Team 64

C. A. No. 13-01234

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELTH 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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PROGRESS
Civ. No. 155-2012
Civ. No. 165-2012

BRIEF FOR JACQUES BONHOMME

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STATEMENT OF JURISDICTION

This case involves an appeal following the issuance of the Order of the United States District Court for Progress granting Shifty Maleau's (Maleau) motion to dismiss in this consolidated case. (R.1-2). The district court had proper subject matter jurisdiction to hear the case under the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2013). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision for the United States District Court for the District of Progress. 28 U.S.C. § 1291 (2013).

STATEMENT OF THE ISSUES

1. Under FRCP 17(a), is Jacques Bonhomme (Bonhomme) the real party in interest rather than Precious Metals International therefore allowing Bonhomme to bring suit against Maleau for violating the CWA §301a for discharge of a pollutant into the waters of the United States?

2. Under the CWA, may Bonhomme, a foreign national, be considered a "citizen" for purposes of bringing a citizen suit?

3. Under the CWA §§502(12) and (14), are the waste piles on Maleau's property are considered "point sources?"

4. Under CWA §507(2), is Ditch C-1 a "water of the United States" and thereby subject to the CWA jurisdiction?

5. Under CWA § 502(7), (12), is Reedy Creek a "navigable water" of the United States?

6. Is Bonhomme liable for violating the CWA by not preventing the arsenic, which was added by Maleau to Ditch C-1, from draining into Reedy Creek via Bonhomme's culvert on his property?

STATEMENT OF THE CASE

This Court is asked to deny the district court's grant of Maleau's motion to dismiss against Bonhomme on five of its stated grounds and to affirm the district court's finding that Reedy Creek is an interstate, navigable water. Bonhomme commenced this suit in the United

States District Court for the District of Progress against Maleau for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2013) (R. 4). Bonhomme's suit was brought pursuant to the citizen suit jurisdiction of the CWA, 33 U.S.C. § 1365. Bonhomme alleged that Maleau violated the CWA by dumping and maintaining waste piles of gold mining overburden next to Ditch C-1, the construction of which has created channels between the piles and channels form the piles to Ditch C-1. (R. 4). As a result, these channels convey arsenic through rainwater runoff into Ditch C-1. (R. 5). Ditch C-1 carries the arsenic to Reedy Creek, passing though a culvert on Bonhomme's farm before flowing into Reedy Creek. *Id.* Under the CWA § 1365, Bonhomme requested all of the relief available. (R. 4).

The State of Progress subsequently filed a citizen suit against Bonhomme alleging that Bonhomme violated the CWA by discharging arsenic through the culvert on his property into Reedy Creek. (R. 5). Maleau then intervened as a matter of right in Progress' citizen suit against Bonhomme under CWA §505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B). (R. 5).

Following consolidation of the two cases, Maleau and Bonhomme respectively, filed motions to dismiss their respective claims against them. (R. 5). On July 23, 2012, the district court rendered its judgment ultimately dismissing the case after holding for Maleau on five separate grounds: (1) that Bonhomme is not a real party in interest pursuant to FRCP 17 as a shareholder in PMI; (2) that Bonhomme is not a "citizen" for purposes of bringing a citizen suit against Maleau under the CWA; (3) that Maleau's waste piles are not "point sources" for the purpose of being regulated by the CWA; (4) that Ditch C-1 is not a "navigable water" subject to regulation by the CWA; and (5) that Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property draining water from Ditch C-1 into Reedy Creek even though Maleau is the but-for cause of arsenic in Ditch C-1. (R. 1-2). The district court agreed

with Bonhomme and the state of Progress that Reedy Creek is a "navigable water" subject to the CWA's jurisdiction. (R. 2-3). Progress also agreed with Bonhomme that Ditch C-1 is a "water of the United States," but sided with Maleau on the remaining four issues. (R.1-2). In addition to granting Maleau's motion to dismiss, the district court also denied Bonhomme's motion to dismiss because Progress adequately stated a cause of action. (R. 3).

Bonhomme appeals the district court's findings: that Bonhomme is not a real party in interest; that Bonhomme is not a "citizen" for the purpose of bringing a citizen suit under the CWA; that the waste piles are not "point sources" to be regulated by the CWA; that Ditch C-1 is not a "water of the United States" for CWA purposes; and that Bonhomme violated the CWA by allowing the pollutants added by Maleau to flow into Reedy Creek through his culvert. (R. 1-2). Maleau appeals the decision that Reedy Creek is a "navigable water" for purposes of the CWA. (R. 2). The State of Progress takes issue with the lower court's decision that Ditch C-1 is not a "navigable water" for purposes of CWA regulation. *Id.*

This Court granted review on September 14, 2013. (R. 3).

