Nos. 13-1236

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TWELFTH CIRCUIT**

---

**SHIFTY MALEAU,**

***Respondent - Appellee, Cross Appellant***

**and**

**STATE OF PROGRESS,**

***Appellee, Cross Appellant,***

**-v.-**

**JACQUES BONHOMME,**

***Petitioner - Appellant, Cross-Appellee.***

---

ON PETITION FOR REVIEW OF A DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PROGRESS.

---

# Brief for the Respondent - Appellee, Cross Appellant

---

Team 69
From the Firm of
Eight Briefs Kills Trees and Associates
69 Progress Street
Progress City
State of Progress

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**CASES: ..... PAGE**

**STATUTES:**



**REGULATIONS:**



**RULE:**



**MISC.:**

## ISSUES PRESENTED

1 Did the District Court err in granting Progress and Maleau's motion to dismiss based on the finding that Bonhomme is not a party of interest under Federal Rules of Civil Procedure 17?

2 Did the District Court err in granting Progress and Maleau's motion to dismiss based on the finding that Bonhomme is not a citizen as defined CWA §§ 505(g), 502(5), 33 U.S.C. §§ 1365(g), 1362(5), because he is a French national, and therefore ineligible to bring a citizen suit under CWA § 505, 33 U.S.C. 1365?

3 Was the District Court correct in asserting that the slag piles are not point sources under the CWA, and granting Maleau's motion to dismiss based on that issue?

4 Did the District Court err in granting Maleau's motion to dismiss based on the finding that Ditch C-1 is not a navigable waterway?

5 Did the District Court err in finding that Reedy Creek is not a navigable waterway under the CWA and denying Maleau's motion to dismiss on that basis?

6 Did Bonhomme violate the CWA by adding arsenic to Reedy Creek through a culvert on his property? Is Bonhomme liable for the arsenic added to Reedy Creek because the culvert conveys those pollutants to Reedy Creek even if he is not the but-for cause?

## STATEMENT OF JURISDICTION

### A. District Court Jurisdiction

Jurisdiction in the United States District Court for the District of Progress was proper under 28 U.S.C. § 1331, "Federal Question Jurisdiction," because this case involves a civil action brought under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* Jurisdiction in the district court was also proper under 28 U.S.C. § 1355 because the action sought to recover a fine incurred under an act of Congress. Finally, jurisdiction was proper under 33 U.S.C. § 1319(b), which provides that the United States may bring civil actions to enforce the provisions of the

Clean Water Act in the United States District Courts where the alleged violators reside or do business.

**B. Court of Appeals Jurisdiction**

Jurisdiction is proper in this Court under 28 U.S.C. § 1291 because the United States District Court for the District of Progress entered a final judgment which "'end[ed] the litigation on the merits"' and left "' nothing for the [district] court to do but execute the judgment."' *Brotherhood of Locomotive Engineers v. Springfield Terminal Ry. Co.,* 210 F.3d 18, 24 n.5 (1st Cir. 2000) (quoting *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 373 (1981)).

On July 23, 2012, the district court entered an opinion and order granting the *Intervenor-Plaintiff- Appellant*'s motion to dismiss on multiple grounds. Bonhomme filed a timely notice of appeal to this Court. The State of Progress and the District Court for Progress are within the jurisdiction of the Twelfth Circuit. Certiorari was granted by that court on September 14th 2013.

## STATEMENT OF THE FACTS

Shifty Maleau and his company deposit overburden and slag onto their property in Jefferson county as part of an industrial mining operation located in another county. The property on which they deposit the slag is dry and located next to Ditch C-1, (the Ditch) which seasonally fills with water. When it rains the rainwater runs off the piles of slag, and some of it washes into the Ditch. Water from that Ditch then travels several miles before going into a culvert and eventually ending up in Reedy Creek. From there the water flows into Wildman Marsh where it dissipates. There is no evidence of water from the Marsh flowing into any other body of water. The Marsh is a seasonal home for migrating birds, and water from it is piped to a nearby interstate highway rest stop.

