CA. No. **13-1234**

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME
Appellant, Cross-Appellee
v.
STATE OF PROGRESS
Intervenor-Appellant, Intervenor Cross-Appellee
and
SHIFTY MALEAU
Appellee, Cross-Appellant

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

Brief for Jacques Bonhomme,
Appellant, Cross-Appellee.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331 (2006), the district courts maintain original jurisdiction over any matters arising out of the laws of the United States including the Clean Water Act of 1972 ("CWA"), 33 U.S.C. § 1251 (2006). The Court of Appeals for the Twelfth Circuit maintains jurisdiction over the final judgments of the District Court, including cases dismissed on summary judgment. 28 U.S.C. §§ 1291, 1294(1) (2006).

STATEMENTS OF THE ISSUES PRESENTED ON APPEAL

1. Whether Mr. Bonhomme is the real party in interest under Fed. R. Civ. P. 17 to bring suit against Mr. Maleau for violating 33 U.S.C. § 1331(a).

2. Whether Mr. Bonhomme – a foreign national – is a "citizen" under 33 U.S.C. 1365, who may bring suit against Mr. Maleau.

3. Whether Reedy Creek is a navigable water/water of the United States under 33 U.S.C. § 1362(7), (12).

4. Whether Ditch C-1 is a navigable water/water of the United States under 33 U.S.C. § 1362(7), (14).

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

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

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

Jacques Bonhomme sued Shifty Maleau for violating the Clean Water Act (CWA) 33 U.S.C. §§ 1251-1387 (2012), under the jurisdiction of the citizen suit provision of that statute, 33 U.S.C. § 1365. (R. at 4.) Mr. Bonhomme alleges that waste piles from Mr. Maleau's mining

operations are point sources that have discharged arsenic into Ditch C-1, a navigable water, and that the Ditch conveys this polluted water into Reedy Creek.

The State of Progress filed a citizen suit against Mr. Bonhomme alleging that he violated the CWA by discharging arsenic into Reedy Creek through a culvert on his land. Mr. Maleau intervened as a matter of right in Progress's action against Mr. Bonhomme under 33 U.S.C. § 1365(b)(1)(B). (R. at 5.) The court then granted Progress and Mr. Malaeu's uncontested motion to consolidate their case with *Bonhomme v. Maleau*. (R. at 5.)

The district court found that Mr. Bonhomme was not a proper plaintiff and dismissed his suit, also holding that it would find for Mr. Maleau on all issues except that Reedy Creek is a "water of the United States." (R. at 10.) The court denied Mr. Bonhomme's motion to dismiss on the grounds that Progress had adequately stated a cause of action. (R. at 10.)

II. FACTUAL BACKGROUND

Reedy Creek is an interstate waterway running for 50 miles in the States of Union and Progress. Interstate travelers utilize Reedy Creek's water, and farmers divert Reedy Creek to irrigate crops that are sold in interstate commerce. (R. at 5.) Ditch C-1 runs through three miles of agricultural land, including the property owned by Mr. Maleau. It flows into Reedy Creek via a culvert running through Mr. Bonhomme's property. The creek ends when it flows into Wildman Marsh. Mr. Bonhomme's property fronts Wildman Marsh, and he uses it for duck hunting parties for his business clients and associates Interstate and foreign duck hunters contribute over 25 millions dollars to the local economy during their visits to the marsh. (R. at 5, 6.)

Mr. Maleau trucks overburden and slag from his mining operation and places it in piles, on his property, adjacent to Ditch C-1. Both the mine and the ditch are in the State of Progress.

(R. at 5.) Rainwater runoff flows into and through the piles, and leaches arsenic from them. This contaminated water ultimately discharges into Ditch C-1 via a series of channels beneath the piles. Because Ditch C-1 is upstream of Reedy Creek and Wildman Marsh, the contaminated water in the ditch is conveyed to these waters as well.

Mr. Bonhomme tested the water in Ditch C-1 both upstream and downstream of Mr. Maleau's property, and the water in Reedy Creek both upstream and downstream of the outflow of Ditch C-1. His results showed that arsenic was undetectable in Ditch C-1 upstream of Mr. Maleau's property and in Reedy Creek upstream of Ditch C-1's outflow point, but present in high concentrations immediately downstream of both. Arsenic is also detectable at lower levels throughout Wildman Marsh. These facts strongly suggest that Mr. Maleau's mining piles are the source of the arsenic in the Creek and Marsh. Because this arsenic fouls the waters of Reedy Creek and Wildman Marsh, Mr. Bonhomme has decreased his hunting parties from eight a year to two, and is afraid to continue to use the Marsh for recreational purposes (R. at 5)

SUMMARY OF THE ARGUMENT

The District Court erred in holding that Mr. Bonhomme was not the real party in interest under Fed. R. Civ. P. Rule 17. Mr. Bonhomme meets the requirements for standing under the citizen suit provision and, thus, possesses the substantive legal right sought to be enforced. In contrast, PMI does not satisfy these requirements, and even if it did, this would not affect Mr. Bonhomme's standing.

The District Court also erred in its holding that, as a French national, Mr. Bonhomme could not bring suit under the CWA's citizen suit provision. Neither the plain language of the provision nor the legislative history and context indicates that this provision was meant to exclude foreign nationals. In addition, allowing Mr. Bonhomme to bring suit under the provision

is consistent with the provision's purpose, and Mr. Bonhomme's standing under Article III means that he has met the statutory requirements for standing, regardless of his citizenship status.

The District Court correctly identified Reedy Creek as navigable water/waters of the United States under 33 U.S.C. § 1362 (7), but erroneously determined that Ditch C-1 falls outside the purview of the statute. Ditch C-1 possesses the requisite characteristics of navigable water/waters of the United States. The ditch is a tributary of Reedy Creek. It is a relatively permanent waterway, running dry only during periods of seasonal drought. Furthermore, the ditch possesses a significant hydrological and chemical nexus with Reedy Creek. By failing to recognize the ditch's effect on downstream water quality, the lower court's interpretation of the CWA infringes on the Executive's congressionally mandated authority to regulate water pollution.

The District Court incorrectly determined that Mr. Maleau's spoil piles are not point sources because they are not "conveyances" based on examples listed at 33 U.S.C. § 1365(12), (14). Federal courts have held that rock piles can be point sources so long as they discharge pollutants into a navigable water. Mr. Maleau's spoil piles collect rainwater, which then leaches toxic arsenic out of the material. The collected water seeps out of the piles and travels down into Ditch C-1, a navigable water, via channels naturally eroded by gravity and water flow. Collection of rainwater and subsequent channeling of pollution in this fashion is a "discharge of pollutants" according to relevant case law. Thus, Mr. Maleau's spoil piles are point sources.