STATEMENT OF THE FACTS

Maleau operates an open pit gold mining and extraction business in Lincoln County, Progress. (R. 5). Maleau trucks the overburden and slag from this operation to his Jefferson County, Progress property and piles it next to Ditch C-1, a drainage ditch measuring about three feet across and one foot deep. *Id.* Ditch C-1 was constructed in 1913 for agriculture purposes, which, through restrictive covenants, is still maintained today. *Id.* Ditch C-1 contains running water from both draining groundwater and rainwater runoff, unless Progress is in a time of drought, which may last as little as several weeks to three months per year. *Id.* Ditch C-1 eventually drains into Reedy Creek, which is about 50 miles long, through a culvert on

Bonhomme's property. *Id*. Reedy Creek flows both in the State of New Union and the State of Progress, eventually ending in Wildman Marsh, an extensive wetland home to migratory birds. (R. 5-6). Bonhomme's property fronts part of the wetlands, and he uses it recreationally for duck hunting. (R. 6).

When it rains, the rainwater percolates through the piles, leaching and carrying arsenic from the piles ultimately discharging into Ditch C-1 via channels eroded by gravity. (R. 5). Bonhomme tested Ditch C-1 both upstream and downstream from Maleau's property and found that arsenic was undetectable upstream, but was found to be in high concentrations just below Maleau's property. (R. 6). Bonhomme also tested Reedy Creek for arsenic where Ditch C-1 flows into it and found that the concentration of arsenic decreases in proportion to the increasing flow of the ditch. *Id.* Arsenic was undetectable in Reedy Creek above the discharge from Ditch C-1. *Id.*

Precious Metals International, Inc (PMI), a direct competitor to Maleau in the gold mining industry, employs Bonhomme. (R. 6) Bonhomme sometimes will host hunting parties for his coworkers, however, he believes the arsenic fouls the waters of Reedy Creek, Wildman Marsh, and the wildlife residing there. *Id.* This concern has led him to decrease his hunting parties from eight a year, to just two. *Id.*

STANDARD OF REVIEW

The review of a district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is de novo. *Turker v. Ohio Dep't of Rehab. & Corr.*, 157 F.3d 453, 456 (6th Cir. 1998). In deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court must liberally construe all claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *See Cargo Partner AG v. Albatrans. Inc.,* 352 F.3d 41, 44 (2d

Cir.2003); *see also Roth v. Jennings*, 489 F.3d 499, 510 (2d Cir.2007). However, to survive a motion to dismiss, "a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, (1949) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, (1955)). Unless a plaintiff's well pleaded allegations of fact have "nudged [its] claims across the line from conceivable to plausible, [the plaintiff's] complaint must be dismissed." *Twombly*, 550 U.S. at 555.

SUMMARY OF THE ARGUMENT

The district court correctly held that Reedy Creek is a "navigable water" for purposes of the CWA; however, the district court erred in holding: that Ditch C-1 is not a jurisdictional water; that Maleau's overburden mining piles were not point sources; that Bonhomme was not a real party in interest under FRCP 17(a); that Bonhomme does not fall within the definition of "citizen" for purposes of bringing a CWA citizen suit; and that Bonhomme violated the CWA by his failure to prevent arsenic (that was initially added by Maleau) in Ditch C-1 from flowing into Reedy Creek merely because Bonhomme owns the culvert connecting Ditch C-1 to Reedy Creek.

Reedy Creek is a "navigable water" for purposes of the CWA because it is an interstate water, running from the State of New Union to the State of Progress. The EPA and Corps both include "interstate waters" within the definition of "waters of the United States," and the Supreme Court unanimously recognized in *Rapanos* that "waters of the United States" are not required to be navigable-in-fact in order to be subject to the CWA's jurisdiction.

Because Reedy Creek is a "navigable water," Ditch C-1 is also a jurisdictional water since it is a tributary to the interstate Reedy Creek. While ditches may sometimes be included within the definition of "point source" and "tributary," the terms are not mutually exclusive; rather, the characteristics of the ditch or conveyance determine whether it most appropriately fits

within the definition of "point source" or "tributary." Typically, an "intermittent" stream is more characteristic of a "point source." Here, Ditch C-1 is not "intermittent" under both tests in Rapanos; rather, it is "relatively permanent" since it flows continuously except during a few weeks of annual drought, and it has a "significant nexus" with Reedy Creek and Wildman Marsh since arsenic was detectable downstream from Maleau's overburden piles. Thus, Ditch C-1 is more appropriately classified as a "tributary" rather than a "point source."