Jacques Bonhomme owns a portion of the Ditch and the culvert. He asserts that there is arsenic in the slag piles, which flows into Reedy Creek through his culvert in violation of the Clean Water Act (CWA). Despite owning the culvert through which any alleged pollutants discharge into Reedy Creek, Bonhomme filed a citizen suit under (CWA) §505, 33 USC §1365 alleging violations of that statute from Maleau's mining activity. The State of Progress later filed a suit against the Bonhomme claiming that he was in violation of the Clean Water Act.

In response to these consolidated suits the District Court found for Maleau and the State holding that Bonhomme was liable under the CWA for discharges on his property. Bonhomme and Maleau appealed and counter appealed, respectively, and the United States Court of Appeals for the Twelfth Circuit granted certiorari.

## PROCEDURAL HISTORY

Jacques Bonhomme sued Shifty Maleau for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2012), under the citizen suit provision of the statute, 33 U.S.C. § 1365. Bonhomme alleges Maleau piled gold mining overburden, waste rock, and dirt adjacent to Ditch C-1 in such an arrangement that rainwater runoff adds arsenic to Ditch C-1. Bonhomme also alleges the Ditch carries the arsenic through a culvert under his farm road and discharges into Reedy Creek, an interstate, navigable water.

State of Progress filed a citizen suit against Bonhomme alleging he violated the CWA by adding arsenic from his culvert, a point source, into Reedy Creek. Maleau intervened in Progress's action against Bonhomme under CWA § 505(b)(1)(B). Maleau and Progress moved to consolidate their case with *Bonhomme v. Maleau*. Bonhomee did not object, and the United States District Court for the District of Progress consolidated the cases. Next, Bonhomme and Maleau each moved to dismiss. The District Court granted Progress's and Maleau's motion to

dismiss holding that Bonhomme is not a proper plaintiff. The District Court opined that even if Bonhomme had been able to maintain his suit, it would have found for Maleau on all issues, except that Reedy Creek is a water of the United States. Bonhomme then filed a timely appeal to the decision of the District Court to the Twelfth Circuit Court of Appeals. Maleau cross-appealed, taking issue with the District Court's decision that Reedy Creek is a navigable water.

## SUMMARY OF THE ARGUMENT

This Court should deny Bonhomme's appeal of the lower court's ruling and should grant Maleau's appeal in overturning the lower court's holding that Reedy Creek is a water of the United States under 33 U.S.C. § 1362(7), (12).

1. Bonhomme is not the real party in interest under FRCP 17(a) to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a). Precious Metals International is the real party in interest under FRCP 17 and the court below did not err in granting the motion to dismiss on this issue.

2. Bonhomme—a foreign national—is not a "citizen" under CWA § 505, 33 U.S.C. 1365 §§ 505(g), 502(5), 33 U.S.C. §§ 1365(g), 1362(5), and the court below did not err in granting the motion to dismiss on this issue.

3. Maleau's mining piles are not point sources under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14). The mining piles are not discernible, confined, and discrete conveyances. Furthermore, the mining piles are nonpoint sources because the surface water runoff is neither channeled nor collected. Finally, the runoff from the mining piles does not lead into a navigable water or waters of the United States. The court below did not err in granting the motion to dismiss on this issue.

4. Ditch C-1 is not a navigable waterway because (a) it does not connect to any navigable waterway and is not traditionally navigable, and (b) it is a point source and cannot be both a point source and a waterway. The court below did not err in granting the motion to dismiss on this issue.

5. Reedy Creek is not a navigable waterway of the United States. Under the test laid out by Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715 (2006), Wildman Marsh is not a navigable waterway and Reedy Creek is not a "water of the United States." The lower court erred in finding for Bonhomme on this issue.