The District Court erred in holding that Mr. Bonhomme violates the CWA by having a culvert on his land. Water movement is properly a "transfer" rather than "addition of pollutants" when water merely flows between two parts of the same water body and no pollutants enter during transit. In this case, the outflow point's landowner is not liable. Ditch C-1 and Reedy

Creek are not meaningfully distinct navigable waters. No pollution enters the water when it travels through the culvert. Even if the water bodies were meaningfully distinct, the EPA's implementation of the unitary waters theory in its interpretation of the CWA insists that liability exists only for the party who added pollutants to navigable waters in the first place.

STANDARD FOR REVIEW

The District Court's dismissal on the grounds that Mr. Bonhomme is an improper plaintiff is a question of law and therefore requires *de novo review*. Thus, the District Court's holdings that Mr. Bonhomme was not the real party interest per Fed. R. Civ. P. 17 and could not bring suit under the CWA due to his French citizenship must be reviewed *de novo*. Similarly, the District Court's holdings that Mr. Maleau's mining waste piles are not "point sources" under the CWA, Ditch C-1 is not a "navigable water," Reedy Creek is a "navigable water," and Mr. Bonhomme violates the CWA because his culvert is a point source are issues of statutory interpretation and are therefore questions of law to be reviewed *de novo.* The District Court erred in its determination on all issues except in its holding that Reedy Creek is a "navigable water" and therefore its decision should be reviewed for judgment as a matter of law.

ARGUMENT

I. PLAINTIFF MR. BONHOMME IS THE REAL PARTY IN INTEREST UNDER FED. R. CIV. P. 17.

The District Court erred in its holding that Mr. Bonhomme was not the "real party in interest" under Rule 17 of the Federal Rules of Civil Procedure, which states, "An action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17(a). In fact, Mr. Bonhomme is the real party in interest, as 1) Mr. Bonhomme possesses the right sought to be enforced, and 2) Allowing Mr. Bonhomme to bring suit is in keeping with Rule 17's purpose of preventing "double liability" against the defendant, as there is little to no risk of double liability in this case.

A. Mr. Bonhomme possesses the right sought to be enforced.

Courts have widely agreed that the "real party in interest" for Rule 17 purposes is the party that possesses, under substantive law, the right sought to be enforced. *United HealthCare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 569 (8th Cir. 1996); *Best v. Kelly*, 39 F.3d 328, 329-330 (D.C. Cir. 1994); *Iowa Public Service Co. v. Medicine Bow Coal Co.*, 556 F.2d 400, 404 (8th Cir. 1977); *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973); *Petition of M/V Elaine Jones*, 480 F.2d 11, 26 (5th Cir. 1973); *Boeing Airplane Co. v. Perry*, 322 F.2d. 589, 591 (10th Cir. 1963). In determining the real party in interest, the court's task, then, is to determine, 1) What is the substantive legal right sought to be enforced, and 2) Which person or entity possesses that right.

i. The substantive legal right sought to be enforced is the right to protection from pollution as provided by the Clean Water Act.

Mr. Bonhomme brings suit under the CWA's citizen suit provision, which allows private individuals to "commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a)(1). The "violation" Mr. Bonhomme alleges is that Mr. Maleau has unlawfully discharged pollutants into navigable water without a proper permit, poisoning the Wildman Marsh and causing environmental harm. 33 U.S.C. § 1311(a). Thus, the relevant "substantive law" is the CWA, and the "right sought to be enforced" is the right to protection from pollution that this Act provides for.

ii. Mr. Bonhomme has standing to enforce this right under Article III of the Constitution, and therefore "possesses" the right.

The party that possesses this "right to protection from pollution" is the party that has standing to bring suit under the citizen suit provision. The requirements for standing under this provision are the same as the requirements for standing under Article III of the United States Constitution. *See* U.S. Const. art. III, § 2; *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d. 387, 395 (4th Cir. 2011); *Lockett v. EPA*, 319 F.3d. 678, 682 (5th Cir. 2003); *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d. 985, 994 (9th Cir. 2000). Therefore, the party that "possesses the right sought to be enforced" is the party who has standing to enforce it under Article III. To have standing, the plaintiff must demonstrate that: 1) He or she suffered an "injury in fact" that is concrete and particularized, and is actual or imminent, 2) The injury is fairly traceable to the challenged action of the defendant, and 3) The injury will likely be redressed by a favorable decision. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 705 (2000); *Sierra Club v. Morton*, 92 S. Ct. 1361, 1366 (1972); *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d. 1143, 1155 (10th Cir. 2013); *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d. 955, 968 (6th Cir. 2009). Mr. Bonhomme meets these criteria. He owns property immediately next to the affected area and frequently uses it for hunting parties composed of his business and social friends and acquaintances. As a result of the affected area's pollution, Mr. Bonhomme avers that he has become afraid to continue to use the marsh for his hunting parties, and decreased the number of parties from eight a year to two a year. Mr. Maleau's claim that the decrease in hunting parties was a result of general economic decline rather than pollution is immaterial for Article III purposes, as Article III only requires an allegation; which explanation is correct is a question of fact for trial.

Mr. Bonhomme has also met the remaining two criteria for Article III standing. To establish traceability, a plaintiff need only show that a defendant discharges a pollutant that causes or contributes to the kind of injuries alleged; the plaintiff does not need to show to scientific certainty that defendant caused the precise harm suffered by the plaintiff. *Piney Run Preservation Ass'n v. County Com'rs of Carrol County, MD*, 268 F.3d. 255, 264 (4th Cir. 2001); *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d. 985, 994, 995 (9th Cir. 2000). Mr. Bonhomme has gone further than this requirement and produced scientific evidence that Mr. Maleau discharges arsenic into Ditch C-1 through his waste piles, and that this discharge is a direct cause of the pollution of Wildman Marsh which has caused Mr. Bonhomme's alleged injury. Finally, a decision in Mr. Bonhomme's favor would likely redress this injury, as it would

force Mr. Maleau to comply with environmental regulations designed to protect the polluted land.

iii. PMI does not possess the substantive right sought to be enforced, and therefore is not the real party in interest.

PMI cannot adequately allege an "injury in fact" to assert standing under Article III, and therefore is not the real party in interest. Mr. Bonhomme, not PMI, owns the property adjacent to Wildman Marsh, and Mr. Bonhomme, not PMI, uses the Marsh to throw hunting parties for guests he chooses to invite. The fact that the majority of these guests happen to be affiliated with PMI in some way is immaterial; the parties are meant for recreation and enjoyment for Mr. Bonhomme and people he knows through his work, not business for PMI.

It is true that PMI may directly benefit from Mr. Bonhomme's success in litigation, as Mr. Bonhomme's hunting parties primarily include PMI business clients and associates and forcing Mr. Maleau's company to comply with environmental regulations will be advantageous for PMI, a direct competitor. However, the real party in interest rule does not require an action to be brought in the name of a party who will ultimately benefit from recovery, but only that the person bringing the action holds the substantive right sought to be enforced. *Reichhold Chemicals, Inc. v. Travelers Ins. Co.*, 544 F. Supp. 645, 649 (E.D. Mich. 1982); *Allen v. Baker*, 327 F. Supp. 706 (N.D. Miss. 1968); *Heine v. Streamline Foods, Inc.*, 805 F. Supp. 2d 383, 388 (N.D. Ohio 2011). In addition, the fact that PMI pays Mr. Bonhomme's litigation expenses is immaterial, as the mere fact that court expenses and attorneys' fees are paid by a third party does not make the paying party the "real party in interest." *Armour Pharmaceutical Co. v. Home Ins. Co.*, 60 F.R.D. 592, 594 (N.D. Illinois 1973).

iv. Even if PMI was a real party in interest, this would not affect Mr. Bonhomme's real party status.

