Team 63

C.A. No. 13-01234

THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,

Plaintiff-Appellant, Cross-Appellee,

v.

SHIFTY MALEAU,

Defendant-Appellant, Cross-Appellee

STATE OF PROGRESS,

Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

JACQUES BONHOMME,

Defendant-Appellant, Cross-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PROGRESS

Civ. Nos. 155-CV-2012 & 165-CV-2012

BRIEF FOR APPELLANT AND CROSS-APPELLEE JACQUES BONHOMME

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STATEMENT OF JURISDICTION

Appellant Jacques Bonhomme ("Bonhomme") has brought this action in the United States District Court for the District of Progress seeking relief under the Clean Water Act ("CWA" or "Act"), Section 505, 33 U.S.C. §§ 1251-1387 (2013), under the jurisdiction of the citizen suit provision of the Act, 33 U.S.C. § 1365 (2013). The district court granted Shifty Maleau's ("Maleau") motion to dismiss and denied Bonhomme's cross motion to dismiss. The district court's order is a final decision and jurisdiction is therefore proper in this appellate court pursuant to 28 U.S.C. § 1291 (2013).

STATEMENT OF THE ISSUES

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

II. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Shifty Maleau for violating the CWA.

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

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

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

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

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress granting Maleau's motion to dismiss and denying Bonhomme's motion to dismiss. Record ("R.") at 10. Bonhomme tested the water near Reedy Creek and Ditch C-1 and discovered the presence of arsenic which be believed to be flowing from Maleau's property. Id. at 6. After proper notice, Bonhomme brought suit against Maleau under the citizen suit provision of the CWA, 33 U.S.C. § 1365, alleging that Maleau arranged gold mining overburden in a configuration of piles such that stormwater runoff has eroded channels between the piles. Id. at 4. This runoff runs into and adds arsenic in rainwater runoff to Ditch C-1 ("the Ditch") through those channels. Id. at 4-5. The runoff then travels through the Ditch and empties into Reedy Creek ("the Creek"), an interstate, navigable water, through a culvert on Bonhomme's property. Id. at 5. Bonhomme asserts that the Ditch is a navigable water because it is a tributary of Reedy Creek. Id.

After proper notice, the State of Progress filed a citizen suit against Bonhomme, alleging that the culvert on his property discharged arsenic into Reedy Creek and thereby violated the CWA. Id. Maleau intervened in Progress's action, and Progress and Maleau consolidated their cases against Bonhomme. Id. The defendants in each suit filed motions to dismiss. Id.

On July 23, 2012, the district court granted Maleau's motion to dismiss on the grounds that Bonhomme is not a citizen for the purposes of the CWA's citizen suit provision and that Bonhomme is not the real party in interest in this suit. Id. at 8. The district court also noted that it would find for Maleau on all issues except that Reedy Creek is a water of the United States. Id. at 10. Bonhomme, Maleau, and Progress each filed a Notice of Appeal.

STATEMENT OF THE FACTS

Maleau owns and operates a gold mining and extraction operation in the state of Progress. R. at 5. Maleau's operations generate waste, which he places into piles. Id. When it rains, rainwater runoff percolates through the piles. Id. The ensuing runoff flows through channels, which are created by erosion resulting from the piles' configuration. Id. These channels leach arsenic into the water in Ditch C-1, a drainage ditch which contains running water for at least nine months each year. Id. The Ditch runs three miles through several agricultural properties and empties into Reedy Creek through a culvert under Bonhomme's property. Id. Restrictive covenants on both Maleau and Bonhomme's deeds require them to maintain Ditch C-1. Id.

Before bringing this suit, Bonhomme tested the water in Ditch C-1 both upstream and downstream of Maleau's property. Id. at 6. Arsenic is undetectable above Maleau's property, but is present in high concentrations just below the property, decreasing in concentration as the Ditch runs away from the property. Id. In Reedy Creek, arsenic is undetectable upstream from the Ditch, but present in high concentrations just below where the Ditch discharges into the Creek. Id. The arsenic is detectable at lower levels throughout Wildman Marsh and the U.S. Fish and Wildlife Service has detected arsenic in three Blue-winged Teal in Wildman Marsh. Id. The Ditch has fouled and continues to foul the waters of Reedy Creek, Wildman Marsh, and the wildlife residing in or visiting the wetland. Id.

Reedy Creek begins in the State of New Union, where it serves as the water supply for Bounty Plaza, a service area that sells gasoline and food along Interstate 250 ("I-250"), a federally funded highway. Id. at 5. The Creek then flows into the State of Progress, passes Bonhomme's property, and ends at Wildman Marsh. Id. Farmers from both the State of New

Union and the State of Progress divert the Creek's waters to irrigate agricultural products. Id. These products are then sold in interstate commerce. Id.

The Marsh is essential to over a million ducks and other waterfowl, as well as a major destination for duck hunters from Progress, New Union, and five neighboring states. Id. at 6. Even hunters from foreign countries travel to Wildman Marsh to hunt. Id. Hunting at Wildman Marsh adds over $25 million to the local economy from interstate hunters alone. Id. Bonhomme's property fronts the wetlands, and contains a large hunting lodge, which he uses primarily for duck hunting with business and social friends and acquaintances. Id. Bonhomme has decreased his hunting parties from eight a year to two a year because he is afraid to continue to use the Marsh for his hunting parties. Id.

SUMMARY OF THE ARGUMENT

This court should reverse the decision of the district court on numerous grounds. Bonhomme has standing to bring this suit, Bonhomme is the real party in interest, Reedy Creek is a water of the United States, Ditch C-1 is a navigable water, Maleau's actions violate the CWA, and Bonhomme's culvert does not add pollutants under the meaning of the CWA. For each of the above reasons, the Court should reverse the grant of Maleau's motion to dismiss and grant Bonhomme's motion to dismiss.

Bonhomme has standing to bring this suit because he is a "citizen," as defined by the CWA. Bonhomme has a recreational interest in Reedy Creek and Wildman Marsh, both of which are adversely affected by runoff Maleau's mining waste piles. The district court held incorrectly that foreign nationals cannot bring suits, unduly narrowing the scope of the CWA citizen suit provision. Furthermore, Bonhomme has standing to bring a suit because he has suffered an injury-in-fact. Bonhomme's fear of using Reedy Creek and Wildman Marsh recreationally for

his hunting parties is a cognizable injury. This injury is fairly traceable to Maleau's operations because contamination resulting from arsenic runoff from Maleau's mining waste piles is the source of Bonhomme's fear and decreased enjoyment of the Creek and Marsh.

Bonhomme is the real party in interest in this case under FRCP 17, because he has a substantive right to bring suit. The CWA confers upon Bonhomme the substantive claim against Maleau for the diminution of his enjoyment of Reedy Creek and Wildman Marsh. Whatever interest Precious Metals Internationals ("PMI") has in the outcome of the litigation is of no import because Bonhomme is the party whose interest has been affected. Bonhomme is thus the party enforcing a substantive right, and therefore the real party in interest.

Reedy Creek is a water of the United States. Congress and the courts have defined waters of the United States broadly to include waters that support activities which, in the aggregate, substantially impact interstate commerce. Reedy Creek substantially affects interstate commerce because it consistently provides water for crop irrigation, hunting bird habitat, and an interstate service area. Alternatively, Reedy Creek is a water of the United States because it is a tributary of Wildman Marsh, a wetland that provides habitat for migratory birds and fosters hunting by interstate and foreign hunters. Tributaries of waters of the United States are considered waters of the United States themselves and are therefore subject to the CWA.

Ditch C-1 is also a water of the United States. It is a tributary of both Reedy Creek and Wildman Marsh and is therefore subject to the CWA. Ditch C-1 is a relatively permanent watercourse containing running water for at least nine months out of a year and its man-made nature and ability to be a point source are inconsequential. Its water significantly affects the chemical, physical, and biological integrity of the other covered waters. Congress had a clear intention to give "navigable waters" the broadest possible constitutional interpretation in order to

promote the CWA's purpose to reduce water pollution and improve water quality. This Court should respect Congress' intention and deem Ditch C-1 a water covered by the CWA.

Maleau's liability under the CWA depends not on whether the waste piles themselves constitute a point source, but rather whether the resulting discharge occurs through *any* point source. Using this proper analysis, this Court should find that Maleau is liable under the CWA because his pollutants are discharged through a point source as explicitly contemplated by Congress: either the erosion channels running down the waste piles or, in the alternative, Ditch C-1 itself. This discharge is not normal nonpoint runoff because it is channeled by Maleau's affirmative conduct via the waste pile placement and maintenance of Ditch C-1. Either of these sources—the natural channels or Ditch C-1—can qualify as the requisite discernable, confined and discrete conveyance into navigable waters to deemed a point source. Therefore, this Court should find that Maleau is responsible for an unpermitted discharge under the CWA.

Finally, this Court should find that Bonhomme is not subjected to liability under the CWA because his culvert acts only as a water transfer as defined and exempted by the Environmental Protection Agency. The operative word that triggers the need for a permit is the "addition" of pollutants to navigable waters. EPA has adopted a regulation that interprets that language to mean that once a pollutant enters a navigable water, merely transferring that polluted water to other navigable waters does not require a permit. The limitations on these exempted transfers are that no water may be diverted for any use and no additional pollutants can be added by the transfer. Both of those supplemental conditions are met here. Therefore, this Court should find that Bonhomme is not liable under the CWA.

STANDARD OF REVIEW

On appeal of a motion to dismiss, the standard of review for appellate courts is *de novo*. See, e.g., Mesocap Ind. Ltd. v. Torm Lines, 194 F.3d 1342, 1343 (11th Cir. 1999). The Court should accept the facts alleged in the complaint as true. Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 204 (2d Cir. 2009) (internal citations omitted). A plaintiff need not plead detailed factual allegations in its complaint, as a court may grant a motion to dismiss only when a plaintiff has failed to raise a right to relief beyond a "facially plausible" level. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

ARGUMENT

I. Bonhomme may maintain this suit, as he is a "citizen" under CWA Section 505(a).

The "citizen suit" provision of the CWA authorizes any citizen to bring a civil action on his own behalf against any alleged violator of effluent standards under the CWA. 33 U.S.C. § 1365(a)(1) (2013). Bonhomme may bring this lawsuit because he is a "citizen" under the Act.

A. Bonhomme is a "citizen," as defined by Section 505(g), because he has a recreational interest which is and continues to be adversely affected by the discharge of arsenic from Maleau's property.

Bonhomme is a "citizen," as defined by Section 505(g) of the Act. Under Section 505(g), the term "citizen" is defined as "a person . . . having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g); Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 173 (2000). In order to prove that he is entitled to sue, Bonhomme therefore need only show that he has an interest which is or may be adversely affected by Maleau's actions.

Bonhomme's interest in the enjoyment of Reedy Creek and Wildman Marsh is and continues to be adversely affected by the arsenic runoff from Maleau's property. Citizen suit plaintiffs sufficiently allege injury to a recreational interest when it is shown that they use an

affected area, and that the aesthetic or recreational values of that area are lessened by the challenged activity. See San Francisco Baykeeper v. West Bay Sanitary Dist., 791 F. Supp. 2d 719 (2011) (noting that "indications that the Bay's ecosystem is degraded . . . harms [the plaintiff's] *aesthetic and recreational interest* in sailing on the San Francisco Bay") (emphasis added); Idaho Conservation League v. Atlanta Gold Corp., 844 F. Supp. 2d 1116, 1128 (D. Idaho 2012). Bonhomme has asserted that the arsenic emitted by Maleau's waste piles fouls the waters of Reedy Creek, Wildman Marsh, and the surrounding wildlife. R. at 6. Bonhomme uses Reedy Creek, Wildman Marsh, and his own property as forums for recreational hunting parties. Id. Due to the contamination of these areas by the arsenic runoff, however, Bonhomme is afraid to continue to use these areas for his hunting parties and has therefore substantially decreased the number of hunting parties he holds there from eight a year to two a year. Id. Bonhomme has therefore sufficiently shown an interest that has and may continue to be adversely affected by the arsenic runoff stemming from Maleau's property.[1]

B. The trial court erred in holding that CWA Section 505 does not entitle foreign nationals to bring Citizen Suits.

Despite the fact that Bonhomme holds an interest that may be adversely affected and therefore qualifies as a "citizen" under the plain language of CWA Section 505(g), the trial court nevertheless held that Bonhomme is not a "citizen" for purposes of the citizen suit provision of the Act. R. at 8. In an inferential leap, the trial court held that by specifying various entities in the

[1] Of these assertions by Bonhomme, Maleau contests only that the reason for the decrease in the hunting parties is due to the decline of the economy. Maleau's argument is inapposite, however, because at the motion to dismiss stage of litigation, all reasonable inferences should be made in favor of the opposing party, in this case Bonhomme. Todaro v. Orbit Intern. Travel, Ltd., 755 F. Supp. 1229, 1232-33 (S.D.N.Y. 1991); Parnes v. Mast Property Investors, Inc., 776 F. Supp. 792, 795 (S.D.N.Y. 1991). Furthermore, even if Bonhomme has decreased the number of hunting parties he holds due to the decline of the economy, this does not foreclose the reasonable possibility that the aesthetic and recreational values of Reedy Creek and Wildman Marsh have been adversely affected by the runoff from Maleau's property.

definition of "person," Congress intended to broaden citizen suit plaintiffs beyond individuals, but not beyond citizens of American nationality.[2] Id.

The trial court's analysis rests on an improper inference. Even if this language evinces Congress' intention to broaden potential citizen suits beyond individuals, as the trial court presumes, this does not imply Congressional intent to limit citizen suits to American plaintiffs. In fact, it would seem to imply the opposite – that the citizen suit provision should be read broadly so as to encompass more, rather than fewer potential plaintiffs. Congressional intent evinces the broad scope of the CWA. Congress intended the words "navigable waters" under the Act to be "given the broadest possible constitutional interpretation" in order to carry out the Act's purpose of reducing pollution and improving water quality. 118 Cong. Rec. 33699 (1972). So too, should the term "citizen" be given broad meaning, so as to not preclude enforcement by aggrieved parties and to further the same noble purposes the CWA was enacted to promote.

C. Bonhomme has standing to bring a Citizen Suit.

To prove standing to bring a citizen suit, Bonhomme need show that he has suffered (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the arsenic runoff from Maleau's waste piles; and (3) that the injury will likely be redressed by a favorable decision. Laidlaw, 528 U.S. at 181.

Citizen suit plaintiffs "adequately allege injury in fact when they aver that they use an affected area, and that the aesthetic and recreational values of that area will be lessened by the challenged activity." Id. at 183. The relevant question is not injury to the environment, but rather

[2] It is not clear from the record what "various entities" the trial court is referring to. The only entities mentioned in the citizen suit provision of the CWA are the United States and "any other governmental instrumentality or agency," both of which are referenced as potential parties defendant in citizen suits. 33 U.S.C. § 1365 (2013). At no other point in this provision is there any specification of who qualifies as a "person" for purposes of defining who may be a plaintiff or defendant in an action under this Section. See id.

injury to the plaintiff. Id. at 181. In Laidlaw, the plaintiffs alleged that, although they would like to use the affected river for fishing and other recreational purposes, they would not do so for fear of the effects from the defendant's discharges. Id. at 181-82. The Court held that these allegations were sufficient injury in fact to establish standing, even if there was no actual injury to the environment. Id. at 183-185. It is an uncontested fact in this suit that Bonhomme personally uses Reedy Creek and Wildman Marsh for his hunting parties. Furthermore, Bonhomme's fear of using the Creek and the Marsh for his hunting parties due to potential arsenic contamination is nearly identical to the harm suffered by the plaintiffs in Laidlaw. Bonhomme has therefore sufficiently alleged injury for purposes of standing in this lawsuit.

To establish traceability, a plaintiff need only show a substantial likelihood that the defendant's conduct is a source of the harm. Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990). In the CWA context, this substantial likelihood is established by showing that (i) a defendant has discharged a pollutant in concentrations greater than allowed, (ii) into a waterway that plaintiffs have an interest in or may be adversely affected, and (iii) the pollutant causes or contributes to the kinds of injuries alleged by plaintiffs. Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1176 (D.Idaho 2001).

Bonhomme's loss of enjoyment of Reedy Creek and Wildman Marsh are almost certainly traceable to a discharge of pollutants from Maleau's property. Bonhomme conducted testing of the water in Ditch C-1, which flows into Reedy Creek, both upstream and immediately downstream of Maleau's property. R. at 6. Bonhomme found that arsenic was undetectable upstream of the Maleau property, but is present in high concentrations below the property. Id. Furthermore, there is no detectable arsenic in Reedy Creek upstream of where it connects to Ditch C-1, but arsenic is present in high concentrations in the Creek just downstream of Ditch C-

1. Id. This is strong evidence that the contamination emanates from Maleau's property. As the district court noted, "if proven [at trial, this pattern] strongly suggests the arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles." Id.

Arsenic pollution is unquestionably a contributor to the harm alleged by Bonhomme. Arsenic is characterized as a "toxic pollutant" and "hazardous substance" under the CWA and CERCLA. See 40 C.F.R §§ 116.4, 302.4, 401.15. It has also been recognized as a contributor to the same loss of recreational resources asserted here. See Idaho Conservation League, 844 F. Supp. 2d 1130 (holding that plaintiffs who feared fishing and swimming in a river where arsenic was discharged had standing under the CWA citizen suit). Bonhomme has therefore established a substantial likelihood that Maleau's arsenic discharge is a source of Bonhomme's harm.

Maleau's compliance with the CWA would almost definitely redress Bonhomme's lessened enjoyment of Reedy Creek and Wildman Marsh because it would eliminate the elevated levels of arsenic that currently prevent Bonhomme from full aesthetic and recreational enjoyment of those areas. See Wis. Res. Prot. Council, Ctr. for Biological Diversity v. Flambeau Mining Co., 903 F. Supp. 2d 690 (W.D.Wisc. 2012) (overruled on separate grounds) (holding that injury can be redressed by simply requiring compliance with the CWA). Bonhomme therefore satisfies the third and final element required for standing.

II. Bonhomme is the real party in interest under FRCP 17.

Bonhomme may maintain a suit as the real party in interest under FRCP 17. Fed. R. Civ. P. 17(a). FRCP 17 requires that an action be brought in the name of the real party in interest. A party can be classified as a real party in interest so long as that party, under substantive law, has the right to bring suit. Boeing Airplane Co. v. Perry, 322 F.2d 589, 591 (10th Cir. 1963).

The right asserted by Bonhomme in the present case is conferred by the CWA, which provides that any citizen may bring an action on his own behalf against any person alleged to be in violation of an effluent standard under the CWA. 33 U.S.C. § 1365(a)(1). As established in Section I of this brief, Bonhomme satisfies all standing requirements and qualifies as a "citizen" under the CWA's citizen suit provision. Because Bonhomme seeks to enforce a substantive right under the CWA, he is the real party in interest in this suit.

Despite the foregoing, Maleau argued, and the trial court held, that PMI, not Bonhomme, is the real party in interest in this case. The trial court based its holding on a number of facts that are irrelevant to Bonhomme's claim. It noted that PMI paid for the arsenic sampling and analyses to support Bonhomme's claims, as well as the attorney and expert witness fees associated with the present litigation. R. at 7. It also took into account the fact that PMI is in direct competition with Maleau, but ignored the fact that PMI has no mines in the entire state of Progress. Id. The court then noted that Bonhomme is the president and largest shareholder of PMI and uses the lodge for hunting parties composed of PMI's business clients. Id. at 7-8.

Each of these factual findings is a red herring. That PMI may benefit from the outcome of this lawsuit does not make it a real party in interest. See Best v. Kelly, 39 F.3d 328, 329 (D.C. App. 1994) (holding that the "real party in interest" is not necessarily the person who will ultimately benefit from the recovery, but rather the party that possesses the substantive law right to be enforced); Reichold Chemicals, Inc. v. Traveler's Ins. Co., 544 F. Supp. 645, 649 (E.D.Mich. 1982) (same). The substantive right asserted by Bonhomme – that his enjoyment of the aesthetic and recreational qualities of Reedy Creek and Wildman Marsh is impeded by Maleau's arsenic discharges – exists wholly independently of any interest PMI has in this case. Bonhomme is the sole owner of the affected property. The hunting parties he holds are not for

business development but rather for the enjoyment of Bonhomme and his guests, many of whom have no connection to PMI. Thus, irrespective of any interest PMI may have in the outcome of the litigation, the substantive right asserted lies with Bonhomme, and he is therefore the real party in interest in this suit.

III. The District Court correctly held that Reedy Creek is a water of the United States.

The Clean Water Act ("CWA") defines "navigable waters" as the "waters of the United States." 33 U.S.C. § 1362(7) (2013). As defined in the Code of Federal Regulations, the "waters of the United States" include "[a]ll other waters such as intrastate . . . streams . . . the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters . . . [w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." 40 C.F.R. § 122.2(c)(1) (2013). Reedy Creek is one such water.

The Supreme Court has interpreted Congress' authority to regulate interstate commerce to include three prongs established in *Lopez*: (1) "the use of the channels of interstate commerce;" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "those activities having a substantial relation to interstate commerce." United States v. Lopez, 514 U.S. 549, 558-60 (1995). The activities referred to in the third prong "arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce." Id. at 561.

The district court correctly held that Reedy Creek is a "water[] of the United States." R. at 10. Maleau argues this holding is in error, but his contention is contrary to congressional intent and unsupported by case law.

A. Reedy Creek is a water of the United States because its water is used for activities that, in aggregate, substantially affect interstate commerce.

Reedy Creek is not a traditionally navigable water. 33 C.F.R. § 328.3(a)(1) (2013). Neither party alleges that its waters are or were ever used for waterborne transportation or that it could be so used with reasonable improvements. R. at 9. However, "Congress evidently intended to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 287 (4th Cir. 2011). While Reedy Creek may not be navigable-in-fact, it substantially affects interstate commerce and thus, satisfies the third prong of the *Lopez* test. Lopez, 514 U.S. at 561. Reedy Creek substantially affects interstate commerce in three significant ways: (1) by being used to irrigate crops which are sold in interstate commerce, (2) by providing water for a wetland used extensively by out-of-state and international hunters, and (3) by being the water supply for an interstate service area.

First, the water from Reedy Creek is "connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." Lopez, 514 U.S. at 561. Farmers from both the State of New Union and the State of Progress divert the Creek's waters to irrigate agricultural products. R. at 5. These products are then sold in interstate commerce.

Second, the water from Reedy Creek flows into Wildman Marsh, a wetland "essential to over a million ducks and other waterfowl" as a resting point for their migrations. Id. at 5. The wetland is also a consistent major destination for duck hunters from seven states and even from a few foreign countries. Id. at 6. The hunting in the wetlands by the interstate hunters alone adds over $25 million to the local economy. Id.

And third, although not dispositive, it is important to note that Reedy Creek is *the* water supply for Bounty Plaza, a service area on the I-250, a federally-funded interstate highway. Id. at

5. Travelers from the east and west of the State of New Union rely on Bounty Plaza for gasoline and food. Id. Thus, the water from Reedy Creek supports commerce activity in Bounty Plaza and further evidences why Reedy Creek constitutes a navigable water.

Overall, it is clear that the water from Reedy Creek substantially affects interstate commerce. In aggregation, the water drawn from Reedy Creek for irrigation, hunting grounds, and water consumption has a substantial effect on interstate commerce. Each of these activities in isolation would likely be sufficient to establish a substantial relation to interstate commerce, but it is not required that any of these activities single-handedly establish this substantial relation. "*Lopez* did not require that the government show that *individual* instances of regulated activity substantially affect commerce to pass constitutional muster under the Commerce Clause." Slingluff v. Occupational Safety & Health Review Comm'n, 425 F.3d 861, 867 (10th Cir. 2005); Lopez, 514 U.S. at 558 (noting that "the *de minimis* character of individual instances arising under that statute is of no consequence"). Instead, federal jurisdiction over Reedy Creek arises from the cumulative, aggregated impacts of selling crops, waterfowl, gasoline, and food in the interstate market. Because there are sufficient interstate activities in the aggregate, Congress has authority to regulate Reedy Creek and the CWA applies.

The facts in this case are similar to *Earth Sciences*. United States v. Earth Scis., 599 F.2d 368 (10th Cir. 1979).[3] In *Earth Sciences*, the court held that Rito Seco, a stream not navigable-in-

[3] The district court in the case at bar erred in concluding that *Earth Sciences* is no longer good law. R. at 10. *Earth Sciences* is still valid law and no court has directly overruled its holding. Neither *Rapanos* nor *Solid Waste Agency of N. Cook Cnty.*, the two Supreme Court cases addressing navigability, confronted the issues of other methods of aggregation (beyond migratory birds) substantially affecting interstate commerce. See Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). *Solid Waste Agency of N. Cook Cnty.* provided only dicta regarding the Commerce Clause, citing *Lopez* and stating that "the grant of authority under the Commerce Clause, though broad, is not unlimited." SWANCC, 531 U.S. at 173.

fact, was a water of the United States covered by the CWA. Id. at 375. Rito Seco was located entirely in Costilla County, Colorado and eventually flowed into two reservoirs for recreational use and agricultural irrigation. Id. at 374. The resulting agricultural products were then sold in interstate commerce. Id. at 375. The court reasoned that although the stream was not used to transport goods or materials, its use in agricultural irrigation and support for trout and beaver established its impact on interstate commerce and was thus covered by the CWA. Id.

Here, like Rito Seco, Reedy Creek is a stream that is not navigable-in-fact but flows into a water body that supports wildlife connected to interstate commerce. R. at 5. Even more compelling than Rito Seco, Reedy Creek is an interstate water body, flowing through the State of New Union into the State of Progress. Id. Its water is drawn for consumption by those living in an interstate service area. Id. The water drawn for agricultural irrigation use by farmers is also drawn directly from the Creek, rather than from the connected water body below. Id. The agricultural products that result are then sold in interstate commerce. Id. *A fortiori*, given the interstate nature of the Creek and its clear ties to interstate commerce, Reedy Creek is a water of the United States covered by the CWA. See also State of Utah By & Through Div. of Parks & Recreation v. Marsh, 740 F.2d 799, 802-04 (10th Cir. 1984) (holding that an entirely intrastate lake was a water of the United States because of its irrigation utility, its use as a recreational site for out-of-state visitors, and its value as a resting point for migratory waterfowl).

B. Even if Reedy Creek on its own cannot be deemed a navigable water, Reedy Creek is a water of the United States because Wildman Marsh is navigable.

Even if this Court is unconvinced that Reedy Creek is a water of the United States based on its interstate commerce impacts in the aggregate, it should still hold that Reedy Creek is a water of the United States because it is a tributary of Wildman Marsh. The trial court correctly concluded that since Wildman Marsh is a navigable water, Reedy Creek, as its tributary, is also a

navigable water. R. at 10. Courts and the EPA recognize that "a tributary of waters of the United States is itself a water of the United States." United States v. Moses, 496 F.3d 984, 989 n.8 (9th Cir. 2007); 40 C.F.R. § 122.2(e) (2013). A tributary is merely a "stream which contributes its flow to a larger stream or other body of water." Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001) (citing Random House College Dictionary 1402 (rev. ed. 1980)). Reedy Creek empties directly into Wildman Marsh, contributing to the Marsh's flow. R. at 5. As such, Reedy Creek is a tributary of Wildman Marsh. If this Court finds that Wildman Marsh is a water of the United States, it follows that Reedy Creek is also a water of the United States.

The trial court also correctly determined that Wildman Marsh is a water of the United States. R. at 10. As mentioned in the previous section, Wildman Marsh is a wetland "essential to over a million ducks and other waterfowl." R. at 5. The wetland is also a major destination for duck hunters from several states and even attracts hunters from a few foreign countries. R. at 6. Interstate hunters alone contribute over $25 million to the local economy. Id. For the same reasons described above, this substantial relation to migratory birds and interstate hunting subjects Wildman Marsh to federal jurisdiction. See Section III.A, supra.

Because Wildman Marsh is a non-navigable interstate wetland used by migratory birds, Maleau may mistakenly contest jurisdiction based on *Solid Waste Agency of N. Cook Cnty*. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs. 531 U.S. 159 (2001) [hereinafter SWANCC]. In *SWANCC*, the Supreme Court invalidated the Migratory Bird Rule, which had allowed isolated, non-navigable, intrastate ponds that "are or would be used as habitat by . . . migratory birds that cross state lines" to be "waters of the US." Id. at 171-72. *SWANCC* thus eliminates CWA jurisdiction over isolated waters that are intrastate and non-navigable, where the

sole basis for asserting CWA jurisdiction is the actual or potential use of the waters as habitat for migratory birds that cross state lines in their migrations. Id.

The case at hand is easily distinguishable from *SWANCC*. To begin, many courts have held that *SWANCC* was a narrow ruling that should not be extended beyond its facts. See, e.g., United States v. Hubenka, 438 F.3d 1026, 1034 (10th Cir. 2006); United States v. Rapanos, 339 F.3d 447, 453 (6th Cir. 2003) (holding that "the [*SWANCC*] Court, [issued] a narrow holding"). Importantly, the Court in *SWANCC* only addressed the issue on statutory grounds, not constitutional grounds. SWANCC at 174 ("We thus read the statute as written to avoid the significant constitutional and federalism questions.").

Moreover, after *SWANCC*, Gary Guzy, General Counsel of EPA, and Robert Anderson, Chief Counsel of the U.S. Army Corps, issued a memorandum providing guidance for its agencies in understanding how to apply *SWANCC*. OFFICE OF WETLANDS, OCEANS, & WATERSHEDS AND U.S. ARMY CORPS OF ENG'RS, EXEC. OFFICES OF THE PRESIDENT, SUPREME COURT RULING CONCERNING CWA JURISDICTION OVER ISOLATED WATERS (2001) [hereinafter GUZY MEMO]. In the memorandum, the agencies stated, "staff should no longer rely on the use of waters or wetlands as habitat by migratory birds as the *sole basis* for the assertion of regulatory jurisdiction under the CWA." Id. (emphasis added). Notably, "other connections with interstate commerce might support the assertion of CWA jurisdiction over 'nonnavigable, isolated, intrastate waters' under subsection (a)(3)." Id.

In light of courts' reluctance to extend *SWANCC* and the guidance within the Guzy memo, it is reasonable to conclude that additional factors may prove, under the third prong of *Lopez*, that in aggregation, the Marsh substantially affects interstate commerce. In addition to providing habitat for migratory birds, the wetland is a major destination for duck hunters from

multiple states and foreign countries. R. at 6. Hunting from the wetland adds over $25 million to the local economy from interstate hunters. Id.; see Colvin v. United States, 181 F. Supp. 2d 1050, 1055 (C.D. Cal. 2001) (holding that the Salton Sea is a water of the United States because it is a popular destination for out-of-state and foreign tourists, who visit the area to fish, hunt, recreate, or gain medicinal benefits from the water). Wildman Marsh thus substantially affects interstate commerce and meets the third prong of the *Lopez* test because it generates over $25 million in local revenue from interstate and international hunters. This Court should therefore hold that Wildman Marsh and its tributary, Reedy Creek, are waters of the United States.

IV. Ditch C-1 is a navigable water under the CWA.

This Court should hold that Ditch C-1 is a navigable water because it is a tributary of navigable waters and is not prevented from being regulated as navigable under the CWA. Much like Reedy Creek, it is undisputed that Ditch C-1 is not a traditionally navigable water and its waters are not and were not ever used for waterborne transportation. R. at 9. As explained in the previous section, a tributary of a navigable water is itself considered a navigable water under the CWA. See Section III.B., supra. Furthermore, agencies have authority to assert CWA jurisdiction over "*all* tributaries to navigable or interstate waters, upstream to the highest reaches of the tributary systems." GUZY MEMO (emphasis added). As such, Ditch C-1 is not precluded from being a tributary under federal jurisdiction even if it is a small tributary in a tributary system.

A. Ditch C-1 is a navigable water despite its annual periods of drought.

Although Ditch C-1 does not contain continuous flow, it is still a relatively permanent water and thus a water of the United States. Even under Scalia's plurality in *Rapanos*, "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months" are not necessarily excluded. Rapanos v. United States, 547 U.S. 715, 732-33 n.5

(2006) (Scalia, J., plurality). The Court only needs to determine that the ditch is a "relatively permanent," rather than "intermittent" and "ephemeral," watercourse. Id. at 732-33.

Here, Ditch C-1 is clearly a relatively permanent watercourse subject to the CWA. It contains running water for at least nine months out of a year, only losing flow for a few weeks to a max of three months due to drought. R. at 5. By the standard of any court, Ditch C-1 would not be considered intermittent or ephemeral. See, e.g., Moses, 496 F.3d at 989 (holding that an intermittent tributary was part of the waters of the United States even though the channel held water continuously for only two months out of the year); United States v. Vierstra, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011) (holding that the Low Line Canal was a relatively permanent water because it had recurring, regular, perennial, and substantial water flowing through it on a seasonal basis for six to eight months of the year); Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 284 (4th Cir. 2011) ("The Corps defines 'relatively permanent waters' as tributaries that 'typically flow[] year-round or ha[ve] continuous flow at least 'seasonally' (e.g. typically 3 months).'").

B. Ditch C-1 is a navigable water despite being man-made.

There is definitive precedent showing that the man-made nature of a watercourse does not prevent it from being considered a navigable water. United States v. Adam Bros. Framing, Inc., 369 F. Supp. 2d 1166, 1174 (C.D. Cal. 2003) ("[J]urisdiction may be asserted under the CWA if there is a hydrological connection between a source of pollutants and navigable waters, even in circumstances where that connection is 'artificial' rather than 'natural.'"); see also Vierstra, 803 F. Supp. 2d at 1170 (holding that the fact that the Low Line Canal was man-made was "of no moment" and made it "no less capable of carrying pollution to navigable and interstate waters"). In fact, "[c]ourts have consistently held that tributaries need not be natural to

fall within the jurisdiction of the CWA." N. Carolina Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 672 (E.D.N.C. 2003) (holding that all of the manmade ditches that flowed into the lake, which was subject to regulation under the CWA, were tributaries likewise subject to regulation under the CWA).

C. Ditch C-1 can simultaneously be a "point source" and a "navigable water."

The trial court erroneously held Ditch C-1 to not be a navigable water. R. at 9. It relied on *Rapanos v. United States*, whereby the plurality stated "point sources" and "navigable waters" are separate and distinct categories. Rapanos, 547 U.S. at 735 (Scalia, J., plurality). Since ditches indisputably are point sources, the trial court reasoned that Ditch C-1 could not simultaneously be a navigable water. R. at 9.

While the district court correctly cited to the plurality's decision in *Rapanos*, the plurality's holding is not binding on this court. The Fourth, Seventh, Ninth, and Eleventh Circuits all follow Kennedy's concurrence. See, e.g., Precon Dev. Corp., 633 F.3d 278; United States v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006); United States v. Robison, 505 F.3d 1208, 1221-22 (11th Cir. 2007). These courts based their conclusions on an analysis of the Supreme Court's decision in *Marks v. United States*, in which the Court directed that, "[w]hen a fragmented 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." Marks v. United States, 430 U.S. 188, 193 (1977). The courts in these four circuits thus concluded that Justice Kennedy's opinion in *Rapanos* controls because, among those Justices concurring in the judgment, Justice Kennedy's view was the least restrictive of federal jurisdiction. Gerke, 464 F.3d at 724-25; Robison, 505 F.3d at 1221-22.

In the alternative, the First and Eighth Circuits follow Steven's dissent, enabling agencies to meet *either* the plurality's or Kennedy's standard in establishing CWA jurisdiction. See United States v. Johnson, 467 F.3d 56, 62-64 (1st Cir. 2006); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009). The courts in these circuits applied the *Marks* standard but concluded that neither the plurality opinion nor Justice Kennedy's opinion was more "narrow." Id. As such, although Ditch C-1 could not be a "navigable water" under the plurality's reasoning, following these courts, this Court could instead follow Justice Kennedy's reasoning and conclude that a point source could simultaneously be a navigable water.

Kennedy's concurrence directly contradicts the plurality's decision, stating that ditches could validly be deemed a point source and a navigable water. Rapanos, 547 U.S. at 772 (Kennedy, J., concurring) (finding that "certain water-bodies could conceivably constitute both a point source and a water"). There is at least one case on point that supports Justice Kennedy's conclusion. See Holly Ridge Assocs., 278 F. Supp. 2d at 672-73, 679 (where the court simultaneously held that the ditches were point sources and were waters of the United States). This Court should join the majority of its sister circuits in following Kennedy's opinion in *Rapanos* and hold that Ditch C-1 can simultaneously be a "point source" and "navigable water."

D. Public policy demands that Ditch C-1 be recognized as a water of the United States subject to the CWA.

It is undisputed that the arsenic from Ditch C-1 has fouled and continues to foul the waters of Reedy Creek, Wildman Marsh, and the wildlife residing in or visiting the wetland. R. at 6. The waters within the ditch are ultimately "significantly affect[ing] the chemical, physical, and biological integrity of other covered waters." Rapanos, 547 U.S. at 717 (Kennedy, J., concurring). Here, the quality of the water in Reedy Creek, which is being used for irrigation and human consumption, is being altered and degraded. R. at 6. Just below the discharge of Ditch C-

1 into Reedy Creek, arsenic is present in the Creek in significant concentrations. Id. Likewise, the chemical composition of the wetland is changing due to the arsenic, endangering the biological integrity of the ecosystem of the navigable water. The arsenic is detectable at lower levels throughout Wildman Marsh and the U.S. Fish and Wildlife Service has detected arsenic in three Blue-winged Teal in Wildman Marsh. Id.

Congress did not intend the definition of "waters of the United States" to be narrow, as it had a clear intention to expand CWA jurisdiction when it replaced "navigable" with "waters of the United States." 118 Cong. Rec. 33699 (1972) (where the Conference Committee explained: "[t]he Conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation" in order to address the dual purposes of the Act to reduce water pollution and improve water quality). Similarly, agencies such as the U.S. Army Corps recognize the broad limits of the definition of "waters of the United States," issuing regulations that "include not only actually navigable waters but also tributaries of such waters.'" Precon Dev. Corp., 633 F.3d at 287. Narrowing the definition of "the waters of the United States" would hinder federal efforts to preserve the nation's water resources. In order to respect Congress' intentions and to protect our nation's natural resources, this Court should hold Ditch C-1 to be a water of the United States subject to CWA regulations.

V. Maleau is subject to the CWA because the pollution from his mining piles is discharged into navigable waters through a discernable, confined and discrete conveyance.

The district court erred in its conclusion that the overburden and slag piles on Maleau's property are not point sources under the Clean Water Act. This Court should reverse the district court's dismissal because the proper inquiry is not whether the *piles* are point sources, but rather whether Maleau's pollutants are discharged through *any* point source. 33 U.S.C. § 1311(a) (2013); id. § 1362(12) ("The term 'discharge of a pollutant' . . . means (A) any addition of any

pollutant to navigable waters from *any* point source. . . .") (emphasis added); S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe, 541 U.S. 95, 105 (2004). Therefore, the statutory question before the court is whether the pollution from the piles is discharged via *any* discernable, confined and discrete conveyance into navigable waters. Id. § 1362(12); id. § 1362(14).

The answer in this case is "yes," either through the eroded channels running down the waste piles, or through Ditch C-1. To allow Maleau to escape liability by the coincidence that his pollutants happen to flow through downstream conveyances that could also be considered point sources would defeat the purpose of the CWA:

> The broad reach of "navigable waters" pushes the natural reading of "point source" back to the point at which an artificial mechanism introduces a pollutant. If, for example, an industrial polluter operated a facility that dumped waste into a pond that feeds a tributary to a river that flows to the ocean, the facility would be the point source. Otherwise, any point at which one waterway empties into another could be construed as a 'point source,' subjecting unsuspecting owners of these confluences to liability when pollutants flow downstream.

Froebel v. Meyer, 217 F.3d 928, 938 (7th Cir. 2000). Testing shows that arsenic enters Ditch C-1 on Maleau's property, and the obvious source for that arsenic is the mining wastes on his property. R. at 6. Maleau's transportation of that waste to this property—ostensibly an attempt to skirt Clean Water Act responsibilities in the first place[4]—is the artificial mechanism responsible for the arsenic polluting the waterways in question here, and that arsenic passes through two potential point sources before even leaving Maleau's property. Therefore, this Court should find that Maleau is subject to the Clean Water Act because the pollutants from his mining piles are discharged into navigable waters from a point source.

We must also note that the district court rested its erroneous decision on bad law. First, *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), was reversed. Envtl. Prot.

[4] Maleau's property in Lincoln County, from which the wastes originate, is unquestionably covered by an extant CWA permits under the Clean Water Act, and there is no question that Maleau would be liable if these discharges occurred at that site. R. at 5.

Agency v. Nat'l Crushed Stone Ass'n, 449 U.S. 54 (1980). Second, *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976), while at least still valid, is inapposite. In *Train*, the 4th Circuit held that uncollected rainwater runoff from large surface areas of power plants did not constitute a point source. Id. at 1373. That court found a limitation on point sources because dispersed runoff is not discharged through "any discernible, confined or [sic] discrete conveyance," as required by section 1362(14).[5] Id. ("Broad though [the point source] definition may be, we are of opinion that it does not include unchanneled and uncollected surface waters.").

Unlike in *Train*, ambient runoff from a large surface area is not at issue; this case involves specific runoff from discrete contaminated waste piles. Moreover, unlike in *Train*, Maleau's discrete runoff is channeled and collected both in the erosion channels and in Ditch C-1, as discussed below. In fact, the *Train* court noted that when the regulations were promulgated, industry actors did not contest that the areas of power plants most like Maleau's waste piles *would* be considered point sources. Id. at 1373 ("Industry agreed throughout the rulemaking that contaminated runoff discharges from coal storage and chemical handling areas fell within this definition [of point source] and should be subject to reasonable controls."). Therefore, *Train* is inapposite at best, and perhaps even contrary to the district court's conclusion, so the court erred in dismissing on this issue because there was no applicable support for its decision.

A. The relevant inquiry is whether Maleau's pollutants were discharged through *any* point source, not whether the waste piles specifically constitute a point source.

The CWA is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2013). To accomplish that goal, the CWA prohibits the "discharge of any pollutant" without the requisite permit. Id. § 1311(a). "Discharge

[5] The actual standard is "any discernible, confined *and* discrete conveyance," not "or." 33 U.S.C. 1362(14) (2012).

of a pollutant" is further defined in relevant part as, "any addition of any pollutant to navigable waters from *any* point source. . . ." Id. § 1362(12) (emphasis added). The emphasized "any" indicates that the point source need not be the discharging source to bring an effluent under the purview of this section. Additionally, "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) (2013) (emphasis added). Repeated use of the word "any," and inclusion of a broad list, demonstrate the intended breadth of the term "point source" in the CWA.

The district court erred in dismissing this claim because it improperly framed the factual inquiry; it did not find the piles to be a point source "because a pile of dirt and stone is not a 'discernible, confined and discrete conveyance,' which is the CWA's definition of 'point source,' 33 U.S.C. § 1362(14)." R. at 9. That is not a sufficient factual finding to complete the inquiry. The CWA asks not whether the discharge is originally emitted from a point source, but rather whether the discharge is added to navigable waters from *any* point source. 33 U.S.C. § 1362(12) (2013). Ruling out just one potential point source does not enable a court to make a reasoned judgment on this matter—especially when other point sources are apparent not only on Maleau's property, but even within the waste piles at issue, as discussed below. Thus the district court did not complete the required inquiry and erred in dismissing this claim based solely on the narrow and incorrect conclusion offered.

B. The natural channels running down the mining waste piles are point sources, because they are discernible, confined, and discrete conveyances, and Maleau affirmatively directed the runoff flow into the navigable Ditch C-1.

Although dispersed rainwater pollution from an entire site is often considered a nonpoint source, runoff from particular locations can still qualify as a point source, especially if that

runoff is collected. See, e.g., U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979). The 10th Circuit has prominently noted that while mining activities often result in nonpoint source pollution, "it is possible pollutants will be conveyed through a point source and be subject to regulation under the [CWA]." Id. at 372. That is the case here.

Previous courts have rejected attempts to interpret the definition of "point source" too narrowly. In *Sierra Club v. Abston Const. Co., Inc.,* 620 F.2d 41 (5th Cir. 1980), mining operators were sued when polluted runoff from spoil piles on a mining site flowed through eroded channels into a nearby creek. Because the defendants had not built the channels through which the discharge occurred, they attempted to narrow the point source definition to exclude all discharges through conveyances created by natural erosion. Id. at 44. The court rejected this interpretation as "too narrow[]," and held that, "[c]onveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition [of a point source] and thereby subject the operators to liability under the [CWA]." Id. at 45.

Like in *Abston Const.*, the runoff from Maleau's spoil piles flows into a nearby water body via discrete eroded channels. R. at 5. Thus like in *Abston Const.*, this constitutes a discharge from a point source. The statutory list of point sources specifically includes "channels." 33 U.S.C. § 1362(14) (2013). In fact, although the district court cited that list of examples in support of its argument that the piles themselves could not be point sources because they are so unlike the items on that list, the trial court ignored its own finding of a structure that *does* appear on that list from only pages earlier: "rainwater runoff flows down the piles . . . eventually discharging *through channels* . . . into Ditch C-1. . . ." R. at 5 (emphasis added). Thus the district court erred in dismissing this claim because by the district court's own admission and

characterization, the runoff from Maleau's waste piles is conveyed through a discrete and even archetypal point source as overtly contemplated by Congress.

Not only does this natural drainage form discrete conveyances sufficient to constitute a point source, but that drainage only operates in this manner because of Maleau's affirmative conduct: the district court explained that erosion from the piles results in this outcome because of "the configuration of the waste piles." Id. As the 5th Circuit has held:

> A point source of pollution may [] be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials.

Abston Const., 620 F.2d at 45. So even if gravity is the primary driver of this discrete discharge, which again would not preclude liability regardless, *id.*, this gravity-driven discharge is not just a natural process—it is a direct extension of Maleau's artificial process of trucking the overburden 50 miles from the mine and placing it in a location and configuration that directly leads to a discharge into navigable waters. Therefore, this Court should find that Maleau's waste piles constitute a point source under the CWA.

C. Alternately, Ditch C-1 is a point source, because it is a discernible, confined, and discrete conveyance that collects polluted runoff and discharges into the navigable Reedy Creek.

Even if Maleau's affirmative pile placement and the resulting discrete conveyance via channels were not sufficient as a point source, Maleau would still be discharging through a point source via Ditch C-1's collection of contaminated runoff. "Gravity flow, resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials." Abston Const., 620 F.2d at 45. Further, CWA regulations demonstrate that scenarios involving artificially collected runoff were specifically contemplated as falling under the CWA:

> Discharge of a pollutant means:
> (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from "any point source," . . .
> This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man. . . .

40 C.F.R. § 122.2 (2012). That is precisely the circumstance here.

Ditch C-1 was constructed as a drainage ditch for the land in question, so its entire purpose is to collect water from the land on which Maleau dumped his mining waste and convey it to Reedy Creek. R. at 5. And Maleau is not a hapless user of Ditch C-1—he is affirmatively obligated by restrictive covenant to maintain the Ditch on his property. Id. As such, Ditch C-1 constitutes affirmative conduct by Maleau to collect and channel the otherwise more dispersed polluted runoff from his waste piles. That act constitutes alternate grounds to render Maleau's mining waste discharged from a point source. See Abston Const., 620 F.2d at 45. Additionally, the point source need not be an original source of the pollutant. Id. (citing S. Fla. Water Mgmt. Dist., 541 U.S. at 105). Ditch C-1 is a discernable, confined and discrete conveyance and qualifies as a point source. 33 U.S.C. § 1362(14) (2013). Therefore, this Court should find that whether the point source was Maleau's waste piles or Ditch C-1, there is a point source on Maleau's property and he is liable under the CWA.

VI. The District Court erred in denying Bonhomme's motion to dismiss on the issue of whether Bonhomme violated the CWA, because his culvert does not "add" pollutants to navigable waters as required to incur liability under section 1362(12).

The district court erred in denying Bonhomme's motion to dismiss regarding his personal liability under the Clean Water Act. This Court should find that Bonhomme is not liable because under the unitary waters doctrine, pollutants that have already been discharged into navigable waters cannot be "added" to navigable waters a second time. The determination of what constitutes an "addition" under the CWA is a question of law that is subject to *de novo* review in

this Court. See Or. Natural Desert Ass'n v. Dombeck, 172 F.3d 1092, 1096 (9th Cir. 1998) (examining the scope of the definition of "discharge").

A. Under the unitary waters doctrine, simply transferring water between navigable waters is not an "addition" unless additional pollutants are discharged.

The CWA prohibits discharges that constitute an "*addition* of any pollutant to navigable waters. . . ." 33 U.S.C. § 1362(12) (2013) (emphasis added). Under the "unitary waters" doctrine, navigable waters in the United States are, at least legally, connected and interrelated as a single, unitary whole. 40 C.F.R. § 122.3(i) (2011); see S. Fla. Water Mgmt. Dist., 541 U.S. at 106-09. As a result, once a pollutant has been added to this unitary body, transfers of water between navigable waters do not trigger liability because they do not "add" pollutants any more than lifting a ladle of soup from a bowl and returning the soup to that same bowl "adds" soup. Miccosukee Tribe, 541 U.S. at 112; Catskill Mountains Chpt. of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001). The unitary waters doctrine draws complementary support from *Chevron* deference, statutory interpretation, and U.S. Supreme Court engagement.

Agencies such as EPA are afforded judicial deference in reasonably interpreting ambiguities in their statutory authority, especially when their interpretations are adopted through a formal rulemaking process. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). There is ambiguity in this statute because "addition" is not defined (and the reasonability of the unitary waters statutory interpretation has been discussed above). In 2008, EPA resolved that ambiguity when it officially adopted the unitary waters doctrine through a formal rulemaking process that culminated in the promulgation of the following provision:

> The following discharges do not require NPDES permits . . .
> (i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

40 C.F.R. § 122.3(i) (2012). Agency deference strongly supports the unitary waters doctrine because this statute was ambiguous and the water transfer rule is a reasonable interpretation.

As above, the CWA prohibits the unpermitted "discharge of any pollutant" into navigable waters. 33 U.S.C. § 1311(a) (2013). The term "discharge of a pollutant" is defined as, "any *addition* of any pollutant *to navigable waters* from any point source." Id. § 1362(12) (emphasis added). The statute is ambiguous because the term "addition" is not defined in the CWA and, as currently argued before this Court now, can be interpreted to either cover or exclude transfers like those through Bonhomme's culvert.

EPA's interpretation is reasonable because an addition *to* navigable waters implies that this provision applies only when pollutants first reach navigable waters; construing the word "addition" to require a permit for the transfer of pollutants *among* navigable waters would not be a natural reading of that word. See generally S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 376 (2006) (stating that an undefined statutory term should be read "in accordance with its ordinary or natural meaning" (internal quotation omitted)). Moreover, the absence of the word "any" before "navigable waters" further suggests that there can be no subsequent discharge once a pollutant has reached navigable waters; if Congress had intended to regulate the transfer of the same water between bodies of navigable water, it easily could have done so in plain language. Instead, Congress ostensibly made water transfers a nonpoint source, instructing EPA to merely give States information on the evaluation and control of "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters . . . including changes caused by the construction of dams, levees, *channels*, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2)(F) (2013) (emphasis added). Therefore, the word "addition" supports the unitary waters interpretation. At the least, the term is ambiguous and warrants deference.

The U.S. Supreme Court's engagement also supports the unitary waters doctrine. In 2004, the Court examined the issue and had the opportunity to disapprove of the doctrine, but did no such thing. Miccosukee Tribe, 541 U.S. at 106-12. Instead, it discussed the doctrine, and then, without reaching a holding, declared that the argument was available to the parties on remand. Id. at 112. The Court has not explicitly adopted the doctrine in a holding yet, but this treatment functions as a lesser endorsement that negates any claim that the doctrine is untenable per se. In fact, Supreme Court support for the doctrine should be even stronger today on account of *Chevron* deference: in 2004, the Court focused on policy arguments and chose not to defer to EPA's invocation of the unitary waters doctrine because at that time, "the Government d[id] not identify any administrative documents in which EPA has espoused that position." Id. at 107. As above, that is no longer the case, as EPA has formally embraced the unitary waters doctrine and can now produce administrative documents as proof. See, e.g., National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33704 (June 13, 2008) (hereinafter "Water Transfer Rule").

EPA's interpretation of its own authority is certainly reasonable, and therefore sufficient to invoke *Chevron* deference. See Nat'l Wildlife Fed. v. Consumers Power Co., 862 F.2d 580, 584 (6th Cir. 1988) (affording *Chevron* deference to EPA's reasonable interpretation of "addition"). Therefore, at least since 2008, the unitary waters doctrine has been legally established and is worthy of full *Chevron* deference. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210, 1227 (11th Cir. 2009) (cert. denied, 131 S. Ct. 643 and 131 S. Ct. 645 (2010)) ("[T]he EPA's [water transfer] regulation . . . accepts the unitary waters theory that transferring pollutants between navigable waters is not an 'addition . . . to navigable waters.'"). Accordingly, if water passes from one navigable water to another through a medium which does

not independently add any new pollutants, that water transfer does not require permitting under the CWA, and the owner of that medium does not incur liability under the CWA.

B. Bonhomme is not liable under the CWA because Ditch C-1 and Reedy Creek are both navigable waters and the culvert adds no new pollutants.

The district court erred in denying Bonhomme's motion to dismiss on the issue of Bonhomme's liability because the discharge from his culvert "adds" no pollutants to navigable waters and is exempted as a water transfer. Although arsenic-laden water passes through Bonhomme's culvert, that polluted water only counts as a discharge when it is first added to navigable waters—which occurs on Maleau's property when the polluted runoff is channeled and enters Ditch C-1. See Froebel v. Meyer, 217 F.3d 928, 938 (7th Cir. 2000). As above, EPA has implemented the unitary waters doctrine and defines a water transfer as, "an activity that conveys or connects [navigable] waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." Water Transfer Rule at 33704. Thus to qualify as a water transfer, four conditions must be met: 1) the originating water must be navigable; 2) the receiving water must be navigable; 3) the transfer cannot divert water for any use; and 4) the transfer cannot itself introduce additional pollutants. 40 C.F.R. § 122.3(i) (2012). If those conditions are met, the transferor is not liable for this discharge under the CWA. Id.

In *Friends of Everglades*, 570 F.3d 1210 (11th Cir. 2009), an appellate court applied the water transfer rule based on the unitary waters doctrine. That case concerned a complicated system of gates, dikes, canals, and pump stations that control water flow in South Florida. The alleged discharge was the transfer of polluted water from a canal pumped uphill into Lake Okeechobee, where those pollutants would not otherwise have directly flowed. Id. at 1214. The discharge met all four of the water transfer criteria: both the canal and the lake were navigable waters, the transfer did not divert water for any other use, and the pumps did not add any

additional pollutants to the water they transferred. Id. Therefore, despite some policy arguments to the contrary, faced with the ambiguity regarding the word "addition" and EPA's clear resolution of that ambiguity with the water transfer rule, the circuit court deferred to the agency interpretation: it held that this flow was exempted as a water transfer and did not require a permit under the CWA. Id. at 1228.

Like in *Friends of Everglades,* the issue of Bonhomme's liability involves the straightforward application of the water transfers rule. And like in *Friends of Everglades*, each of the four requirements is met here: First, as argued above, Ditch C-1 is a navigable water. See Section III., supra. Second, as argued above, Reedy Creek is a navigable water. See Section IV., supra. Third, Bonhomme's culvert merely transfers water from one navigable water to another; it directly connects Ditch C-1 and Reedy Creek, R. at 5, and does not divert the water for any use. Fourth, no evidence has been presented to suggest that the culvert adds any pollutants of its own. Therefore, the water transfer rule applies and Bonhomme incurs no liability for merely facilitating a water transfer.

While the flow control systems in *Friends of Everglades* were more elaborate than the simple culvert at issue here, there is no complexity requirement for water transfer systems: in the rulemaking for the water transfer rule, "activity" was clarified to mean, "*any* system of pumping stations, canals, aqueducts, tunnels, *pipes, or other such conveyances* constructed to transport water from one water of the U.S. to another water of the U.S. *Such a system may consist of a single tunnel* . . . along the course of the transfer. . . ." Water Transfer Rule at 33704 (emphasis added). The culvert on Bonhomme's property is a simple water transfer system connecting two waters of the United States without subjecting the transferred water to any intervening use, so it

is exempted as a water transfer. Therefore, the district court erred in dismissing Bonhomme's motion to dismiss on this claim and this Court should find Bonhomme not liable under the CWA.

CONCLUSION

For the foregoing reasons, Bonhomme respectfully asks this Court to reverse the district court's decision in its entirety. First, Bonhomme has established standing to bring this suit. Second, Bonhomme is the real party in interest. Third, Reedy Creek is a water of the United States. Fourth, Ditch C-1 is a navigable water. Fifth, Maleau's mining operations violate the CWA. And lastly, Bonhomme's culvert does not add pollutants under the meaning of the CWA. For each and all of the above reasons, this Court should reverse the grant of Maleau's motion to dismiss and grant Bonhomme's motion to dismiss.