The true point sources in this case are the channels draining runoff from Maleau's overburden piles. Courts have held that when conveyances *channel* runoff water into a jurisdictional water rather than diffuse the water, the conveyances are point sources. Here, the runoff was channeled into the jurisdictional water of Ditch C-1 as evidenced by the detectable arsenic in the ditch. Further, the conveyances were actually created and collected by Maleau, whether intentionally or not, simply by constructing the overburden piles. Courts have found that there are point sources in these situations when human efforts are reasonably likely to cause the pollutants to be discharged into a jurisdictional water. Here, the channels were eroded by gravity after Maleau placed the piles on the land, and it is because of this act that the arsenic leaches into the runoff that discharges into the jurisdictional water of Ditch C-1 and later Reedy Creek.

The district court erred when it decided that PMI, not Bonhomme, was the "real party in interest." To be considered a "real party in interest" a plaintiff must have standing to sue under the substantive law of the subject matter of the lawsuit. Bonhomme meets the standing requirements of the CWA. PMI does not allege any injury from Maleau's actions, and could not maintain a citizen suit. The fact that PMI, as a direct business competitor with Maleau, may potentially benefit from Bonhomme's suit does not establish them as a "real party in interest." As

Bonhomme has pleaded his case sufficiently to state a claim as a "real party in interest," the district court granting Maleau's motion to dismiss was inappropriate.

Bonhomme is considered a "citizen" under the plain language of the CWA. The term "citizen" is broadly defined in the citizen suit provision of the CWA, which is consistent with the policy behind the CWA. Courts have demonstrated the far reach of the citizen suit provision by classifying States as citizens under the CWA. The application of the analysis used by the district court would circumvent the intention of the citizen suit provision. Bonhomme's claim should not have been dismissed, because he is a "citizen" under the CWA.

The district court incorrectly held that Bonhomme could be liable under the CWA for the discharge of arsenic. The culvert on Bonhomme's property is not considered a point source because it discharges water from storm run off and agricultural irrigation, which is an exemption. Furthermore, Bonhomme did not violate the CWA because he wasn't in control of the pollutant being discharged from Maleau's point source. Bonhomme cannot be held liable for being unable to stop Maleau's pollution.

Therefore, the district court erred in dismissing Bonhomme's claim against Maleau based on these holdings.

ARGUMENT

I. REEDY CREEK IS A "NAVIGABLE WATER" AND THUS SUBJECT TO THE CWA JURISDICTION BECAUSE IT MEETS THE REGULATORY DEFINITION AS AN "INTERSTATE WATER"

The court below correctly held that Reedy Creek is a "navigable water" under CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12). The purpose of the CWA is to restore and maintain the "chemical, physical and biological integrity of [the] Nation's waters." 33 U.S.C. § 1251(a). To

further this goal, the CWA prohibits the discharge of pollutants into navigable waters without a permit. 33 U.S.C. § 1311(a). "Navigable waters" is defined as the "waters of the United States." 33 U.S.C. § 1362(7). The EPA defines "waters of the United States" to mean, in pertinent part: "(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (b) All interstate waters …; (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), … "wetlands," … or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters: (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes; (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (3) Which are used or could be used for industrial purposes by industries in interstate commerce; … (e) Tributaries of waters identified in paragraphs (a) though (d) of this definition…." 40 C.F.R. §122.2 (2013); *see also,* 33 C.F.R. § 328.3(a) for the Corps' regulation defining "waters of the United States," which is essentially identical to the EPA's definition.

As a policy matter, water quality is easily affected by pollution in other parts of the aquatic system so construing the CWA broadly is consistent with the objectives and goals of the CWA. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 133-135, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). Before the CWA, "waters of the United States" meant interstate waters that are "navigable in fact" or readily susceptible of being rendered so. *Rapanos, citing, The Daniel Ball,* 10 Wall., 557, 563, 19 L.Ed. 999 (1871) *and United States v. Appalachian Elec. Power Co.,* 311 U.S. 377, 406, 61 S.Ct. 291, 85 L.Ed. 243 (1940). Following the enactment of the CWA, the Corps broadened the definition of "waters of the United States" to one which would extend "to the outer limits of Congress's commerce power," meaning that a jurisdictional water does not

have to be navigable in fact. *Rapanos* at 723-24, *citing* 42 Fed. Reg. 37144 (1977) n. 2. In fact, "[i]t has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164 at 173 (1979). As agreed upon by all of the justices in *Rapanos*, a body of water does not have to be navigable in the traditional sense in order to constitute a "water of the United States," and thereby be subject to Congress' regulations. *Id*. at 730-31, 126 S.Ct. 2208 (plurality opinion); *id.* at 759, 126 S.Ct. 2208 (Kennedy, J., concurring in the judgment); *id.* at 787, 126 S.Ct. 2208 (Stevens, J., dissenting). As long as Congress has the authority to regulate, it may delegate its' decision making authority to other regulatory agencies, provided that the agencies have intelligible guidelines. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928); *Skinner v. Mid.-Am. Pipeline Co.*, 490 U.S. 212, 218-24, 109 S.Ct. 1726, 104 L.Ed.2d 250 (1989); *United States v. Darby*, 312 U.S. 100, 112-21, 61 S.Ct. 451 (1941). In enacting the CWA, Congress gave the EPA decision-making authority under CWA § 402; therefore, the EPA can define "waters of the United States."

Here, Reedy Creek is a "navigable water" because it is an interstate water as defined by the EPA in subsection (b) of 40 C.F.R. § 122.2 since it begins in the state of New Union and flows into the state of Progress. The EPA and Corps regulations clearly include an interstate water within the definition of "waters of the United States." Further, the inclusion of an "interstate water" within this subsection of the definition is not modified by the requirement that it be used in interstate or foreign commerce or that it impact interstate or foreign commerce as specified in subsections (a) and (c) of the EPA's statutory definition. The mere fact that it meets subsection (b)'s requirement that the water be an "interstate water" is enough to subject Reedy Creek to the CWA's jurisdiction. Further, it is not necessary that the "interstate waters" be

traditionally navigable or capable of being rendered navigable. Because Reedy Creek clearly falls into the definition of "waters of the United States" by being an "interstate water," it is superfluous to engage the Commerce Clause in this analysis.

II. DITCH C-1 IS A "WATER OF THE UNITED STATES" BECAUSE IT IS A TRIBUTARY OF AN INTERSTATE WATER

The court below erred in granting Maleau's motion to dismiss because Ditch C-1 is a "water of the United States" for purposes of the CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14). The EPA's regulations define "waters of the United States" to include tributaries of navigable waters. 40 C.F.R. § 122.2 (2013). Ditch C-1 is a tributary to Reedy Creek, which is a navigable water, so Ditch C-1 is therefore included within the definition of the "waters of the United States" and subject to federal CWA jurisdiction. In *Rapanos*, a divided Supreme Court discussed factors for determining whether a tributary is subject to the CWA's jurisdiction. The plurality found that "relatively permanent continuously flowing bodies of water 'forming geographic features'" was within the definition of "waters of the United States" for a tributary. *Id*., 547 U.S. at 739, 126 S.Ct. 2208. In his concurrence, Justice Kennedy held that waters should possess a "significant nexus" with the "chemical, physical, and biological integrity" of navigable-in-fact waters in order to be subjected to the CWA's jurisdiction. *Id*. at 780, 126 S.Ct. 2208; however, Justice Kennedy's concurrence was specifically directed to wetlands rather than tributaries. *Id.* at 779. But, some courts have applied Justice Kennedy's test to the tributary analysis. *Benjamin v. Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210 (D. Or. 2009); *Environmental Protection Information Center v. Pacific Lumber Co*., 469 F.Supp.2d 803, 823 (N.D. Cal. 2007); and *United States v. Robison,* 505 F.3d 1208 (11th Cir. 2007). The dissent affirmed federal regulation of tributaries of jurisdictional waters, *Rapanos*, at 788, 126 S.Ct. 2208, and indicated that they

would find jurisdiction if either the plurality's test or Justice Kennedy's test were met. *Id.*, 547 U.S. at 810, 126 S.Ct. 2208. Lower courts are split over which test to apply, but the First, Ninth, and Eighth Circuits find jurisdiction over waters that meet either the plurality's or Justice Kennedy's test. *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *Northern California River Watch v. Wilcox*, 633 F.3d 766 (9th Cir. 2011); and *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009).

In a factually similar case, the court in United States v. Vierstra, 803 F.Supp.2d 1166 (D. Id. 2011), found that a non-navigable tributary that eventually discharges into a water of the United States was a tributary subject to the CWA's jurisdiction. The tributary was "part of a continuous channel with a distinct, open, and direct surface water connection to and from navigable waters for six to eight months of the year." *Id*. at 1167. Further, "even though the canal is man-made, lacks an interstate connection, and the flow is seasonal," the court found that the allegations could support a finding that the tributary was a water of the United States if proven. *Id*. These facts were sufficient to find that the tributary canal meets both the "relatively permanent" and the "significant nexus" standards from *Rapanos*. *Id*. at 1170-72.

Here, Ditch C-1 meets both the "relatively permanent" and the "significant nexus" tests as specified in *Rapanos v. US*, 547 U.S. 715, 126 S.Ct. 2208, 165 L.Ed.2d 159 (2006). Ditch C-1 has running water throughout the year, except for brief periods of drought lasting from a few weeks to no more than three months. It is one-foot deep and three feet across, and its water comes from a combination of groundwater and rainfall runoff. Thus, it is "relatively permanent." Further, it has a substantial nexus to Reedy Creek and Wildman Marsh as demonstrated by the presence of arsenic downstream from Maleau's property in both of those bodies of water.

Further, that Ditch C-1 may be deemed a point source in certain situations does not prevent it from falling within the jurisdictional provisions of the CWA. In *Rapanos*, Justice Scalia, writing for the majority, excluded intermittent waterways from the definition of "waters of the United States" because they more appropriately fell within the definition of a "point source." *Rapanos* at 735. In *Vierstra*, the court rejected a defendant's claim that a canal could not be a "water of the United States" because it could be included within the definition of a "point source." *Id*. at 1173-74. Rather, the court found "that a single waterway or channel that is [a] 'water[] of the United States' in terms of CWA jurisdiction may also be described appropriately as a "point source" *depending upon the particular circumstances of the discharge*." *Id*. at 1173 (emphasis added). The plurality opinion does not state that every channel must either be a "point source" or a "navigable water" for all purposes. *Id*. *See also, National Assn. of Home Builders v. United States Army Corps of Engineers*, 699 F. Supp. 2d 209, 215-16 (D.D.C. 2010) (vacated on other grounds) (analyzing *Rapanos* and finding that a ditch, though including in the definition of a point source, may, under the certain circumstances, otherwise qualify as "waters of the United States."). While the plurality opinion suggests that it is unlikely that a "point source" can also be a "water of the United States," it stops short of concluding that the terms are mutually exclusive. So, even though "ditch" is included within the CWA's definition of "point source" under CWA § 502 (14), it is not categorically excluded from being a "water of the United States." *Id*. Here, Ditch C-1 is not intermittent and is relatively permanent and thus falls more appropriately within the definition of a "water of the United States" instead of "point source."

Maleau's argument that Ditch C-1 is not navigable because it has never floated a boat and because it is too small to do so in the future is misguided because a water does not have to be navigable in the traditional sense to be covered by the CWA's jurisdiction. Further, the fact that

the ditch is man-made is of no consequence as "[a] man-made structure cannot eliminate the CWA's jurisdiction over a water of the United States." *Moses,* 496 F.3d at 989.

III. MALEU'S MINING WASTE PILES ARE "POINT SOURCES" BECAUSE MALEAU CONTRUCTED THE PILES, WHICH CREATED CHANNELS THAT CONVEYED ARSENIC TO JURISDICTIONAL WATERS

The court below erred in finding that Maleau's mining waste are not "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14). A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, or discrete fissure … from which pollutants are or may be discharge." 33 U.S.C. § 1362(14). Courts interpret "point source" broadly because "[t]he concept of a point source was designed to further the scheme to eliminate pollution of the nation's waters by embracing the broadest possible definition of any identifiable conveyance from which pollution might enter the waters of the United States." United States v. Earth Sciences, Inc. 599 F.2d 368, 373 (10th Cir. 1979). Thus, identifying a point source is important for enforcing the CWA because the discharge of a pollutant from a point source into a navigable water requires a permit. While point source polluters may require a permit, nonpoint source polluters have no federal regulatory scheme or permitting system because it is "virtually impossible to isolate to one polluter." *Earth Sciences* at 371.

Whether a conveyance is a point source depends on a highly-fact based inquiry and requires a demonstration of a discrete conveyance that channels runoff. Specifically, to be a point source, the runoff must be channeled into a water of the United States rather than diffused. *Pacific Lumber* at 822. Here, there was clearly a channeling rather than a diffusion of the water as the arsenic was detected in the water of Ditch C-1 downstream from the point source. At the

least, the facts as stated plausibly support a finding that the arsenic-laced water was channeled rather than diffused and therefore the channels act as the point source.

Some courts have found that runoff that is conveyed into waters of the United States constitutes a point source. In *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir. 1980), the court found that "surface runoff collected or channeled by the operator constitutes a point source discharge." Further, the court found that the defendants were liable even if they did not actually construct the conveyances "so long as [the human efforts] are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* at 45. "Gravity flow, resulting in a discharge into a navigable body of water, may be a part of a point source discharge if the miner at least initially collected or channeled the water and other materials." *Id.* at 45-46. Here, Maleau was responsible for trucking the mining overburden fifty miles from his mining site in Lincoln County, Progress to Jefferson County, Progress and putting them in piles next to Ditch C-1. Then, when it rains, rainwater runoff flows down the piles and percolates them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying the arsenic from the point source piles into the water of Ditch C-1.

IV. BONHOMME IS THE "REAL PARTY IN INTEREST" UNDER THE SUBSTANTIVE LAW OF THE CWA

The district court improperly held that Bonhomme was not a "real party in interest" under the Federal Rules of Civil Procedure 17(a). The court was incorrect in determining the "real party in interest" is PMI, because they would ultimately benefit from Bonhomme's suit. Bonhomme meets the statutory requirements to be considered a "real party in interest" because he has the underlying substantive basis to bring a citizen suit under the CWA. Furthermore, PMI

would not be able to sustain a citizen suit under the CWA because they lack standing for want of an injury in fact.

A "real party in interest" is a party authorized to bring suit under a statute. FRCP 17(g). It is well established law that an "…action must be brought by a person who, according to the governing substantive law, is entitled to enforce the right." *Reichhold Chemicals, Inc. v. Travelers Ins. Co.*, 544 F.Supp. 645, 648 (E.D. MI., 1982); *See Also Hanna Mining Co. v. Minnesota Power and Light Co.*, 573 F.Supp. 1395, 1397 (D.Minn., 1983); *Scheufler v. General Host Corp.*, 895 F. Supp. 1416,1418 (D.KS., 1995); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir.1984). The "real party in interest" standard does not require the suit to be brought in the name of the party that will ultimately benefit from recovery, but the suit must be brought by the person who, according to the governing substantive law, is entitle to enforce the right. *Reichhold Chemicals, Inc. v. Travelers Ins. Co.*, 544 F.Supp. 645, 649 (E.D. MI., 1982). *See also*; *Delor v. Intercosmos Media Group, Inc.*, 232 F.R.D 562 (E.D.La. 2005). Bonhomme is a "real party in interest" under the substantive law of the CWA.

The intent of the CWA is to restore and maintain the integrity of the nation's waterways. 33 U.S.C § 1521(a). The CWA allows for a private citizen to bring a civil action in federal court against a person who is alleged to be in violation of the effluent standards of the CWA. 33 U.S.C. § 1365. The purpose of the citizen suit provision is to aid in the enforcement of the CWA. To bring a CWA citizen suit, an individual must have standing to sue, meaning the individual has suffered an injury in fact, there must be a causal connection between the injury and the conduct that is the basis of the complaint, and it must be likely, rather than speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). An injury in fact is adequately alleged if an individual's aesthetic or recreational value of the

area is lessened by the challenged activity. *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000). *See also*; *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (CA. 2011). Bonhomme has alleged facts sufficient to qualify him as a "real party in interest" under the substantive law of the CWA.

Bonhomme has standing to bring a suit against Maleau under the citizen suit provision of the CWA because he has suffered a recreational injury due to Maleau's discharge of arsenic. Bonhomme owns property that fronts part of the wetlands that he uses in conjunction with his hunting lodge for recreational duck hunting. (R. 5). Bonhomme alleges that the arsenic that Maleau discharges is fouling the waters of Reedy Creek, Wildman Marsh, and the wildlife. (R. 6). Since Maleau began leeching arsenic into the water, Bonhomme has decreased his hunting parties by 75 percent each year. This is enough to qualify as a recreational injury under the CWA. *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183 (2000). Bonhomme meets the substantive requirements to maintain a suit under the CWA.

PMI is not a real party in interest because they do not have the authority to sue under the substantive law. PMI directly competes with Maleau in the gold mining business; however, the company has not been injured by Maleau's actions, therefore they would not be able to maintain a citizen suit against him. Although PMI may eventually be benefited by a favorable outcome to Bonhomme, this has no bearing on whether they would be considered a "real party in interest." *Reichhold Chemicals, Inc. v. Travelers Ins. Co.*, 544 F.Supp. 645, 649 (E.D. MI., 1982). The court also focused on PMI's payment of Bonhomme's litigation costs, however "[t]he mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient" for standing. *Nat'l Taxpayers Union, Inc. v. U.S.*, 68 F.3d 1428, 1434 (D.C.Cir 1995)(quoting, in parenthetical, *Ass'n forRetarded Citizens*

v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees, 19 F.3d 241, 244 (5th Cir. 1994)). The district court was incorrect in holding that PMI would be the "real party in interest" because they would ultimately benefit from a favorable outcome and are funding Bonhomme's litigation. PMI does not have standing to bring a citizen suit under the substantive law of the CWA, therefore they could not be a "real party in interest."

The court incorrectly granted Maleau's motion to dismiss because Bohomme is the real party in interest under the Federal Rules of Civil Procedure 17(a).

V. BONHOMME IS A "CITIZEN" FOR THE PURPOSES OF THE CWA'S CITIZEN SUIT PROVISION

The district court improperly granted Maleau's motion to dismiss Bonhomme's claim because he is a foreign national rather than a United States Citizen. Under the plain language of the CWA, Bonhomme is entitled to file a citizen suit. The citizen suit provision has been broadened to include other entities that are not traditionally considered "citizens" of the United States. The court incorrectly restricted the plain language of the statute beyond the definition supplied by Congress.

Section 505 of the CWA, the citizen suit provision, enables "any citizen" to maintain suit against violators of the effluent emission standards of the CWA. 33 U.S.C § 1365. This statute defines citizen as, "For the purposes of this section, the term 'citizen' means a person or persons having an interest which is or may be adversely affected." There is no mention of nationality in this broad definition. Further, "person" is also defined in the CWA. "The term '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). Again, there is no mention of nationality in this broad definition. Bonhomme is considered both a citizen and a person under

the CWA. Bonhomme is considered a citizen under the CWA's definition because, as a landowner, he has an interest that has been affected by Maleau's actions.

Allowing Bonhomme to sue, as a foreign national is consistent with the policy behind the CWA. It is the purpose of the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). When the CWA was passed, the enforcement authority of the federal government was not only expanded, but the citizen suit provision was also enacted. For the first time, a private citizen was able to bring a civil action in federal court against any person or government that violated the effluent or limitation requirements of the CWA. 33 U.S.C. § 1365(a). The citizen suit provision in the Clean Air Act, which is almost identical to the CWA citizen suit provision, has been stated as being essential because, "It reflects Congress's recognition that '(c)itizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike." *Natural Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 699-700 (D.C. Cir. 1974) "Anyone even remotely familiar with the case law of the period will discern that this provision took broad steps to facilitate the citizen's role in the enforcement of the Act, both in renouncing those concepts that make federal jurisdiction dependent on diversity of citizenship and jurisdictional amount, and in removing the barrier, or hindrance, to citizen suits that might be threatened by challenges to plaintiff's standing." *Id.* The CWA, whose citizen suit provision is essentially the same, also abolished these typical jurisdictional requirements so that the purpose of the CWA and the citizen suit provision could be upheld.

The courts have broadly construed the term "citizen" to include other entities that are not considered "citizens" under the traditional meaning of the word, which is consistent with the policy behind the CWA. A State is a "citizen" under the Clean Water Act (CWA) and a "person"

under Resource Conservation and Recovery Act (RCRA) and is thus entitled to sue under the citizen suit sections of those Acts. *U.S. Dept. of Energy v. OH*, 503 U.S. 608 (1992), on remand 965 F.2d 1401. *See also*; *Comm. of Mass. v. U.S. Veterans Administration*, 541 F.2d. 119. (Mass. 1976). A state would not be considered a "citizen" under the district court's analysis of taking the term at its plain meaning rather than how it is defined in the statute and this is inconsistent with both the purpose of the citizen suit provision and prior case law. Bonhomme, a property owner, who has been injured under a violation of the CWA would be considered a "citizen" under the broad interpretation the courts have given the term.

The district court argued that the broad meaning of person did not deprive citizen of a more narrow meaning. *Solid Waste Agency of Northern Cook County* states, "We cannot agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the state." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineer*, 121 S. Ct. 675, 682 (2001). The facts of that case differ from Bonhomme's. The Court was not willing to completely read "navigable" out of the statute because the Court was not willing to extend this to ponds formed from an abandoned mining site. By reading "navigable" out of the statute, all waters would be included. This is easily distinguishable from the term "citizen" because prudential standing requirements continue to regulate that ability for just anyone to maintain a citizen suit action. The district court was incorrect in applying the reasoning behind *Solid Waste* to this situation.

Bonhomme is a "citizen" under the definition Congress included in the statute, which is consistent with the intent under the CWA. Furthermore, courts have been liberal in their interpretation of "citizen" and Bonhomme, as a sufficiently injured party, would fit within the

broad definition. For the preceding reasons, the district court improperly granted Maleau's motion to dismiss.

VI. BONHOMME DID NOT VIOLATE THE CWA WHEN ARESENIC WAS DISCHARGED INTO REEDY CREEK FROM THE CULVERT LOCATED ON HIS PROPERTY

The district court improperly denied Bonhomme's motion to dismiss the claim that he violated the CWA by adding arsenic to Reedy Creek through a culvert on his property. Bonhomme's culvert is not considered a point source because of the agricultural use exemption. The district court focused solely on the point source issue without considering the other aspects of the statute and the intent of the CWA.

It is accepted that a culvert would be considered a point source, however there are exceptions. "The term "point source" means 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. This term does not include agricultural storm water discharges and return flows from irrigated agriculture." 33 U.S.C.A. § 1362(14). Agricultural storm water discharges, which are excluded from the Clean Water Act's (CWA) definition of "point source." For example, the discharge of a pollutant was exempt for agricultural purposes when rainwater came in contact with manure and flowed into navigable waters. *National Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738 (CA. 2011). Bonhomme is required by restrictive covenants to his land to maintain the drainage Ditch C-1 for agricultural purposes. (R. 5). The drainage ditch is used for both irrigation and strom water drain off. (*Id.)* Under the plain language of the statute, Bonhomme's culvert is not considered a point source,

and he would not be required to obtain a permit for the irrigation and storm water drain off regardless of the pollutants therein.

Alternatively, if the court finds that Bonhomme's culvert is not included in the agricultural exemption, he still would not be liable for Maleau's pollution. Under the CWA, "…Congress has placed liability with those in control of the pollutants being discharged." *Friends of Sakonnet v. Dutra,* 738 F. Supp. 623, 629-30 (D.R.I. 1990). Bonhomme is not in control of the pollutants being discharged and therefore, cannot be held liable for not obtaining a proper permit. Permits are available for potential polluters, and it was the responsibility of Maleau to obtain a permit for his point source. Progress is attempting to hold Bonhomme liable in fact similar to the *Sakonnet* case where the court stated, "By attempting to hold either the town or the Souzas liable, the defendants are saying the law reaches those who have absolutely no control over the processes that the permit system regulates. Neither the town nor the Souzas could obtain a permit for the discharge into the Sakonnet River from the Sherwood Park septic system, yet the defendants would have this Court hold one of them liable for not obtaining a permit before another's pollution flowed through their property." *Id.* This factual situation is similar because Bonhomme did not have the authority to obtain a permit for Maleau's overburden, point source piles. Allowing Progress to maintain this suit against Bonhomme is holding an innocent third party responsible for something outside of their control. Bonhomme asks this court to follow the holding in *Sakonnet*.

The district court also focused solely on point source while claiming causation is not an issue. Many cases have stated that point sources can be responsible for all pollution that comes from a confined system. *See, e.g., Sierra Club v. Abston Construction Co., Inc.,* 620 F.2d 41 (5th Cir.1980); *Fishel v. Westinghouse Electric Corp.,* 640 F.Supp. 442 (M.D.Pa.1986); *U.S. v. Saint*

Bernard Parish, 589 F.Supp. 617 (E.D.La.1984). This situation is distinguishable because these cases focus on the existence of a point source, not responsibility of the pollutant. "'Point source' is in the definition of 'discharge of a pollutant' to distinguish kinds of pollution, not to establish the source of liability. Liability must lie with the person or persons causing 'the addition of any pollutant to navigable waters.'" *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 629-30 (D.R.I. 1990). The district court improperly separated the idea of a "point source" from the "discharge of a pollutant." *Id.* Allowing the district court to focus solely on point source, allows Maleau to benefit from his alleged bad faith activities of moving his overburden piles to avoid seeking a permit. By dissecting the statute in the way that the district court did, the CWA would penalize innocent parties for the violations of others.

Bonhomme is not liable for Maleau's addition of arsenic into the waters of the United States. First, his culvert is not considered a point source because it is excluded via its agricultural uses. Furthermore, Bonhomme had no control to obtain permitting over the point source that added the pollutant. Lastly, it was inappropriate for the district court to dissect the CWA statute in such a way that focused only on whether or not the culvert was a point source without any regard for liability. For these reasons, the district court improperly denied Bonhomme's motion to dismiss.

CONCLUSION

For the foregoing reasons, the district court's judgment regarding the following issues should be overturned: (a) that Bonhomme is not a real party in interest pursuant to FRCP 17; (b) that Bonhomme is not a "citizen" for purposes of bringing a citizen suit against Maleau under the CWA; (c) that Maleau's waste piles are not "point sources" for the purpose of being regulated by

the CWA; (d) that Ditch C-1 is not a "water of the United States" subject to regulation by the CWA; and (e) that Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property draining water from Ditch C-1 into Reedy Creek even though Maleau is the but-for cause of arsenic in Ditch C-1.

Further, the district court's judgment that Reedy Creek is a "navigable water" should be affirmed.

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