Even if PMI was a real party in interest, this would not affect Mr. Bonhomme's ability to bring suit. If a plaintiff possesses the substantive right sought to be enforced, the action cannot be dismissed on Rule 17 grounds, even if another party has vital interest in the litigation. *Best v. Kelly*, 39 F.3d 328, 329-330 (D.C. Cir. 1994) (Lawsuit by prisoners challenging change in provider of a drug treatment program could not be dismissed on Rule 17 grounds, despite the fact that the program provider also had a vital interest in the action). As Mr. Bonhomme can adequately assert standing under Article III, he has standing to enforce this right under the CWA, and thus is a real party in interest; his company's interest in the litigation is immaterial.

B. Allowing Mr. Bonhomme to bring suit is in keeping with the purpose of Rule 17.

The purpose of the "real party in interest" rule is to protect defendants from having to twice defend action, once against the ultimate beneficiary of a right and then against the actual holder of substantive right. *In re Signal Intern., LLC*, 579 F.3d 478, 487 (5th Cir. 2009); *United HealthCare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 569 (8th Cir. 1996). Fortunately, it is highly unlikely that Mr. Maleau will be forced to face double liability from both Mr. Bonhomme and PMI. As demonstrated above, Mr. Bonhomme, not PMI possesses the right sought to be enforced; PMI is merely an ultimate beneficiary. Therefore, the rule excludes PMI from bringing suit.

Even if PMI was a real party in interest, the factual record demonstrates that PMI has no intention of bringing its own, separate lawsuit. PMI was given the opportunity to join the lawsuit from the beginning, when Mr. Maleau raised the "real party" issue in its answer to Mr. Bonhomme's complaint. PMI declined to join the suit, but is nevertheless paying Mr. Bonhomme's litigation fees. If PMI intended to file suit against Mr. Maleau on its own behalf, it

would have been much more efficient and less costly to join Mr. Bonhomme's suit when it had the opportunity rather than pay for both Mr. Bonhomme's suit and its own.

Because Mr. Bonhomme possesses the right sought to be enforced and there is little to no danger of a separate lawsuit from PMI, the District Court erred in granting summary judgment for Mr. Maleau on this issue.

II. PLAINTIFF MR. BONHOMME IS ELIGIBLE TO BRING SUIT UNDER THE CLEAN WATER ACT'S CITIZEN SUIT PROVISION, DESPITE HIS STATUS AS A FOREIGN NATIONAL.

In declaring summary judgment for Mr. Maleau, the trial court also held that, as a French national, Mr. Bonhomme could not bring suit under the CWA's citizen suit provision. The trial court's ruling was erroneous on three grounds: 1) The language of the provision does not bar foreign nationals from bringing suit, 2) Allowing Mr. Bonhomme to bring suit is consistent with the purpose of the provision, and 3) Mr. Bonhomme has standing under Article III of the Constitution, and therefore has met the requirements for standing under the statute.

A. The language of the citizen suit provision does not bar foreign nationals from bringing suit.

The first step in determining the meaning of a statute's language is to look at the plain meaning of the word or phrase in question. The CWA's citizen suit provision states that "any citizen may commence a civil action on his own behalf" to enforce the Act. 33 U.S.C. § 1365(a). Mr. Maleau and the State of Progress argue that the word "citizen" indicates an intention to restrict this right to U.S. citizens. However, the provision defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The CWA further defines "person" as an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. §

1362(5). None of these definitions stipulate or imply a requirement of U.S. citizenship. The plain meaning of the statute, then, does not exclude foreign nationals from bringing suit under the Act.

Comparing the CWA to the environmental legislation upon which it was based also leads to the conclusion that the provision was not intended to exclude foreign nationals from bringing suit. The Clean Air Act ("CAA") contains a citizen suit provision very similar to the CWA's, except rather than using the word "citizen," the CAA version stipulates that "any person may commence a civil action on his own behalf." 42 U.S.C. § 7604(a). The CAA's definition of "person" is similar to that of the CWA: "an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C.A. § 7602(e).

The "citizen suit" provisions in the CAA and the CWA "share the common central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 383-384 (1987). In fact, the legislative history of the CWA provision states that the citizen suit provision in the CWA was modeled after the provision in the CAA, and that Congress intended that the two provisions be comparable. S. Rep. No. 92-414 at 3745 (1971); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60-61 (1987); *Subject Matter Jurisdiction, Standing and Citizen Suits: The Effect of* Gwaltney v. Chesapeake Bay Foundation, Inc., 48 MD. L. REV. 403, 420 (1989). Thus, it is reasonable to read the CWA citizen suit provision in the same way as the CAA's version, which does not even use the word "citizen" and gives no indication that a plaintiff's U.S. citizenship status is relevant in any way.

One might argue that the use of the word "citizen" rather than "person" in the CWA indicated a legislative intent to distinguish it from the CAA, restricting the right of citizen suit to U.S. citizens where the CAA did not. However, nothing in the legislative history indicates this; in fact, the history suggests the opposite, as the senate report describes the provision as allowing "anyone" to bring suit, making no mention of a citizenship requirement. S. Rep. No. 92-414 at 3744 (1971).

In sum, neither the plain meaning of the statute nor the legislative history suggest that the citizen suit provision was intended to exclude foreign nationals.

B. Allowing Mr. Bonhomme to bring suit under the "citizen suit" provision is in keeping with the purpose of this provision.

Examining the citizen suit provision in light of its purpose also suggests that Mr. Bonhomme should be allowed to bring suit, despite his status as a foreign national. The purpose of the provision is to enable private parties to assist in enforcement of environmental policy. *Lockett v. EPA*, 319 F.3d. 678, 684 (5th Cir. 2003); *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 706 (9th Cir. 2007); *Com. Of Mass. v. U.S. Veterans Administration*, 541 F.2d 119, 121 (1st Cir. 1976). Mr. Bonhomme seeks to aid in the enforcement of the CWA by bringing suit against a party who has allegedly been polluting a national wildlife refuge. To bar Mr. Bonhomme from bringing suit on the technicality that he is not a United States citizen, particularly when the statute has not explicitly made citizenship a requirement, would frustrate this effort and undermine the very purpose of the statute.

C. Mr. Bonhomme meets the requirements for standing under Article III; therefore, he has standing under the statutory requirements of the Clean Water Act.

Finally, if a plaintiff asserting an interest under the CWA meets the constitutional standing requirements to satisfy Article III, then that plaintiff satisfies the statutory standing threshold as well. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d. 387,

395 (4th Cir. 2011); *Lockett v. EPA*, 319 F.3d. 678, 682 (5th Cir. 2003); *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d. 985, 994 (9th Cir. 2000). We have already shown that Mr. Bonhomme has satisfied the constitutional requirements for standing, as he has suffered an "injury in fact," the injury is fairly traceable to the challenged action of the defendant, and the injury will likely be redressed by a decision in Mr. Bonhomme's favor. *Allen v. Wright*, 468 U.S. 737, 751 (1984). Mr. Bonhomme's status as a foreign national has not affected his ability to claim Article III standing. As courts have determined that the citizen suit provision was not intended to impose additional standing requirements beyond those of Article III, his citizenship status should not affect his ability to bring suit under the statute either.

Nothing in the language, the legislative history, the purpose, or the statutory requirements of the CWA suggest that Mr. Bonhomme's citizenship status prevents him from bringing suit. The District Court erred in granting summary judgment for Mr. Maleau on this issue.

III. REEDY CREEK IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES."

The District Court, in its opinion granting Mr. Maleau's motion to dismiss, indicated that, if given the opportunity to rule on the matter, it would accept Mr. Bonhomme's assertion that Reedy Creek is navigable water as defined by the CWA. 33 U.S.C. §1362 (7). Although that court's interpretation of the Act is imperfect, its judgment is sound on this point.

CWA authority, exercised through the U.S. Army Corps of Engineers, only applies to navigable waters, defined as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362 (7). Thus, judicial interpretation of this statutory provision effectively determines the reach of the federal government's jurisdiction over the nation's waters. Unfortunately, the latest Supreme Court interpretation of this CWA provision, *Rapanos v. United States*, 547 U.S. 715 (2006), does not provide clear direction. No Circuit Court has unequivocally adopted the

four justice *Rapanos* plurality's construction of 33 U.S.C. § 1362 (7). Three Circuit Courts (the Seventh, the Ninth, and the Eleventh) have adopted the concurring opinion, endorsed by a single justice. *See U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), *Northern California River Watch v. City of Healdsburg*, 496 F. 3d 993 (9th Cir. 2007) and, *U.S. v. Robison*, 505 F.3d 1208 (11th Cir. 2007). The First, Third, and Eighth Circuits have held that any waters meeting the plurality or concurring opinions' understanding of the CWA provision are navigable. *See U.S. v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *U.S. v. Donovan*, 661 F.3d 174 (3rd Cir. 2011), and *U.S. v. Bailey*, 571 F.3d 791 (8th Cir. 2009). The Fifth and Sixth Circuits have declined to rule on which *Rapanos* opinion controls in their courts. *See U.S. v. Lucas*, 516 F.3d 316 (5th Cir. 2008) and *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). Reedy Creek is a navigable water under any of the *Rapanos* standards.

A. Reedy Creek is navigable water even though it is not navigable in fact.

Neither the CWA, nor the Environmental Protection Agency's (EPA) relevant provisions in the Code of Federal Regulation, support Mr. Maleau's assertion, based on an antiquated understanding of the law, that waters unable to "float a boat" cannot be navigable. 40 C.F.R. § 122.2. Indeed, the ability to float watercraft was once dispositive of federal government jurisdiction over a waterway under the Commerce Clause. *See The Daniel Ball*, 77 U.S. 557 (1870), and *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). The CWA superseded this earlier conception. As early as 1975, the courts took notice of these changes in *Natural Resources Defense Council, Inc. v. Callaway*, 392 F.Supp. 685, 686 (DC 1975). The Supreme Court's most recent ruling on navigability vis a vis the CWA, *Rapanos*, similarly acknowledges that navigability in fact is no longer the appropriate standard. *Rapanos*, 547 U.S. at 724.

B. Reedy Creek runs interstate, and affects interstate commerce.

The District Court incorrectly extends the *Rapanos* plurality to a ruling on which of the three "categories of activity" the CWA can regulate. *U.S. v. Lopez*, 514 U.S. 549, 558 (1995). In order to limit CWA jurisdiction to the first *Lopez* category, "channels of interstate commerce," as the District Court contends, *Rapanos* would have to reject provisions in the Code of Federal Regulations, 40 C.F.R. § 122.2, which establish that "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce" and "all interstate waters" are waters of the United States. *Lopez*, 514 U.S. at 519. While *Rapanos* does reject some elements of 40 C.F.R. § 122.2, it never takes up that specific languge. *Rapanos*, 547 U.S. at 734.

A more accurate reading of the *Rapanos* plurality, and certainly a reading conscious of the fact that the majority of the *Rapanos* court advocates a more liberal standard for CWA jurisdiction, supports, as 40 C.F.R. § 122.2 does, CWA jurisdiction over Reedy Creek under either of the three *Lopez* categories: "channels of interstate commerce," "persons or things in interstate commerce," and "activities that substantially affect interstate commerce."

Reedy Creek is arguably not a physical channel of interstate commerce, because it is not navigable in fact. However, its cleanliness certainly affects agricultural products sold into interstate commerce by the farmers who divert Reedy Creek for irrigation, and the activities at Wildman Marsh that feed an annual $25 million into the local economy, much of it from interstate and foreign duck hunters. Neither *Rapanos*, the CWA, nor the Commerce Clause single out any of these activities at the expense of the others. U.S. Const. art.1 § 8 cl.3. Far from no longer "good" law, as the District Court would classify it, *U.S. v. Earth Sciences, Inc.*, 599 F.2d

368 (10th Cir. 1979), merely illustrates a proper application of the CWA under the Commerce Clause. If anything, the depth to which the Ra*p*anos court ventures into the picayune details of wetlands and the definition of the border between land and water signifies that the judicial acceptance, of CWA jurisdiction over waterways via the Commerce Clause, noted in *Earth Sciences, Inc.* is still operative. Earth Science, Inc., 599 F. 2d at 375.

C. Navigable waters are relatively permanent geographic features.

The plurality opinion holds that a waterway can only be amenable to the Corp's jurisdiction if it is at least relatively permanent. *Rapanos*, 547 U.S. at 732. Augmenting its requirement of "relative permanence," the plurality makes recourse to Webster's Dictionary definitions of "waters" such as rivers, lakes, and streams to further define waters of the US as those waters "forming geographical features." *Id*. at 733.

The conditions under which mere "relative" permanence is acceptable are not germane to an analysis of Reedy Creek, because the record nowhere states that Reedy Creek ever dries up. While the exact depth and volume of the creek, along its fifty-mile course, is unclear, it contains sufficient water to supply an interstate highway service station and agricultural irrigation. There can be little doubt that Reedy Creek is a permanent, geographic feature of the states of Union and Progress, and therefore waters of the United States under the plurality standard.

Justice Kennedy's concurrence objects to the plurality's emphasis on permanence. He juxtaposes "the merest trickle, if continuous," ostensibly classified as waters of the US under the plurality view, with "torrents thundering at irregular intervals through otherwise dry channels," which the plurality would exclude, to show that an unrelenting focus on permanence is illogical in the context of a statute pointed at downstream water quality. *Rapanos*, 547 U.S. at 769. While some irregular waterways could be excluded, other impermanent waterways should be excluded.

The dissenting opinion, commanding the approval of four justices, agrees with the concurrence that permanence is an improper threshold for classifying water as waters of the US. *Id.* at 800.

Classifying Reedy Creek as waters of the US under the concurring and dissenting opinions' standard is straightforward. A waterway meeting the plurality's stringent requirement for permanence will also, as a matter of logical inference, pass muster with the concurring/dissenting opinions' broader understanding of CWA jurisdiction. The dissenting opinion openly recognizes this inference, and stated that both the concurring and plurality opinion's definitions of waters of the US are effectively subsets of its own definition. *Id.* at 810. Quite likely, all nine justices would agree that Reedy Creek constitutes waters of the United States.

Circuit Court applications of *Rapanos* have mostly focused, like *Rapanos* itself, on the classification of marginal wetlands. The lack of judicial attention to larger waterways such as Reedy Creek suggests a general acceptance of their amenability to CWA jurisdiction. Several post-*Rapanos* decisions, classifying even smaller waterways as navigable, reinforce the solidity of Reedy Creek's designation as a water of the United States. See *U.S. v Moses*, 496 F. 3d 984, (9th 2007) (holding Teton Creek, which runs interstate but is seasonally dry, as water of the United States), *U.S. v Lucas*, 516 F.3d 316, 327 (5th 2008) (holding a system of tributaries to a creek as waters of the United States under either of the three *Rapanos* standards), and *U.S. v. Donovan*, 661 F. 3d 174, 185 (3rd Cir. 2011) (needing extensive discovery into soil saturation and vegetation to differentiate channels from surrounding land, and holding those channels waters of the United States under the plurality or concurring *Rapanos* standard).

IV. DITCH C-1 IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES."

Mr. Maleau asserted, in his motion to dismiss, that Ditch C-1 is not a water of the United States because it is not navigable in fact, and because Ditch C-1 is a point source. The trial court indicated that it would side with Mr. Maleau on this characterization, citing *Rapanos* to buoy the assertion that, under the CWA, a watercourse cannot be a point source and a water of the United States simultaneously. *Rapanos*, 547 U.S. at 735. On the first contention, Mr. Maleau misinterprets the CWA definition of navigable waters, and ignores a sizeable body of law holding that tributaries of navigable waters can themselves be classified as waters of the US for purposes of CWA jurisdiction. On the second contention, Mr. Maleau and the trial court exaggerate the precedential value of a four-justice plurality opinion that no Circuit Court has adopted. The mutual exclusivity of point sources and waters of the United States is questionable. The *Rapanos* concurrence, which, unlike the plurality, has been unequivocally adopted as controlling precedent in multiple Circuit Courts, expressly denies that such mutual exclusivity exists.

A. Tributaries of waters of the United States are waters of the United States.

In 1975, the Corps[RD6] redefined waters of the United States to "include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce." *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985). Subsequent judicial reconsiderations of the CWA questions in *Riverside*, of which *Rapanos* is the latest, have not materially denigrated the validity of the Corp's 1975 interim regulations regarding tributaries, nor that of the regulation's modern incarnations, 33 C.F.R. § 328.3(a)(3) and 40 C.F.R. § 122.2.

Solid Waste Agency of North Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) ("*SWANCC*") bridges the temporal gap between Riverside and Rapanos. *SWANCC* did not bring a material redefinition in the Court's treatment of tributaries under the CWA. Even the dissent, arguing for a more expansive construction of the Corp's jurisdictional authority, admitted that the holding "invalidates . . . the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." *SWANCC*, 531 U.S. at 176-77.

None of the opinions in *Rapanos* take issue with the Corp's classification of tributaries of navigable waters as navigable waters themselves; the difference lies in how expansively the justices in each opinion define "tributary." The Corp's broad interpretation of tributaries satisfies the concurring and dissenting opinions. However, the plurality asserts that the Corp's have defined tributaries too broadly. The plurality extends its criteria of relative permanence to tributaries, and asserts that the Corp's construction of waters bends the term "beyond parody." *Rapanos*, 547 U.S. at 734. Working from this insistence on permanence, the plurality held that "ditches, channels, and conduits" are "by and large not waters of the United States" because such terminology typically addresses "watercourses through which intermittent waters typically flow." *Id.* at 736–37.

If this definition of relative permanence were widely accepted, it could exclude Ditch C-1 from CWA jurisdiction, as Ditch C-1 is dry for anywhere from three to six months per year. However, the *Rapanos* plurality opinion is neither widely accepted nor overly strict about permanence: in a footnote, the plurality accepted CWA jurisdiction over "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at

732 n.5. In the same note, the plurality classified waters it certainly would not find jurisdictional no more broadly than "lasting no longer than a day" and diurnal. *Id*.

Justice Kennedy's concurrence objects to the plurality's emphasis on permanence. He juxtaposes "the merest trickle, if continuous," ostensibly classified as waters of the US under the plurality view, with "torrents thundering at irregular intervals through otherwise dry channels," which the plurality would exclude, to show that an unrelenting focus on permanence is illogical in the context of a statute designed to downstream water quality. *Id*. at 769. While some irregular waterways could be excluded, other impermanent waterways should be included. The dissenting opinion, commanding the approval of four justices, agrees with the concurrence that permanence is an improper threshold for classifying water as waters of the US.

The record states that Ditch C-1 runs dry seasonally. There is no assertion that, within the months in which water flows through it, its flow is merely a day-to-day affair. CWA jurisdiction over a seasonal creek survived judicial review in the Ninth Circuit. *U.S. v. Moses*, 496 F.3d 984, (2007) . In *U.S. v. Vierstra*, 803 F.Supp.2d 1166 (Idaho 2011), the District Court held that the Low-Line canal, a tributary of the Snake River that flows six to eight months per year, would also meet the Rapanos plurality's permanence standard. Thus, Ditch C-1 could well be jurisdictional even under the strictest *Rapanos* standard, and is even more likely jurisdictional under the concurrence's looser approach to permanence.

B. <u>The concurring opinion's "significant nexus" proposition implies a broad acceptance of 33 C.F.R. § 328.3(a)(3) and 40 C.F.R. § 122.2 definitions of navigable tributaries.</u>

The *Rapanos* concurrence did not merely contest the idea of relative permanence. Additionally, it put forth an entirely separate set of criteria with which to evaluate the navigability of waters: the "significant nexus," a chemical, biological, and hydrological connection between waters, originally established in *SWANCC*. *Rapanos v. United States*, 547

U.S. at 780. The concurring opinion adopted the significant nexus test in response to the Corps' expansive jurisdiction over tributaries, including ditches and drains. *Id.* at 782. The concurrence had the opportunity to reject some or all of the Corps' definition of tributaries, but chose not to. Instead, it adopted the significant nexus test as a means to determine jurisdiction over wetlands lying beyond these tributaries. Thus, the very existence of the significant nexus test proves that the concurrence, which multiple Circuits have adopted as controlling precedent, accedes to the Corps' broad jurisdiction over tributaries.

C. Ditch C-1 has a significant nexus with Reedy Creek and is therefore a navigable tributary.

The significant nexus test, although developed to determine the navigability of wetlands adjacent to tributaries not navigable in fact, can also be applied directly to a non-navigable tributary. A wetland or tributary has the "requisite nexus" with navigable waters, and is therefore also navigable, if it affects the chemical, biological, or hydrological composition of the navigable waters around it. Even a "merely hydrological" connection could be sufficient to establish significant nexus under certain circumstances. *Id. at* 784.

US v Donovan, 661 F.3d 174 (3rd Cir. 2011), illustrated an application of the significant nexus test. The government, aided by two expert reports, conducted extensive chemical, biological, and hydrological testing on a network of channels crisscrossing Mr. Maleau's property. The experts found that Mr. Maleau's wetlands played an important role in pollutant sequestration and maintenance of the local aquatic food web in downstream waters. *Donovan*, 661 F.3d 174, 186. Upon these findings, the court recognized a significant nexus between Mr. Maleau's wetlands and surrounding waterways.

Courts have also found a significant nexus based primarily on hydrological and chemical connections. In *North California River Watch v. City of Healdsburg*, 496 F.3d 993, 996 (9th Cir.

2007), a man-made pond filled with wastewater-transferred chloride to nearby Russian River through an underground aquifer. Although the opinion indicates no findings of a biological nexus, the chemical and hydrological ties were sufficient to establish a significant nexus between the water in the pond and the Russian River, thereby bringing the pond within the purview of the CWA.

The hydrological connection between Ditch C-1 and Reedy Creek is undisputed: Ditch C-1 collects rainwater and agricultural runoff for the extent of its three mile course, all of which it eventually discharges into Reedy Creek. Mr. Bonhomme has found significant concentrations of arsenic downstream from Ditch C-1 in Reedy Creek, but none upstream, establishing a chemical nexus. Mr. Bonhomme's tests have also born out a chemical nexus between Ditch C-1 and Wildman Marsh. Although nothing on the record suggests a biological link, it is likely that a strong chemical and hydrological connection are sufficient to establish a significant nexus between Ditch C-1 and Reedy Creek, thereby rendering Ditch C-1 waters of the United States.

D. Ditch C-1 could be navigable water even if it were a point source.

Mr. Maleau and the District Court cite the Rapanos plurality in support of their assertion that a waterway cannot be a point source and waters of the United States. *Rapanos*, 547 U.S. at 735. Yielding, only hypothetically and momentarily, to Mr. Maleau's assertion that Ditch C-1 is a point source, does not categorically exclude Ditch C-1 from waters of the United States. If it were Reedy Creek, or an even bigger river, that passed by Mr. Maleau's slag piles and thereby became infiltrated with arsenic, this mere infiltration would not magically transform them from navigable waters into something else. Put another way, if a mining company were to begin stacking slag piles on the banks of the Mississippi, and arsenic from the slag reached the Mississippi, that mining company's unilateral act would not strip the Mississippi's status as waters of the United States. The much smaller dimensions of Ditch C-1 do nothing to alter the

faulty logic upon which Mr. Maleau, the trial court, and the *Rapanos* plurality have predicated their conclusion.

The *Rapanos* concurrence similarly disputed the conclusion that point sources and navigable waters are mutually exclusive categories, on grounds that permanent and intermittent flow have little bearing on whether a watercourse is a point source or waters of the United States. *Id.* at 772. This element of Mr. Maleau's claim is logically unsound.

E. The trial court's characterization of Ditch C-1 eviscerates the CWA and subverts the will of Congress.

If appellee were to prevail on his characterization of ditch c-1, there would be two possible outcomes: no CWA power of enforcement for an arsenic polluter threatening commerce and wildlife, or only CWA sanction of a person whose activities are not the cause in fact of the pollution. Neither propositions adheres to the purposes or letter of the CWA.

33 USC § 1251 (a) describes the purpose and objective of the CWA as to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The EPA and U.S. Army Corps of Engineers have promulgated an extensive body of regulations in order to actualize this legislative mandate. The trial court, referencing the Rapanos plurality, would curtail these regulations to the point at which the CWA ceases to function, as adding arsenic to Reedy Creek and Wildman Marsh certainly prejudices the chemical integrity of the Nation's waters, and quite likely the physical and biological integrity as well.

This contrast between regulatory language and judicial interpretation is not an instance of first impression.

In the landmark case of *Chevron v. National Resource Defense Council*, 467 U.S. 837 (1984), the Supreme Court established a doctrine of judicial deference ("Chevron deference") to administrative interpretation of statutes:

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-843.

The trial court, and the *Rapanos* plurality, gave insufficient deference to the C.F.R. It is patently permissible to regulate lesser waterways in the context of a statute meant to preserve the integrity of the nation's waters, as these lesser waterways feed into the nation's waters. The Rapanos concurrence and dissent understood this. The concurrence develops a doctrine of significant nexus precisely because it prohibits statutory overreach while deferring to the 40 C.F.R. § 122.2 definitions of tributaries. The dissent is even more direct, stating: "the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive's position…and its own obligation to interpret the laws rather than make them." *Rapanos*, 547 U.S. at 809-10.

V. MR. MALEAU'S MINING WASTE PILES ARE "POINT SOURCES" UNDER THE CLEAN WATER ACT.

The District Court erred in ruling that Mr. Maleau's mining waste piles are not "point sources" under the CWA. A point source is "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). Despite that piles of rock are not among the examples listed in the statute, case law indicates that waste piles are "discernible, confined, and discrete conveyances." Because the piles collect and channel water which then leaches toxic arsenic, they "discharge" pollutants. Therefore, the district court was erroneous in its judgment that the waste piles are not "point sources."

A. The mining waste piles are "discernible, confined, and discrete conveyances."

"The definition of a point source is to be broadly interpreted." *Ague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991) *revs' in part,* 505 U.S. 557 (1992). "The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States." *Id.* at 1354–55. The CWA text clarifies that such conveyances include, "but [are] not limited to" the examples mentioned. Reading the text plainly implies a vast range of conveyances that may serve as point sources. So long as a "discernible, confined and discrete conveyances" discharges or may discharge pollutants, it is a point source. The mere absence of a category from the list of point source examples in the CWA does not disqualify it from being classified as one.

The Eleventh Circuit applied the broad definition standard of *Ague* in *Parker v. Scrap Metal Processors, Inc.,* 386 F.3d 993 (11th Cir. 2004). Plaintiff brought an action against owner of adjoining property and operators of a scrap metal business for violation of the CWA and other related claims. He alleged that defendant's piles of debris and scrap metal, through which rainwater flowed and leached toxic chemicals, were point sources for the purposes of the CWA. "The piles of debris in this case collected water, which then flowed into the stream," and thus were "point sources within the meaning of the CWA." *Id.* at 1009.

