court should affirm the lower court's holding that Reedy Creek is a navigable water under the Act.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF FOR APPELLANT contains no more than 14,000 words and fully complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure.