Team No. 62

D.C. No. 155-CV-2012
D.C. No. 165-CV-2102

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUT

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PROGESS

BRIEF FOR SHIFTY MALEAU
Intervenor-Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

Appellant Jacques Bonhomme sued Shifty Maleau in the United States District Court for the District of Progress seeking judicial review under the Clean Water Act (CWA), a law of the United States. 33 U.S.C. § 1365 (2006). Because federal district courts have original jurisdiction over any civil action arising under the laws of the United States, the district court had proper subject matter jurisdiction over the case. 28 U.S.C. § 1331 (2006). On July 23, 2012, the district court granted the State of Progress and Maleau's motion to dismiss and denied Bonhomme's motion to dismiss. The Twelfth Circuit has jurisdiction of appeals from final decisions of that district court. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES

I. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Shifty Maleau when the injury Bonhomme alleges is an injury to PMI, not himself.

II. Whether Bonhomme may bring a citizen suit against Maleau under CWA § 505 when Bonhomme is a French national and not a citizen of the United States.

III. Whether Maleau's mining waste piles are "point sources" under the CWA § 502 when rainwater runoff flows down and through the piles and into Ditch C-1.

IV. Whether Ditch C-1 is a "navigable waters" under CWA § 502 when it is an irrigation ditch and only flows intermittently throughout the year.

V. Whether Reedy Creek is a "navigable water" under CWA § 502 when it is used as a water supply for an interstate service area and for agricultural purposes, and serves as a tributary to a wetland.

VI. Whether Bonhomme violated the CWA when he added arsenic to Reedy Creek through a culvert on his property, even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress granting the State of Progress's (Progress) and Shifty Maleau's (Maleau) motion to dismiss and

denying Jacques Bonhomme's (Bonhomme) motion to dismiss. (R. 10). Bonhomme commenced a civil action against Maleau under the citizen suit provision of the CWA. 33 U.S.C. § 1365 (2006). (R. 4). The State of Progress initiated its own citizen suit against Bonhomme and Maleau intervened as a matter of right in this action. *Id.* (R. 5). The district court granted Progress and Maleau's motion to consolidate their case because the facts and law were the same in both. *Id.*

All three parties filed a motion to dismiss. (R. 5, 10). The district court dismissed Bonhomme's suit against Maleau, holding that (1) Bonhomme was not a proper plaintiff because he was not a "real party in interest" under FRCP 17; (2) Bonhomme was not a "citizen" under CWA § 505 and so was not entitled to bring an action; (3) Maleau's mining waste piles are not "point sources" under CWA § 502; (4) Ditch C-1 is not a navigable water because it is a point source; (5) Bonhomme violated the CWA because he allowed pollutants added by Maleau to flow into Reedy Creek through his culvert; and (6) Reedy Creek is a water of the United States under sections 502(7) and (12) of the CWA. (R. 1, 2, 10).

All three parties filed a Notice of Appeal. (R. 1). Bonhomme challenges the first five holdings of the district court. (R. 1, 2). Progress filed an appeal challenging the fourth holding of the court that Ditch C-1 is not a navigable water. (R. 2). Maleau challenges the final holding of the court that Reedy Creek is a water of the United States under the CWA. *Id.*

STATEMENT OF THE FACTS

Maleau owns an open pit gold mining and extraction operation located next to the Buena Vista River, a river which maintains water flow throughout the year, in Lincoln County, Progress. (R. 5). The overburden and slag from the mine is trucked to Maleau's property in Jefferson County, Progress, and placed in piles adjacent to Ditch C-1. *Id*. Rainwater runoff flows down through the piles where it collects arsenic, a chemical commonly associated with gold

mining and extraction, and is eventually discharged through channels eroded by gravity into Ditch C-1, leaching arsenic into the waters of the Ditch. *Id*.

Ditch C-1 is a drainage ditch that begins before Maleau's property and runs through several agricultural properties in Progress before it enters Reedy Creek through a culvert on Bonhomme's property. *Id*. The ditch primarily contains groundwater drained from saturated soil, as well as rainwater runoff. *Id.* During annual periods of drought, lasting several weeks to three months, the Ditch does not contain running water. *Id.*

Reedy Creek headwaters are in the state of New Union, where it is used as the water supply for Bounty Plaza, a service area on Interstate 250 (I-250). *Id*. The Creek courses for about fifty miles through agricultural land, primarily providing water for irrigation purposes, passes into Jefferson County and Bonhomme's property, and ends in Wildman Marsh (Marsh). *Id*. The Marsh is an extensive wetland, providing habitat for over one million migrating ducks and other waterfowl. (R. 5-6). The U.S. Fish and Wildlife Service (USFWS) own and maintain much of the wetlands as part of the Wildman National Wildlife Refuge. (R. 6). These wetlands provide recreational opportunities for hunters across the region and country and add over $25 million to the local economy. *Id*.

Bonhomme's property and hunting lodge sit on the edge of the Marsh. *Id.* He does not reside there, but uses the property only for hunting parties made up primarily of business clients and associates of Precious Metals International, Inc. (PMI). (R. 6–8). Bonhomme is PMI's President, largest shareholder, and Board Director. (R. 7).

Bonhomme alleges the arsenic has polluted the waters of Reedy Creek and the Marsh, as well as wildlife in the marsh. (R. 6). Because of the presence of arsenic, he has decreased his hunting parties from eight to two per year. *Id*. Maleau contends Bonhomme's decreased use of

the Marsh is due to a general economic decline, reflected in PMI's declining profits, and not because of the presence of arsenic in the water. *Id*.

Bonhomme, with financial support from PMI, conducted testing of arsenic levels in Ditch C-1, Reedy Creek, and the Marsh. (R. 6, 7). No arsenic was detected upstream of Maleau's property or in Reedy Creek above Ditch C-1. (R. 6). Arsenic was present downstream of Maleau's property and in Reedy Creek just below the area where Ditch C-1 discharges into the Creek. Arsenic is also found at lower levels throughout the Marsh. *Id*. In addition, the USFWS found low levels of arsenic in three Blue-winged Teals in the Marsh. *Id*.

The district court took judicial notice of certain political motivations on the part of the three parties involved. *Id*. First, it took notice that Progress's Attorney General held a press conference stating that Progress filed suit against Bonhomme to protect both the waters of the State and Maleau, as one of the area's largest employers. *Id*. Second, it took notice that Bonhomme, at his own press conference, alleged the Attorney General sued Bonhomme to fulfill a political debt to Maleau, a major contributor to the Attorney General's election campaign. *Id*. Bonhomme also accused Maleau of unfairly lowering his cost of doing business by using illegal hiring practices, treating his employees poorly, and intentionally disregarding the environment. (R. 6-7). According to Bonhomme, Maleau is avoiding the CWA permitting requirements by trucking his mining waste to Jefferson, rather than leaving it at the mine adjacent to the Buena Vista River where it would be subjected to a CWA permit. (R. 7).

STANDARD OF REVIEW

The district court granted Progress and Maleau's 12(b)(6) motion to dismiss because Bonhomme is not a proper plaintiff. FED. R. CIV. P. 12(b)(6). This court reviews a district court's

granting of a 12(b)(6) motion to dismiss *de novo*. *Ballentine v. U.S.,* 486 F.3d 806, 808 (3d Cir. 2007).

SUMMARY OF THE ARGUMENT

The district court properly found that Bonhomme is not a real party in interest under FCRP 17 and therefore cannot bring suit against Maleau. In addition, it properly held that Bonhomme is not a "citizen" entitled to bring suit against Maleau as required under CWA § 505. Furthermore, the district court correctly held that Maleau's mining waste piles are not point sources under CWA § 502 and Ditch C-1 is not a navigable water under CWA § 502(7) and 502(12). However, the district court erred in finding that Reedy Creek is a navigable water of the United States. Finally, the district court properly held that Bonhomme is liable for the addition of arsenic into Reedy Creek under the CWA, not Maleau.

Bonhomme is not the real party in interest because PMI is the party to whom the claim belongs and Bonhomme cannot bring a third party claim on PMI's behalf. The district court properly held that Bonhomme is not the real party in interest under FRCP 17 because the injury he alleges is an injury to PMI. As such, PMI is the party to whom the claim belongs and the party entitled, under governing corporate law, to bring that claim. Bonhomme cannot bring a third party claim on behalf of PMI because, as a shareholder of PMI, he cannot seek personal recovery based on an alleged injury to PMI. Moreover, since PMI was not added to the suit, Maleau could be subject to duplicative action by PMI, a clear violation of res judicata.

In addition, the district court properly held that Bonhomme is precluded from bringing a citizen suit against Maleau because he is not a "citizen" of the United States. Congress's broad definition of "citizen" and the legislative history of the CWA illustrate Congress did not intend that foreign nationals bring such a suit. The broad definition of a "citizen," in a citizen suit under

the CWA § 505, is in direct conflict with the definition provided in the U.S. Constitution and, under the Supremacy Clause of the Constitution, the definition in the Constitution should prevail. Furthermore, analysis of Congress's broad definition of "citizen" and the legislative history of the CWA show Congress intended that "citizen" include entities such as corporations and states, not foreign nationals. This Court should not allow a foreign national to bring a citizen suit against Maleau.

Furthermore, the district court properly held that Maleau's mining piles are not point sources as defined by the CWA. The plain language of CWA § 502, paired with relevant court interpretations of this language, reveal that Maleau's overburden piles are not "discernable, confined and discrete conveyance[s.]" Furthermore, the case relied on by Defendant-Appellant, *Sierra Club v. Abston Constr. Co., Inc.*, is distinguishable from the case at hand and, as a result, the holding is inapplicable. Finally, a review of legislative history of the CWA and its subsequent amendments and regulations confirms that neither Congress nor the Environmental Protection Agency (EPA) contemplated including piles of dirt and stone as point sources under the statute. As a result, Maleau's piles cannot be defined as point sources.

The district court also properly held that Ditch C-1 is a point source, not a navigable water of the United States. Section 502 of CWA is clear: ditches are point sources. The ditch cannot simultaneously be two elements under the CWA. The separate classification of ditches under the CWA, as noted in *Rapanos*, is used to distinguish between a watercourse that flows constantly and those that flow intermittently. The latter are not considered navigable waters. Therefore, because Ditch C-1 runs intermittently, it is a point source, not a navigable water.

The district court erred by finding that Reedy Creek is a water of the United States. In recent years, the Supreme Court has significantly narrowed the definition of navigable waters. In

Rapanos, the Court held that rivers must be highways of interstate commerce to fall within the definition of waters of the United States. However, the government is not permitted to "pile inference upon inference" to establish their authority under the Commerce Clause. To establish jurisdiction using the Commerce Clause would require laying inference upon inference by linking the ducks through multiple layers to the overburden piles and, in the case of Bounty Plaza, that Reedy Creek somehow provides a highway of commerce to the Plaza.

Finally, the district court correctly found that, even if Reedy Creek is a navigable water, Bonhomme is the party liable under the CWA, regardless of whether Maleau was the party responsible for the presence of arsenic in the water. This is true because Bonhomme owns and operates the point source from which the pollutant enters Reedy Creek. The language of CWA § 502, placed in its broader statutory and regulatory context, indicates that a point source only need "convey" a pollutant into a navigable water, not generate the pollutant itself, to constitute an unlawful discharge. Furthermore, the Supreme Court recently held in *South Florida Water Management District* that a point source need only convey a pollutant into a navigable water for liability to arise under the CWA is controlling in this case. This holding confirms that it is Bonhomme, not Maleau, who is liable for pollution under the CWA.

ARGUMENT

I. BONHOMME IS BARRED FROM BRINGING SUIT AGAINST MALEAU BECAUSE HE IS NOT THE REAL PARTY IN INTEREST UNDER FRCP 17.

Rule 17(a) of the Federal Rules of Civil Procedure requires that a claim be brought in the name of the real party in interest. FED. R. CIV. P. 17(a). The real party in interest is the "party to whom that claim 'belongs' or the party who 'according to the governing substantive law, is entitled to enforce that right.'" *Oscar Gruss & Sons, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003) (quoting 6A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE §

1543, at 334 (2d ed. 1990)). A party must assert his own legal right and interest and cannot rest his claim to relief by basing it on the legal rights and interests of third parties. *Powers v. Ohio*, 499 U.S. 400, 409–10 (1991). This well-established limitation serves the purpose of Rule 17 which is to protect the defendant against any future claims by the party entitled to recover, and makes certain that res judicata will have its full effect. FED. R. CIV. P. 17 advisory committee's notes (1966 Amendment). It is true, as a general rule, that a claim should not be dismissed for lack of a proper plaintiff. *Cf.* FED. R. CIV. P. 17(a)(3). But the legislature has provided for this, satisfying the constitutional demand for due process by requiring, under Rule 17, that the real party in interest be given a reasonable amount of time to "ratify, join, or be substituted in the action." *Id.*

In this case, PMI is the party to whom the claim belongs and the party entitled, under governing substantive law, to enforce that claim. Bonhomme cannot rest his claim on the legal interests of PMI and bring a third party suit on its behalf. Finally, to allow Bonhomme to bring his claim without substituting or adding PMI as a party, is to violate the doctrine of res judicata.

a. PMI is the party to whom the claim belongs and the party entitled to bring that claim.

Bonhomme's alleged injury stems from a fear of using Wildman Marsh because of the presence of arsenic in Reedy Creek and Wildman Marsh and the resulting decrease in the number of hunting parties he normally hosts on the marsh. (R. 6). Though Bonhomme owns the hunting lodge, the parties are composed primarily of PMI business clients and associates. (R. 7-8). This strongly suggests that the hunting parties are hosted by Bonhomme in his capacity as president, board director, and the largest shareholder of PMI. (R. 6-7). Therefore, it stands to reason that the parties benefit PMI and any decrease in the number of these parties injures PMI and not Bonhomme.

The record indicates that Bonhomme also considered PMI to be the injured party and the one to whom the claim belongs. First, the statements Bonhomme made at his press conference reveal that his lawsuit against Maleau and Progress had everything to do with Maleau as a direct business competitor and nothing to do with any personal injury Bonhomme sustained as a neighboring property owner. (R. 6–7). Second, costs incurred to move this lawsuit forward have been paid by PMI, not Bonhomme. Tests conducted to determine the presence of arsenic in Ditch C-1 and Reedy Creek were either paid for or handled by PMI. Moreover, PMI pays for Bonhomme's attorney and expert witnesses. PMI is the party to whom the claim belongs and under the governing substantive law, is the party entitled to enforce that right. Bonhomme cannot rest his claim on PMI's legal right.

b. Bonhomme is not entitled to bring the claim and is also precluded from bringing a third party claim on PMI's behalf.

Bonhomme cannot bring a claim relying on the legal interests of PMI; to do so improperly invokes third party standing. The doctrine of standing is an inquiry that involves both constitutional limitations and prudential limitations on the exercise of federal court jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Rule 17(a)'s requirement of a real party in interest is a codification of the prudential limitation on standing. *Rawoof v. Texor Petroleum Co., Inc.*, 521 F.3d 750, 757 (7th Cir. 2008). Prudential standing encompasses, among other considerations, "the general prohibition on a litigant's raising another person's legal rights." *Elk Grove Unified School Dist. v. Nedow*, 542 U.S. 1, 16 (2004). This rule, however, is not absolute, and there are rare circumstances where courts have permitted third party standing. *Warth*, 422 U.S. at 501. Third party standing is appropriate on the finding of two elements: (1) the litigant's relationship to the person whose right he seeks to assert; and (2) the third party's ability to protect its own interests. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

Applying these principles, Bonhomme falls short of meeting his burden. First, Bonhomme's relationship with PMI and his alleged injury stems from his capacity as shareholder and officer of the company. For this reason, the governing substantive law is corporate law. Well-settled principles of the shareholder standing rule prohibit Bonhomme from seeking personal recovery based on an alleged injury to the corporation in which he owns shares. *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990).

An exception to this rule is made when a shareholder can show that the corporation owed him a special duty or that he "suffered an injury separate and distinct from that suffered by other shareholders." *Taha v. Engstrand*, 987 F.2d 505, 507 (8th Cir. 1993). A shareholder, however, must "assert more than personal economic injury resulting from a wrong to the corporation." *Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir. 1983).

The exceptions to the shareholder rule do not apply to the facts of this case. There is nothing in the record to indicate that PMI owed Bonhomme any type of special duty. Additionally, Bonhomme's asserted injury relates to the diminished number of hunting parties he has been able to organize. Such an injury is not a direct and personal interest to him independent of other shareholders, instead it implicates the interests of PMI for which the hunting parties were held. Even if Bonhomme could show a diminution in the value of his stock because of the lack of volume in hunting parties, such an economic injury does not suffice to make him a proper plaintiff under Rule 17(a). For this reason, under governing substantive law, PMI is the party entitled to bring the claim, not Bonhomme.

Second, PMI was afforded the opportunity, under Rule 17(a)(3), to join or substitute itself as a party in this case. FED. R. CIV. P. 17(a)(3); (R. 7). The fact that it did not do so to protect its own interests does not entitle Bonhomme to litigate on its behalf. For this reason, Bonhomme

does not satisfy the two elements of third party standing and is barred both by governing substantive law and by prudential limitations from bringing a claim on PMI's behalf.

c. Without the addition of PMI as a party to the suit, Maleau could be subject to duplicative litigation.

Rule 17(a) functions to protect parties from multiple suits over the same matter. FED. R. CIV. P. 17 advisory committee's notes (1966 Amendment). The principles of claim preclusion require the correct party to a suit bring his own claim against the defendant. "The purpose of this requirement 'is to assure a defendant that a judgment will be final and that res judicata will protect the defendant from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right.'" *In re Signal Intern, LLC*, 579 F.3d 478, 487 (5th Cir. 2009) (quoting Farrell Constr. Co. v. Jefferson Parish, La., 896 F.2d 136, 140 (5th Cir. 1990)).

If this action were to proceed without PMI as a party, Maleau might find himself subject to the harassment of a future and duplicative action brought by PMI. This violates the very foundation of res judicata and provides no finality of judgment.

Because Bonhomme is neither the party to whom the claim belongs nor the party entitled to enforce the claim against Maleau, he does not possess any substantive right to proceed against him. Moreover, Bonhomme cannot meet the requirements to bring a third party claim on behalf of PMI. Therefore, Bonhomme is not the real party in interest under Rule 17(a) and is precluded from bringing this claim. To hold otherwise would violate the purpose of the rule and the doctrine of res judicata. The district court properly held that Bonhomme's suit should be dismissed for failure to state a claim.

II. BONHOMME MAY NOT BRING SUIT AGAINST MALEAU BECAUSE HE IS A FOREIGN NATIONAL AND NOT A "CITIZEN" UNDER CWA §§ 502(5) AND 505(g).

Section 505(a) of the CWA provides that "any citizen may commence a civil action on his own behalf" against any person who violates the statute. 33 U.S.C. § 1365(a) (2006). The provision defines a "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (2006). Section 502(5) provides that "a 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5) (2006). The plain language of the statute does not expressly permit a foreign national, like French citizen Bonhomme, to commence a civil action. (R. 8). For this reason, the narrow constitutional definition of "citizen" should preclude Bonhomme from bringing suit. In addition, an analysis of the legislative history and the wording of the Act itself, indicate that Congress intended "citizen" in CWA § 505(a) to mean nationality and not "person."

a. The constitutional definition of "citizen" precludes Bonhomme from bringing suit under the CWA.

The Constitution provides that a "citizen" is a person "born or naturalized in the United States . . . ." U.S. CONST. amend. XIV, § 1. Naturalization means the conferring of United States nationality after birth. 8 U.S.C. § 1101(a)(23) (2006). When making the determination of who can bring a suit under the CWA these two different definitions of "citizen" present a conflict. This friction is easily resolved, however, under the Supremacy Clause of the Constitution, which provides that "[t]his Constitution, and the Laws of the United States, shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The rule of

priority contained in the Supremacy Clause is straightforward: The Constitution trumps those statutes which are inconsistent with it. *Marbury v. Madison*, 1 Cranch 137, 177 (1803)).

b. CWA's broad definition of "citizen" is not intended to include foreign nationals, but to expand the different types of entities who can bring suit under the Act and reflects Congressional intent to limit the scope of standing to those entities who can show an injury in fact.

Congress used the broad definition of "citizen" as a "person" so that it could expand the scope of entities that can bring suit for a violation of the Act. For purposes of the Act, a "person" includes corporations, municipalities, and states. 33 U.S.C. § 1362(5) (2006). This expansion of who or what constitutes a "person" does not mean Congress intended that a "citizen" authorized to bring suit under the Act include a foreign national. Rather, Congress wanted to ensure that entities beyond just individuals could enforce the nation's water pollution laws. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 167 (U.S. 2000) (holding that an environmental organization had standing to bring a citizen suit under the CWA).

Using a similar mode of statutory analysis, the Supreme Court has held that even though it had extended the word navigable to include non-navigable wetlands, it did not intend to strip the word navigable of its meaning altogether. *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (hereinafter, "*SWANCC*"). To that end the Court stated:

> [I]t is one thing to give a word limited effect and quite another to give it no effect whatever. The term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. In the same way, by defining "citizen" as a "person," Congress did not intend to deprive "citizen" of its narrow constitutional definition.

Congress passed the CWA shortly after the Supreme Court decided *Sierra Club v. Morton*. 405 U.S. 727 (1972). Congress intended the statute to confer standing of a citizen's right to sue in accordance with the principles of *Morton*. *Sierra Club v. SCM Corp*., 747 F.2d 99, 104 (2d Cir. 1984). One of the main principles held by the *Morton* Court was that an organization whose members suffered an aesthetic or environmental "injury in fact" could sue on the organization's behalf. *Morton*, 405 U.S. at 739 (holding that the Sierra Club lacked standing to bring an action under the APA because it did not claim an injury in fact to one of its members). When the standing requirement of CWA § 505 was drafted, Congress's definition of "citizen," as a "'a person or persons having an interest which is or may be adversely affected,' *means those who can claim injury in fact within the meaning of Morton*." *SCM Corp*., 747 F.2d at 105 (emphasis added).

The Congressional definition of "citizen" was therefore meant to codify the scope of standing under the CWA to specifically include an "injury in fact." *Id*. at 104-07. That is, Congress defined "citizen" as a "person" to ensure that a citizen suit be brought by a citizen who had a concrete injury. The definition was not meant to make the distinction between the broad concept of "citizen" as a "person" and the narrow constitutional definition of "citizen" as one of nationality.

c. Legislative history of the CWA and the wording of the Act itself, indicate that a "citizen" under CWA § 505 specifically means the narrow concept of "citizen."

The legislative history of CWA § 505, however, demonstrates that Congress did intend the word "citizen" to mean the narrow concept of "citizen" as nationality. Senator Edmund Muskie, co-author of the CWA, wanted the person who brings suit under section 505 to be a citizen of the U.S. This is demonstrated by the Senator's comments when discussing the wording of section 505 on the Senate floor:

> Further, every *citizen* of the United States has a legitimate and established interest in the use and quality of the navigable waters of the United States. Thus, I would presume that a *citizen of the United States*, regardless of residence, would have an interest as defined in this bill regardless of the location of the waterway and regardless of the issue involved.

SCM Corp., 747 F.2d at 105 (quoting 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 249-50 (1973) (emphasis added)).

Senator Muskie's intention that a "citizen" under CWA § 505 be a citizen of the U.S. is further illustrated by an analysis of the wording of the CWA itself. The use of "person," "individual," or "public" in almost every provision of the CWA, in contrast to the use of "citizen" which is used only in section 505, demonstrates that the authors of the CWA intended "citizen" under section 505 to mean nationality, rather than its broader definition as "person." *See e.g*., 33 U.S.C. § 1251(e) (2006) (stating that a goal of the act is "[p]ublic participation"); 33 U.S.C. § 1272(c) (2006) (providing that a plan for dredging must include an opportunity for "public comment"); 33 U.S.C. § 1319(a)(1) (2006) (stipulating enforcement compliance for "any person" in violation); 33 U.S.C. § 1344(a) (2006) (requiring the issuance of a permit after an opportunity for "public hearings").

Congress intended to broaden section 505(a) beyond people to include corporations and states, and require these entities to show a concrete injury in fact. The legislative history and the wording of the statute illustrate that Congress did not intend a foreign national bring suit under the CWA. Therefore, the district court properly found that, since Bonhomme is not a U.S. citizen, he is precluded from bringing a claim against Maleau under CWA § 505(a).

III. MALEAU'S MINING WASTE PILES ARE NOT "POINT SOURCES" AS DEFINED BY THE CWA.

Under the CWA's National Pollutant Discharge Elimination System (NPDES), it is unlawful for a person to discharge any pollutant into a navigable water unless explicitly

permitted. 33 U.S.C. §§ 1311(a), 1312(a), 1342(a) (2006). The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term "point source" is defined 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). Maleau's overburden piles, however, do not fit this definition. First, the plain language of the CWA, paired with relevant court interpretations of this language, reveal that Maleau's overburden piles are not "discernable, confined and discrete conveyance[s]" under the statute. 33 U.S.C. § 1362(14). Second, the case relied on by Defendant-Appellant, *Sierra Club v. Abston Constr. Co., Inc.*, is distinguishable from the case at hand and, as a result, the holding is inapplicable. 620 F.2d 41, 43 (5th Cir. 1980). Finally, a review of legislative history of the CWA and its subsequent amendments and regulations confirms that neither Congress nor the EPA contemplated including piles of dirt and stone as point sources under the statute.

a. The term "point source," as defined by the CWA and interpreted by the courts, does not include Maleau's piles of overburden.

The CWA defines point source as "any discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The term "conveyance" is defined as the "act of taking or carrying someone or something from one place to another." NEW OXFORD AMERICAN DICTIONARY, 380 (3d ed. 2010). A point source, under the ordinary meaning of "convey," must carry a pollutant into a navigable water. A pile of dirt and stone cannot function as a conveyance. As further evidence, the statute includes a list of potential point sources, most of which – pipes, channels, ditches, tunnels and conduits – serve to carry water. 33 U.S.C. § 1362(14). As the trial court correctly noted, none of these examples "remotely resemble a pile of dirt and stone." (R. 9).

While the piles themselves are not point sources, courts have addressed the question as to whether mining or industrial materials become point sources when paired with stormwater runoff. A number of Circuit Courts have held that, in order to become a point source, there must be some kind of channeling or collection of the stormwater.

In a case regarding whether the coal industry was required to secure a permit for uncollected contaminated rainfall runoff, the Fourth Circuit held that a point source does not include unchanneled and uncollected surface waters. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (abrogated on other grounds in *In Re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490 (E.P.A. Feb. 1, 2006) (holding that other courts have read *Appalachian Power* as holding that best available technology limits do not require a comparative cost-benefit analysis)). The court concluded that Congress did not intend to broaden the definition of point source so as to include all runoff around coal storage facilities. *Appalachian Power Co.,* 545 F.2d at 1373.

In *Consolidated Coal Co. v. Castle*, the Fourth Circuit affirmed its previous holding, stating that EPA regulations dealing with surface waters around coal preparation plants and associated areas applies only to discharges from point sources. 604 F.2d 239, 250 (4th Cir. 1979). The court further held that point sources do not include unchanneled and uncollected surface waters. *Id.*; *see also O'Leary v. Moyer's Landfill, Inc.,* 523 F. Supp. 642, 655 (E.D. Pa. 1981).

The Ninth Circuit has recently echoed these interpretations, holding in a number of cases that, unless stormwater is channeled or collected before it reaches a navigable water, it is not a point source. *E.g. Envtl. Def. Ctr., Inc. v. U.S. E.P.A.*, 344 F.3d 832, 842 (9th Cir. 2003) (stating that if a diffuse runoff, such as rainwater, is not channeled through a point source, it is not

subject to federal regulation); *Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (stating that runoff caused primarily by rainfall around activities that employ or create pollutants is a nonpoint source pollution and is therefore not regulated under the CWA); *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) (holding that mining activities are subject to permitting requirements under the CWA when they release pollutants from a discernible conveyance).

There is nothing in the record to indicate that Maleau has in any way collected or channeled the rain that fell on to his overburden. (R. 5). Instead, the rain "flows down the piles and percolates through them." (R. 5). From there, it falls into channels that have been eroded by gravity, not by Maleau and then into Ditch C-1. (R. 5). There is nothing in the record to indicate that Maleau configured the piles in an effort to "direct the waterflow or otherwise impede its progress." *Abston*, 620 F.2d at 45.

b. *Sierra Club v. Abston Constr. Co., Inc.* is distinguishable from the case at hand and, as a result, its holding is inapplicable.

Bonhomme relies on the holding in *Abston* for the rule that overburden piles are point sources. 620 F.2d at 43; (R. 8). However, this case is distinguishable. *Id.* at 45. In *Abston*, defendants operated coal mines using the strip mining technique where overburden is removed to expose coal. *Id.* This overburden was then placed in piles nearby. *Id.* Rain would fall on to the piles and carry sediment and acid into an adjacent stream. *Id.* In an effort to prevent this runoff, the defendants created sediment basins to catch the water. *Id.* at 43. However, these basins sometimes overflowed, resulting in the addition of sediments and acid into the creek. *Id.* The plaintiffs contended these activities constituted "point sources" under the CWA. *Id.*

The reviewing court in *Abston* noted that "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 or otherwise impede its progress." 620 F.2d at 44–45. The operator's creation of sediment basins evidenced effort to change the surface, as did the operator's placement of overburden in a way that stormwater would cause erosion of the overburden and discharge through ditches, gullies, and similar conveyances into a navigable water. *Id*. at 45. Because the defendants had made an effort toward altering water flow, the overburden and runoff constituted a point source for the purpose of the CWA. *Id*.

The case at hand, however, is distinguishable from *Abston* in two ways. First, Maleau has made no changes to the surface where the piles are currently. (R. 5). In *Abston*, the runoff ran directly from a surface the defendants had altered substantially by strip mining and building sediment basins. Here, no such change to the surface occurred. The piles merely sit atop the surface. (R. 5). Second, there is nothing in the record to indicate that Maleau made an attempt to direct or impede the waterflow. There is no evidence of construction of channels or dams, or the installation of any pipes or conduits. (R. 5). Maleau made no effort to turn what is clearly diffuse water into a discrete conveyance. *Id*. As a result, the piles are not point sources, even under the *Abston* interpretation.

c. The legislative history of the CWA, subsequent amendments, and agency regulations suggest neither Congress nor the agency intended piles of dirt to be considered "point sources."

A review of the CWA, accompanying regulations, and legislative history, reveals that neither Congress nor the EPA intended "point sources" to be defined so broadly. After the passage of the CWA, the EPA struggled to process permit applications from countless owners and operators of point sources throughout the country. *Decker v. N.W. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1331 (2013). In an effort to more efficiently allocate resources, the EPA issued a

regulation removing from the permitting requirement a number of activities involving stormwater, including "uncontrolled discharges composed entirely of storm runoff when these discharges are uncontaminated by any industrial or commercial activity." *Nat. Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1373 (D.C. Cir. 1977) (noting that the EPA excluded smaller sources of pollutant discharges in its regulations so as to conserve enforcement resources for more significant point sources of pollution); 40 C.F.R. § 125.4 (1975). The D.C. Court of Appeals, however, found that the agency did not have the authority to exempt categories of point sources from the permit requirements of the CWA. *Costle*, 568 F.2d at 1377.

In response to this decision, and the difficulty facing the EPA in regulating stormwater runoff, Congress amended the CWA to exempt certain discharges of stormwater runoff. Pub. L. No. 100-4, 101 Stat. 76 (1987); *Decker,* 133 S. Ct. at 1331. These amendments included a section known as the Water Quality Act of 1987, which stated no permit is required for "discharges of stormwater runoff from mining operations…which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for *collecting and conveying* precipitation runoff." 33 U.S.C. § 1342 (emphasis added). In this amendment, Congress emphasized that a point source requires some sort of conveyance, likely in the form of a pipe, conduit, ditch or channel. *See id*. The amendment does not include diffuse runoff for good reason. To do so would be to burden the EPA with the same overwhelming obstacles Congress sought to alleviate in passing these amendments. *See Decker,* 133 S. Ct. at 1331–32 (noting that the statutory exemptions were considered necessary because, from the outset, the EPA had encountered recurring difficulties in determining how best to manage stormwater discharges).

A recent holding by the Supreme Court echoes this policy. In *Decker*, the Court held that, under the Silvicultural Rule promulgated by the EPA, the stormwater runoff did not constitute a point source. *Id*. at 1326. In light of these considerations, it is clear that the holdings from the Ninth and Fourth Circuit Courts more accurately reflect the Congressional intent to exclude from the definition of "point source" diffuse, unchanneled stormwater runoff. *E.g., Envtl. Def. Ctr., Inc*., 344 F.3d at 842; *Or. Nat. Desert Ass'n*, 172 F.3d at 1098; *Trustees for Alaska* 749 F.2d at 558; *Consol. Coal Co.,* 604 F.2d 239; *Appalachian Power Co.,* 545 F.2d at 1373. Therefore, the district court properly found that Maleau's overburden piles are not point sources.

IV. DITCH C-1 IS NOT A NAVIGABLE WATER/WATER OF THE UNITED STATES

Historically, navigable waters were defined as waters that "are navigable in fact" or "susceptible of being used, in their ordinary condition, as highways for commerce." *Daniel Ball*, 77 U.S. 557 (1870). Since the enactment of the CWA, courts have broadened their interpretation of the term navigable waters. *Rapanos v. U.S*. 547 U.S. 715, 751 (2006) (finding the term "navigable waters" encompasses something more than traditionally "navigable-in-fact"); *U.S. v. Riverside Bayview Homes, Inc*. 474 U.S. 121, 133 (1985) (holding that Congress chose to define the waters covered by the CWA broadly). However, the broadening of this interpretation has not lead the courts to define all waters as navigable. *E.g., Rice v. Harken Exploration Co.,* 250 F.3d 264, 270 (5th Cir. 2001) (finding a body of water is protected under the CWA only if it is actually navigable or adjacent to an open body of navigable water.)

a. Ditch C-1 fails to qualify as navigable water under the CWA, because the ditch is a point source and cannot be two elements simultaneously.

The CWA is clear: ditches are point sources. 33 U.S.C. § 1362(14). The CWA explicitly lists "ditch" as an example of a point source. 33 U.S.C. § 1362(14). Navigable waters, on the other hand, are defined as "waters of the United States." 33 U.S.C. § 1362(7). The Supreme

Court has held that the distinction between the two discharges would be meaningless if the categories were significantly overlapping. 547 U.S. at 735. Ditches are classified separately to cover those waters that flow intermittently. *Id*. at 736. Based on the record, Ditch-C1 is a drainage ditch used for agricultural purposes and only runs intermittently. (R at 5). Therefore, Ditch C-1 qualifies as a point source, not a navigable water source.

b. The statute is clear Ditch C-1 is not a navigable water of the United States.

If a statute is ambiguous, a court may resort to canons of statutory construction to determine the meaning. *Natural Res. Def. Council, Inc. v. Muszynski* 268 F.3d 91, 98 (2d Cir. 2001). When determining which meaning should prevail, the court should put the text in the context of the entire statutory structure, avoid absurd results, address internal inconsistences, and give deference to the view of the agency tasked with administering the statute. *Id*. (citing *U.S. v. Turkette*, 452 U.S. 576, 580 (1981)).

In this case, the statute is clear: ditches are point sources. When examining the context of ditches within the entire statutory structure of the CWA, it is clear that ditches are point sources. In 33 U.S.C. § 1362(14) Congress explicitly defined ditches as a point source. In 33 U.S.C. § 1362(7) however, Congress failed to explicitly list ditches. To ignore this specific drafting would be to ignore Congress's specific intent to regulate ditches as point sources.

Despite the clear language of the statute, the lower courts are split on whether ditches are point sources or navigable waters. *E.g. Stepniak v. United Materials, LLC*, 2009 WL 3077888 (W.D.N.Y. Sept. 24, 2009) (finding that a ditch did not constitute waters of the United States and that a ditch does not constitute navigable water for CWA purposes); *Headwaters Inc. v. Talent Irrigation Dist*. 243 F.3d 526 (9th Cir. 2001) (holding that irrigation canals are waters of the U.S. where the canals exchange water as a tributary to natural streams and a lake). In 2011, the EPA

released a guidance document revising their interpretation of waters of the United States. EPA, *Draft Guidance on Identifying Waters Protected by the CWA* (2011), http://www.epa.gov/tp/pdf/wous_guidance_4-2011.pdf (hereinafter, "Draft Guide Document"). Within this document, the EPA expanded its jurisdiction to include agricultural ditches that connect to a traditional navigable waters, and ditches that drain natural bodies of water into a tributary system of a traditional navigable water or interstate water. *Id*. at 12.

When reviewing the agency's interpretation of the statute, the court will look to see if Congress spoke directly to the question at issue. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43 (1984). If Congressional intent is clear, both the agency and the court must give effect to the unambiguously expressed intent of Congress. *Id*. If, however, the court determines the statute is ambiguous with respect to a specific issue, the court must determine whether the agency's answer is based on a permissible construction of the statute. *Id*. at 843. The EPA has extended its jurisdiction impermissibly. The CWA specifically defines ditches as point sources. 33 U.S.C. § 1362(14). To ignore this specific definition of ditches is an impermissible construction of the statute.

c. Ditch C-1 fails to qualify as a navigable water the tests adopted in *Rapanos*.

The leading Supreme Court case for determine which bodies of water qualify as navigable waters of the United States resulted in a split opinion. *Rapanos*, 547 U.S. 715. Under the *Marks* directive, when following a divided opinion, the lower court must follow the holding of the court that is taken by "those members who concurred in the judgment on the narrowest grounds." *Marks v. U.S.*, 430 U.S. 188, 193 (1977). The circuit and lower courts are split on which test from *Rapanos* should be adopted. *U.S. v. Johnson* 467 F.3d 56, 66 (1st Cir. 2006) (holding jurisdiction over waters of the U.S. can be met using either test adopted in *Rapanos*);

Precon Dev. Corp., Inv. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011) (finding that Justice Kennedy's significant nexus test governs the jurisdiction). Regardless of the test that the court adopts, Ditch C-1 is not a navigable water.

The plurality in *Rapanos*, written by Justice Scalia, found that waters of the U.S. are only those waters that are relatively permanent or continuously flowing bodies of water. 547 U.S. at 739. The Court clarified, waters of the U.S. "does not include channels through which water flows *intermittently*." *Id*. (emphasis added). The Court further clarified the distinction between point sources and waters of the U.S., finding "the separate classifications of 'ditch[es], channel[s], and conduit[s] – which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow – shows that these are, by and large, *not* 'waters of the United States." *Id*. at 735–36. In this case, Ditch C-1 flows intermittently, not continuously. (R. 5). Therefore, Ditch C-1 is not a navigable water.

Justice Kennedy's concurrence adopted the test articulated in *SWANCC*, water is a navigable water if the water "possesses a 'significant' nexus to waters that are or were navigable in fact or could reasonably be so made." *Id*. at 759 (quoting *SWANCC,* 531 U.S. at 167). The nexus cannot be speculative or insubstantial. *Rapanos*, 547 U.S. at 780.

In this case, Ditch C-1 runs sometimes into Reedy Creek. (R. 5). The presence of water in Ditch C-1 depends on a number of factors: weather, maintenance by landowners, and levels of irrigation. This creates a speculative nexus between the waters, because it is not always clear when the water from Ditch C-1 will flow into Reedy Creek. Furthermore, Reedy Creek maintains water flow throughout the year, regardless of whether Ditch C-1 is maintaining water flow or not. (R. 5). Its flow does not depend on the Ditch C-1 contribution, therefore Ditch C-1's

contribution to Reedy Creek is insubstantial. For this reason, Ditch C-1 is not a navigable water under the significant nexus test and cannot then be waters of the United States.

d. Ditch C-1 is not a tributary of Reedy Creek.

In the alternative, the argument has been made that an irrigation canal is a navigable water if it is a tributary to a navigable water. *Headwaters, Inc*. 243 F.3d at 533. However, other courts have read the Supreme Court's decision in *SWANCC* to mean that there must be more than a mere "hydrological connection;" there must be a substantial nexus between the waters. *FD&P Enterprises, Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 517 (Dist. Ct. N.J, 2003). In this case, there is not a substantial nexus between Ditch C-1 and Reedy Creek. Ditch C-1 runs only intermittently into Reedy Creek. (R. 5). Furthermore, in Justice Scalia's opinion in *Rapanos* he expressed concern over sweeping assertions of jurisdiction and held that *only* waters with a *continuous* surface connection to bodies of waters are waters of the United States. 547 U.S. at 726. In this case, Ditch C-1 is not continuously present. Rather, the water dries up during the year. (R. 6).

In the wake of the *Rapanos* and *SWANCC* decisions, the EPA promulgated a draft guidance document that defined "ditch" to include tributaries to navigable waters. *See supra* Draft Guidance Document. The Draft Guidance Document expands the categories of waters coming under the EPA's jurisdiction to include tributaries to traditional navigable waters. *Id*. However, this is an unreasonable and impermissible interpretation of the CWA even considering the broad definition of "ditch" in *Rapanos* and goes beyond the EPA's authority. The Draft Guidance Document violates the Court's finding in *SWANCC* and expands jurisdiction to include isolated, non-navigable waters as interstate waters and remote other waters. Jeffrey Jakob,

Agency Games: Why the EPA and Army Corps of Engineers Exceed Their Jurisdiction Under the CWA, and What Can Be Done About It, 31 Temp. J. Sci. Tech. & Envtl. L. 285, 298–99 (2012).

The Court is unwilling to replace the *plain* text and *original* understanding of a statute with an amended agency interpretation. *Rapanos,* 547 U.S. at 750. (Citing *SWANCC* at 169–170). Congress has clearly said that ditches are point sources. 33 U.S.C. § 1362(14). This is a clear violation of *SWANCC* because the word "navigable" must have some meaning. *Id*. Second, the EPA is attempting to broaden the significant nexus test as articulated by Justice Kennedy. The EPA is attempting to expand its old standard of exercising jurisdiction over any tributary that flows into traditional navigable water and with an ordinary high water mark. *Id*. The Court has found that, "when an administrative interpretation of a statute invokes the outer limits of Congress' power, [the court] expect[s] a clear indication that Congress intended that result." *SWANCC,* 531 U.S. at 172. In the case of the CWA and the current case, the EPA has attempted to continue to expand its jurisdiction in violation of the CWA. Congress was clear, ditches are point sources, however, the EPA has sought to expand its jurisdiction despite the fact that Congress did not give the agency clear power to do so. Therefore, the district court did not err in concluding Ditch C-1 is not a navigable water.

V. REEDY CREEK IS NOT A NAVIGABLE WATER OF THE UNITED STATES

Historically, navigable waters were defined as those waters that "are navigable in fact" or are "susceptible of being used, in their ordinary condition, as highways for commerce." *Daniel Ball*, 77 U.S. at 563. In this case, each party agrees Reedy Creek has not been used or will not be used for waterborne transportation. (R. 5).

a. Reedy Creek is not a highway of interstate commerce.

The Court has expanded the definition of navigable to include waters that can be used as interstate highways, giving the federal government power to regulate under the Commerce Clause of the Constitution. U.S. CONST, art. 1, § 8, cl. 3; *U.S. v. Appalachian Elec. Power Co.,* 311 U.S. 377, 404 (1940). Bonhomme and Progress argue that Reedy Creek is similar to the Rito Seco Creek in Colorado, defined by the Tenth Circuit as navigable waters. *U.S. v. Earth Scis.* 599 F.2d 368 (10th Cir. 1979). The court found that an irrigation creek fell under waters of the United States, because Congress intended to regulate discharges into water that may affect interstate commerce. *Id.* In *Riverside Bayview Homes,* the Supreme Court upheld the Corps' determination that it had jurisdiction over wetlands adjacent to navigable waters. 474 U.S. 121, 130 (1985). Even though the plain language of the statute did not compel this conclusion, the Court explained that Congress intended "navigable waters" to have a broad meaning. *Id.* at 132. The Court found that Congress intended to regulate waters that would not be navigable under the traditional understanding of the term by exercising their power under the Commerce Clause.

Since *Earth Sciences* and *Bayview Homes*, however, the Supreme Court has significantly narrowed the definition of navigable waters. In *Rapanos,* the Court held that rivers must be highways of interstate commerce to fall within the definition of navigable waters. 547 U.S. at 724. That is, the waterways must fall under prong one of the *Lopez* dormant commerce clause test. The Court in *Lopez* recognized three broad categories of activity that Congress may regulate under its commerce power. Congress may regulate the use of channels of interstate commerce, instrumentalities of interstate commerce, and activities that have a substantial relation to interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 558–59 (1995).

The *Lopez* Court found that Congress has the power to regulate commerce amongst foreign nations, states, and the Indian Tribes. 514 U.S. at 552 (citing U.S. CONST. art. I. §8, cl. 3). Congressional power to regulate under the Commerce Clause is, however, "subject to outer limits." *Lopez* at 557–58 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). The Court further clarified that the government may not "pile inference upon inference" to establish authority under the Commerce Clause, expanding authority into those areas retained by the states. *Id.* at 567.

In this case, Bonhomme has attempted to lay "inference upon inference" to establish that Maleau's activities fall within the reach of the Commerce Clause. First, Bonhomme argues that because Reedy Creek is a water supply for Bounty Plaza it falls within the Commerce Clause. (R. 5). This would require laying inference upon inference that water in Reedy Creek provides a highway of interstate to encourage commerce along the interstate. A more plausible explanation is that I-250 provides the highway of interstate commerce, not Reedy Creek. Second, Bonhomme argues that Reedy Creek flows into Wildman Marsh, which is a stop over for waterfowl. This too would require layering inference upon inference. First, the ducks seasonally live on the water in the wetland. Second, the water in the wetland flows from Reedy Creek. Third, Reedy Creek is only at times fed by Ditch C-1. The connection is attenuated at best.

b. Reedy Creek is not navigable water because it is not an instrumentality of interstate commerce.

The *Rapanos* Court focused on the first prong, to gain jurisdiction under the Commerce Clause, however some may argue that the EPA could gain jurisdiction under the second or third prongs of *Lopez*. Under the second prong of *Lopez*, the government can gain jurisdiction over instrumentalities of interstate commerce: the means by which people or things in commerce move, including trains planes, cars trucks, boats and other vehicles. *U.S. v. Shahani-Jahromi*,

286 F. Supp. 2d 723, 733 (E.D. Va. 2003) (citing *U.S. v. Miles,* 122 F.3d 235, 246 (5th Cir. 1976). In this case, Reedy Creek does not provide a means for people or commerce to move. Each party has agreed that Reedy Creek has not been used for waterborne transportation or could be with improvements. (R. 9).

Few courts have interpreted persons as instrumentalities of commerce. The courts that have done so have found that a person is an instrumentality when they are a passenger, traveler, operator or crew member of an instrumentality of commerce or persons whom have a plain and clear nexus to interstate commerce. *Minn. ex rel. Hatch v. Hoeven*, 370 F. Supp. 2d 960, 969 (D.N.D. 2005) aff'd. 456 F.3d 826 (8th Cir. 2006) (citing *Shashani-Jahromi*, 286 F. Supp. 2d at 733; *Groome Res. Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 203 (5th Cir. 2000).

In *Hatch,* the court found that non-resident hunters did not have a "plain and clear nexus to interstate commerce." 370 F. Supp. 2d at 969. The court found that the interstate movements were in the pursuit of a purely recreational activity. *Id*. The situation in Minnesota is similar to the case at hand. Here, duck hunters come for recreational purposes. (R. 6–8). However, hunting is considered a recreational activity and thus does not fall within the Commerce Clause.

These hunters are not coming as a traveler of an instrumentality of commerce. In this case, the arguable instrumentality is Reedy Creek and the hunters are not traveling on this instrumentality to hunt. The same argument can be made for the travelers along the interstate. The travelers are not traveling along the instrumentality of commerce, Reedy Creek, rather the travelers are on the interstate. (R. 9). Furthermore, creating a relationship between Reedy Creek and the travelers would require layering impermissible inference upon inference.

c. Reedy Creek is not navigable water because it does not have a substantial effect on interstate commerce.

In determining if the Commerce Clause has substantial effects on interstate commerce, the court looks to whether the activity is at least in part an economic endeavor. *U.S. v. Morrison*, 529 U.S. 598, 611 (2000). In *Hatch*, the court examined whether interstate waterfowl hunters had a substantial effect on interstate commerce. 370 F. Supp. 2d at 970. The court found the non-resident hunters did not have a "plain and clear nexus to interstate commerce," because the non-resident's interstate movement is purely *recreational*. *Id*. (emphasis added). In the case at hand, the hunters go to Bonhomme's property to engage in recreational hunting. (R. 5–6). The alleged violations of the CWA do not prevent the hunters from continuing to move in and out of Progress. The hunters are free to continue hunting if they so chose. Going to the hunting lodge has nothing to do with commerce or economic activity. In this case, the hunters who visit the lodge do not engage in the purchasing of a service or product.

The Court has extended Congress's commerce power to regulate only those activities having a *substantial* relation to interstate commerce. *Lopez*, 514 U.S. at 558–59 (citing *Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)). In this case, the flow of Reedy Creek does not have a substantial relation to interstate commerce. Reedy Creek provides water for the service area, however the Plaza sells gasoline and food, not the water. (R. 5). Furthermore, finding that the water has a substantial effect on interstate commerce would require laying inference upon inference, which the government cannot do. *Lopez*, 514 U.S. at 567.

d. The Wetlands in Wildman Marsh National Wildlife Refuge are not "waters of the United States" merely because the refuge is federal property.

While the Court defined a wetland as a water of the United States in *Rapanos*, it did not expressly consider or reject the argument that water on federal property is included within waters

of the United States. However, the Court did find that *only* wetlands with continuous surface connection to waters of the United States are covered by the CWA. 547 U.S. at 742 (emphasis added). To establish that the wetlands are covered by the Act requires that the relatively permanent body of water connected to traditional interstate navigable waters is connected to the wetland and the wetland has a continuous surface connection to the water of the United States. *Id*.

In this case, there is not a continuous surface connection between the Wildland Marsh and traditional interstate navigable waters. Reedy Creek is not a traditional navigable waters of the U.S. Therefore even though there is a continuous surface connection to Wildland Marsh, the EPA cannot claim jurisdiction, because jurisdiction can be established *only* over those wetlands with continuous surface connection to *waters of the United States*. Therefore, the district court erred in concluding that Reedy Creek is a navigable water.

VI. EVEN IF MALEAU IS THE BUT-FOR CAUSE OF THE PRESENCE OF ARSENIC IN DITCH C-1, BONHOMME VIOLATES THE CWA BY ADDING ARSENIC TO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY.

Even if Maleau is responsible for the presence of arsenic in the irrigation ditch, he is not the violator of the CWA. Because Bonhomme is responsible for the point source in question, he is the one liable under the CWA. (*See* R. 5). The CWA does not contemplate pollution in terms of causation, direct addition or indirect addition.

a. The language of the statute that a point source only need "convey" a pollutant into a navigable water, not generate the pollutant itself.

The CWA makes it unlawful to discharge a pollutant into a navigable water. 33 U.S.C. § 1311(a), 1312(a), 1342(a) (2006). "Discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12) (2006). A "point source" as defined by the Act as a "discernible, confined and discrete *conveyance*." 33 U.S.C. §

1362(14) (2006) (emphasis added). The Act also provides a list of examples that includes pipes, ditches, channels, tunnels and conduits, all of which serve to transport water or effluent from one point to another, not to generate pollutants. *Id*.; *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004). It is clear, based on the plain language of relevant sections, that a violation occurs when any person discharges a pollutant from a point source into a navigable water, whether or not that person generated the pollutant.

Even if the language above is deemed ambiguous, a review of the provisions of the entire law, as well as its purpose and policy, reveals that it is the owner and operator of the point source who is to be held liable for a violation of the CWA regardless of whether they generated the pollutant. *Maracich v. Spears*, 133 S. Ct. 2191, 2203 (2013). The CWA consistently uses the language "owner and operator" of a point source, rather than using language of agency, such as "creator" or "generator." An "owner or operator" is defined as "any person who owns, leases, operates, controls, or supervises a source." 33 U.S.C. § 1316(a)(4). Section 1311 allows the "owner or operator" of a point source to apply for a modification of permit requirements and section 1318 requires the "owner or operator" of a point source to establish and maintain records, maintain monitoring equipment and methods, sample effluents and provide such other information as the EPA may reasonably require. 33 U.S.C. § 1311(g); 33 U.S.C. § 1318(a). This language provides further evidence that it is not necessarily the generator of the pollutant who will be held liable, but the operator or owner of the point source that is discharging that pollutant. There may be a circumstance, of course, when the generator would be both the generator of the pollutant and the operator of the point source. That is not the situation in the case at bar.

The regulations promulgated by the EPA, which is the governmental body charged with enforcing the CWA, also suggest that liability arises, not when a person generates a pollutant, but

when a person owns a point source that is discharging that pollutant into a navigable waterway. 33 U.S.C. § 1251 (2006). The EPA defines "addition of any pollutant" to include "discharges through pipes, sewers, or other conveyances *owned* by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately *owned* treatment works." 40 C.F.R. § 122.2 (2013) (emphasis added). In another regulation, the agency notes that an inactive mining operation which is subject to permitting requirements, are "mining sites that are not being actively mined, but which have an identifiable *owner/operator*." 40 C.F.R. § 122.26 (2013) (emphasis added). This language "reinforces the view that ownership of a point source will trigger liability." *Sierra Club v. El Paso Gold Mines, Inc*., 421 F.3d 1133, 1144 (10th Cir. 2005).

b. The Supreme Court holding that a point source need only convey a pollutant into a navigable water for liability to arise under the CWA is controlling in this case.

The Supreme Court, in *South Florida Water Management District*, issued a decision that is consistent with the above interpretation of the CWA, and under which Bonhomme is liable, not Maleau. 541 U.S. at 96. In *South Florida* plaintiffs filed a citizen suit, claiming the defendant violated the CWA by not acquiring a permit before pumping water containing high levels of phosphorous from a canal into a wetland. *Id*. at 99. In this case, defendants operated a pump station that removed water from a canal, designed to collect groundwater and rainwater, into an undeveloped wetland area. *Id*. at 101. Before pumping, however, the water was polluted by agricultural fertilizer. *Id*. at 101. Both parties agreed the pump itself did not add any pollutants to the water. *Id*. at 104.

In addressing whether or not the pump constituted a "point source" as contemplated by the CWA, the court rejected the lower court's finding that the CWA only requires a permit when pollutants originate from that point source, and not when pollutants originating elsewhere merely

pass through that point source. *Id*. at 96. The point source need only convey the pollutant into a navigable water according to section 1362(14) of the Act. *Id*. at 96. As the Court noted, the Act's examples of point sources transport, but do not generate pollutants. *Id*. at 96.

The Court's decision affirmed what a number of courts already held: point sources need only convey pollutants into a navigable water, not create them. *E.g*. *Catskill Mountains Chapter of Trout Unlimited, Inc*. *v*. *City of New York*, 273 F.3d 481, 493 (2d Cir. 2001) *adhered to on reconsideration*, 451 F.3d 77 (2d Cir. 2006); *El Paso Gold Mines, Inc*., 421 F.3d at 1144 (10th Cir. 2005); *U.S*. *v*. *Law*, 979 F.2d 977, 979 (4th Cir. 1992); *Nat'l Wildlife Fed'n v*. *Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982); *see City of Milwaukee v*. *Ill*. *and Mich*., 451 U.S. 304, 320 (1981). There is ample precedent showing that it is the owner and operator of the point source who will be held liable for violating the CWA, not necessarily the generator of the pollutant.

These courts recognize an important policy argument. In *South Florida*, the Court noted that one of the primary goals of the CWA was to place requirements on municipal wastewater treatment plants. 541 U.S. at 105; *see* 33 U.S.C. § 1311 (establishing a schedule requiring publicly owned treatment works to secure a permit by certain dates). If it were necessary to show the owner of the point source is the original polluter in order to establish a violation of the CWA, this would mean that a pump discharging effluent from a sewage treatment plant would be excluded, because the pollutants did not originate at the pump. Brief for Respondent at 16, *S*. *Fla*. *Water Mgmt*. *Dist*. *v*. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2013) (No. 02-626). This would seriously frustrate the CWA's purpose of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C § 1251 (2006). In light of the recent Supreme Court decision and accompanying policy considerations, the district court properly held that it is Bonhomme is violating the CWA, not Maleau.

CONCLUSION

Bonhomme is not a real party in interest under FRCP 17, and thus, is not the proper party to bring this claim. Additionally, Bonhomme, a foreign national and not a United States citizen, is not entitled to bring a citizen suit under the CWA § 505. Furthermore, Maleau's mining waste piles are not point sources under CWA § 502, because neither the language of the statute, nor relevant court interpretations suggest overburden piles should be considered point sources. In addition, under the plain language of the CWA, Ditch C-1 is a point source, not a navigable water. Furthermore, Reedy Creek is not a navigable water because it does not provide a direct relationship with interstate commerce and thus does not fall under the jurisdiction of the Commerce Clause. Finally, even if this court were to find that Reedy Creek is a navigable water, Bonhomme is liable for the addition of the arsenic into Reedy Creek, not Maleau, because Bonhomme owns and operates the point source from which the pollutant enters Reedy Creek. The Intervenor-Plaintiff, therefore, respectfully requests this Court affirm the district court's dismissal of the case.

Respectfully submitted,

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Counsel for Shifty Maleau