The instant case is nearly identical to *Parker* in regards to the identification of a pile as a discrete conveyance. Mr. Maleau's overburden and slag piles, composed of dirt and stone, are structurally similar to the piles of discarded scrap metal in *Parker.* Neither type of pile is explicitly enumerated among the examples of a point source listed in 33 U.S.C. § 1362(14), yet the Eleventh Circuit deemed those in *Parker* to be the sort of conveyances that the CWA was intended to control. Their different composition is irrelevant; the piles in *Parker* and the instant case both contain poisonous materials that hatch out when rainwater percolates through them.

The overburden piles in the instant case greatly resemble the point source scrap metal piles in *Parker* in regards to structure and environmental consequences. The piles in the instant care are therefore "discernible, confined, and discrete" conveyances for the purposes of the CWA.

B. Mr. Maleau's mining piles collect and channel polluted water and thus discharge pollutants, or are capable of discharging pollutants.

i. Collecting and channeling storm water laced with toxic chemicals is "discharging pollutants."

Channeling rainwater and conveying it to waters of the United States constitutes a discharge under the CWA. The Ninth Circuit has held that "allegations of generalized rainwater runoff do not establish a 'point source' discharge absent an allegation that the rainwater is discretely collected and conveyed to waters of the United States." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 509 (9th Cir. 2013); *accord Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1152-53 (9th Cir. 2010) (holding that rainwater seeping through a mining pit cover is "nonpoint source pollution because there is no confinement or containment of the water"). The court has exemplified this collection of rainwater and subsequent channeling of polluted water in the context of land and machinery used for mining. By collecting rainwater,

leaching toxic chemicals, and channeling them into navigable waters as runoff, these conveyances "discharged" pollutants and were thereby point sources. *See Comm. To Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305 (9th Cir. 1993) (defendants discharged a pollutant from their abandoned mine facility within the meaning of the CWA because the site collected and channeled surface runoff that then deposited into the nearby Mokelumne River); *Trustees for Alaska v. E.P.A.,* 749 F.2d 549 (9th Cir. 1984) (defendant's sluice box was a confined channel). For overburden piles to be considered point sources, it must be shown that they discharged pollutants by collecting and channeling rainwater that then escaped as polluted rainwater runoff.

ii. Mr. Maleau's waste piles collect rainwater and channel it into a navigable water so as to constitute a discharge.

"Storm-water runoff does not, in all circumstances, originate from a point source, but several courts have concluded that it does when storm water collects in piles of industrial debris and eventually enters navigable waters." *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Avoyelles Sportsmen's League, Inc. v. Marsh,* 715 F.2d 897, 922 (5th Cir.1983). Piles of debris or overburden that collect water, which then flows into a navigable water, therefore discharge as point sources. *Parker*, 386 F.3d at 1009 (defendant's piles of industrial debris and construction equipment collected rain-water that then flowed into a nearby stream and were therefore point sources of resulting toxicity); *Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, 940 F. Supp. 2d 1005 (D. Alaska 2013).

Discharge is more conspicuous when the point source is "constructed for the express purpose of storing pollutants or moving them from one place to another." *Ecological Rights Found.*, 713 F.3d at 509; *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) (an aircraft equipped with tanks spraying

pesticide from mechanical sprayers directly over covered waters); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,* 261 F.3d 810, 815 (9th Cir. 2001), *aff'd,* 537 U.S. 99 (2002) (bulldozers and backhoes that redistributed the bottom layer of soil (the "pollutant")).

A point source of pollution may also exist 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" constitutes the creation of a point source. *Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 45 (5th Cir. 1980); *Sierra Club, Mineral Policy Ctr. v. El Paso Gold Mines, Inc.*, No. CIV.A.01 PC 2163 OES, 2002 WL 33932715 (D. Colo. Nov. 15, 2002) (mineshaft was a point source because water flowed through it, contracted zinc manganese, and eventually reached a creek). If storm water merely filters through piles of waste or overburden and seeps into the ground beneath, then the piles are not point sources. *Greater Yellowstone Coal.*, 628 F.3d at 1153 (overburden piles were not point sources because storm water was not collected or channeled, but instead filtered through hundred of feet of overburden and undisturbed materials).

The facts in *Sierra Club* regarding defendant's overburden piles strongly resemble those in the instant case. In *Sierra Club*, defendants formed spoil piles of overburden rock and dirt extracted via their strip mining activities. The piles were highly erodible, allowing rainwater runoff to carry overburden materials to adjacent streams, causing siltation and acid deposits. The court held that if these piles were found to channel rainwater, then they were point source. *Sierra Club,* 620 F.2d at 47.

Parker continued this line of reasoning. "[D]ebris strewn on the defendant property" in piles "collected water, which then flowed into [a] stream." Thus these debris piles were point sources. *Parker*, 386 F.3d at 1009.

Like the piles in *Sierra Club* and *Parker*, Mr. Maleau's overburden piles, which are heaps of mostly rock, release toxic chemicals into a body of water when rainwater runoff percolates through them. The piles first collect rainwater in a manner consonant with *Parker*: water enters the piles, where it remains long enough to leach toxic chemicals. *Parker*, 386 F.3d at 1002. In *Parker*, lead and PCBs were the toxic chemicals in question. The instant case presents the same mechanism, but with arsenic.

Following collection, rainwater exits the piles and flows down into channels eroded by gravity. The channels in question were eroded by gravity and exist between the piles and Ditch C-1. If movement of water through these naturally eroded channels constitutes "channeling" of polluted water in the manner contemplated by the statute, then the waste piles are point sources. A "channel . . . from which pollutants may be discharged" is a conveyance in its own right. 33 U.S.C. § 1362(14). It is immaterial whether these channels naturally formed due to erosion and gravity or were instead manmade. *Sierra Club*, 620 F.2d at 45 ("Conveyances of pollution formed either as a result of natural erosion or by material means . . . may fit the statutory definition and thereby subject the operators to liability under the Act). Thus these natural depressions channel polluted water from Mr. Maleau's spoil piles and direct their flow into Ditch C-1. This channeling constitutes discharge of a pollutant from a point source. Mr. Maleau's mining piles are physically connected to these channels, and comprise the exclusive source of arsenic that they channel. We will show that Ditch C-1 is a navigable water.

Courts have also held that mining materials not enumerated under 33 U.S.C. § 1362(14) are point sources because they similarly collect and convey water into navigable waters. *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168 (D. Mont. 1995) (mine adits and pits are discernable, confined and discrete conveyances of acid drainage constituting point

sources); *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 651 F. Supp. 2d 512 (S.D.W. Va. 2009) (acid mine drainage discharged through outfall pipes at a bond forfeiture site were conveyed through a point source) *Beartooth* and *Huffman* illuminate the instant case; the pattern of rainwater collection and discharge via channeling persists as a telltale point source indicator.

Although they are not enumerated in the CWA, mining piles can be point sources that discharge pollutants. Mr. Maleau's mining waste piles are "discernible, confined, and discrete conveyances" of this nature. Collection of rainwater and subsequent channeling into a navigable water constitutes a discharge. Mr. Maleau's piles collect rainwater, which percolates through them and absorbs arsenic. This water then flows into naturally eroded channels surrounding the piles into Ditch C-1. Polluted water moving in this fashion is thus discharged into a navigable water.

VI. MR. BONHOMME DOES NOT VIOLATE THE CWA BY ADDING ARSENIC TO REEDY CREEK THROUGH A CULVERT ON HIS PROPERTY.

In its determination that Mr. Bonhomme violates the CWA by adding arsenic into Reedy Creek via the culvert, the District Court relies upon a narrow reading of the holding in *South Fla. Water Mgmt. Dist*., namely "the owners of point sources do not have to initially add pollutants to water to be liable under the CWA as long as their point sources convey the pollutants to navigable waters." The holding of *South Fla. Water Mgmt. Dist.* as the District Court presents it does not adequately address the issues in the current case. *See S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) (liability for point source discharge makes owners liable although those sources do not generate pollutants).

Other portions of the holding in *South Fla.* govern the instant case. If the source and the destination of polluted water, moving through a conveyance, are both "navigable waters" that are not meaningfully distinct, the property owner in possession of the conveyance is not liable due

solely to that possession. However, if the two navigable waters are meaningfully distinct, the property owner is liable for the point source discharge. *Id.*, at 96, 112.

Even if the two navigable waters are meaningfully distinct, the application of the "unitary waters theory" may still absolve the property owner from liability. In such an instance, if there is no addition of pollutants to water during its transit between navigable waters, then the alleged violator is not liable, regardless of whether the waters are meaningfully distinct. *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1228 (11th Cir. 2009).

A. Ditch C-1 and Reedy Creek are not "meaningfully distinct."

A conveyance must be able to "discharge" pollutants to be a point source that requires a permit. 33 U.S.C. § 1362(14). "The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362 (12). "Transferring" pollutants between navigable waters is distinct from "adding" them to navigable waters "Under a common understanding of the meaning of the word "add," no pollutants are "added" to a water body when water is merely transferred between different portions of that water body." *Los Angeles Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc*., 133 S. Ct. 710, 713 (2013). Thus, transfer of pollutants is a permissible exception to the NPDES requirement of the CWA. *W. Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010). A transfer of this nature counts as a discharge of pollutants under the CWA only if the source and destination are meaningfully distinct navigable waters. *Los Angeles County Flood Control Dist.*, 133 S.Ct. 710. "[N]o discharge of pollutants occurs when water, rather than being removed and then returned to a water body, simply flows from one portion of the water body to another." *Los Angeles Cnty. Flood Control Dist.*, 133 S. Ct. at 713.

Because the flow of polluted water between "two parts of the same water body" cannot constitute a discharge of pollutants, "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of a pollutant" under the CWA." *Los Angeles Cnty. Flood Control Dist.*, 133 S. Ct. at 711, citing *S. Florida Water Mgmt. Dist.,* 124 S. Ct. at 1545. The Supreme Court applied this logic regarding the flow of polluted storm water out of a concrete channel within a river, which it found did not violate the CWA NPDES requirement because the source and destination waters were not meaningfully distinct. The instant case resembles *Los Angeles*. The culvert structurally and functionally resembles the concrete channel. Ditch C-1 and Reedy Creek are connected via the culvert in such a way that they are aspects of the same water body.

B. The Culvert is not a point source under the Unitary Waters Theory.

The Eleventh Circuit has elaborated on the question of whether point sources that do not generate pollutants fall under the NPDES requirement when navigable waters are treated unitarily. *See Friends of Everglades*, 570 F.3d at 1228 (EPA's regulation reading of the CWA NPDES requirement to operate under the unitary waters theory is reasonable given the ambiguity in the statutory provision). Under this theory, meaningful distinction between navigable waters is irrelevant in classifying polluted water movement as an "addition" or "transfer." An "addition" of pollutants to navigable waters can only occur when the navigable water acting as a source is unpolluted prior to discharge into another navigable water. The CWA's meaning of "addition" in light of the dichotomy between unitary and distinct navigable waters is unclear and open to reasonable administrative interpretation.

Implementation of the unitary waters theory to determine that movement of already polluted waters between navigable waters does not independently require a permit is therefore

reasonable. *Friends of Everglades*, 570 F.3d at 1228 (EPA interpretation of navigable waters under unitary water theory demands *Chevron* deference owed to agencies interpreting statutes); *See Chevron,* 467 U.S. 837 (administrative agencies entitled to interpret statutes under their purview in a reasonable manner).

Under the unitary view, addition of pollutants via a point source occurs only when pollutants enter navigable waters, and not when navigable waters flow into each other. Ditch C-1 and Reedy Creek are both navigable waters of the United States, connected via the culvert on Mr. Bonhomme's property. The culvert does not add any pollutants into the water flowing through it. Rather, arsenic from Mr. Maleau's spoil piles leeches directly into the water of Ditch C-1 during rainstorms. Polluted water then moves from a navigable water to another. Viewed unitarily, this movement is a "transfer" between two sections of the same body of water, not a discharge into navigable waters. *See generally Huffman* (the unitary waters theory exception applies only when polluted water is transferred between navigable waters).Because the culvert does not discharge, it cannot be considered a point source. Mr. Bonhomme thus does not violate the CWA by the culvert's presence on his land.

The EPA's promulgation of the unitary water theory in its dispensation of the CWA is a reasonable interpretation of statutory language deserving *Chevron* deference. The theory states that movement of pollutants from one navigable water into another is not an "addition" of pollutants. Because both Ditch C-1 and Reedy Creek are navigable waters, and the culvert does not add pollutants to the water, Mr. Bonhomme is not liable for the culvert's outflow.

CONCLUSION

Mr. Bonhomme's proper standing under Article III of the Constitution gives him standing to bring a citizen suit under the CWA; therefore, he possesses the substantive right sought to be enforced in this case and is the real party in interest. In addition, the citizen suit provision of the CWA does not bar foreign nationals from bringing suit. Furthermore, Mr. Bonhomme properly pleaded his claim for relief against Mr. Maleau, as Mr. Maleau's spoil piles are point sources that discharge pollutants into Ditch C-1 and Reedy Creek, which are navigable waters under 33 U.S.C. § 1362 (7) and (12). Therefore, the court should REVERSE the District Court's dismissal of Mr. Bonhomme's complaint. The culvert on Mr. Bonhomme's property is not a point source, and thus Mr. Bonhomme does not violate the CWA. Therefore, Progress and Mr. Maleau failed to adequately state a cause of action, and the court should REVERSE the District Court's decision not to dismiss Mr. Maleau's claim.