6. Bonhomme is liable for discharge into Reedy Creek because Ditch C-1 and Bonhomme's culvert are both point sources under the Clean Water Act. Bonhomme, therefore, is liable for polluting Reedy Creek with Arsenic because he owns the culvert/point sources discharging the pollutant into Reedy Creek. The court below did not err in denying Bonhomme's motion to dismiss on this issue.

## ARGUMENT

### I. BONHOMME CANNOT MAINTAIN THIS ACTION

Bonhomme cannot maintain his suit under Rule 17(a) of the Federal Rules of Civil Procedure (FRCP) because he is not the real party in interest.

#### A. Bonhomme is not the Real Party in Interest pursuant to Rule 17(a) of the Federal Rules of Civil Procedure.

Fed. R. Civ. Pro. 17(a). FRCP 17(a)(1) states that:

> [A]n action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought: (A) an executor, (B) an administrator, (C) a guardian, (D) a bailee, (E) a trustee of an express trust, (F) a party with whom or in whose name a contract has been made for another's benefit, and (G) a party authorized by statute.

Fed. R. Civ. Pro. 17(a). This list is not meant to be exhaustive and anyone possessing the right to enforce a particular claim can be a real party in interest even if that party is not expressly identified in the rule. §1543Real Party in Interest—In General, 6A Fed. Prac. & Proc. Civ. § 1543 (3d ed.).

The negative purpose of Rule 17(a) is to assure a defendant that a judgment will be final and that res judicata will protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right. *Farrell Const. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 142 (5th Cir. 1990); *see Celanese Corp. v. John Clark Industries,* 214 F.2d 551, 556 (5th Cir.1954); Fed.R.Civ.P. 17(a) advisory committee's note to 1966 amendment, reprinted in 39 F.R.D. 84, 85; 6A C. Wright, A. Miller & M. Kane § 1543. Here, if PMI does not join the action as the actual holder of the substantive right, then there will be nothing to stop PMI from suing the defendant later on after the suit by Bonhomme has been substantively resolved. This is exactly the kind of problems the drafters of FRCP 17(a) foresaw when they drafted the rule.

The phrase, "real party in interest," is a term of art utilized in federal law to refer to an actor with a substantive right whose interests may be represented in litigation by another. Fed. Rule Civ. Proc. 17(a); *U.S. ex rel. Eisenstein v. City of New York, New York*, 556 U.S. 928, 934-35, (2009); Black's Law Dictionary 1154 (8th ed. 2004) (defining a "real party in interest" as "[a] person entitled under the substantive law to enforce the right sued upon and who generally ... benefits from the action's final outcome"). In this case, there is little doubt that PMI is entitled under the substantive law to enforce the right being sued upon and will certainly benefit from the action's final outcome, as PMI is a business competitor of Maleau's mining company. It is in direct competition with Maleau and his mining business. Furthermore, PMI conducted or paid for the sampling and analyses to support Bonhomme's contention that the arsenic in Reedy Creek and Wildman Marsh comes from Maleau. PMI pays the attorney and expert witness fees for Bonhomme in this case. Indeed, were PMI not a "real party in interest" under FRCP 17(a), it is doubtful that they would have invested as much time and money as they have into this case.

Finally, it is worth nothing that under FRCP 17(a)(3), the court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to join the action. In the defendant's initial response to Bonhomme's complaint, the defendant raised this issue and has given PMI ample opportunity to join the action as the real party in interest. PMI has not done this, and therefore, the trial court did not err in dismissing the case on the grounds that the Bonhomme is not the proper plaintiff.

**B. Bonhomme does not have Standing to Maintain this Action.**

Furthermore, it is important to note that the issue of a real party in interest is separate—but related to—the issue of standing. *See generally* §1542Real Party in Interest, Capacity, and Standing Compared, 6A Fed. Prac. & Proc. Civ. § 1542 (3d ed.). Bonhomme cannot maintain this suit because

doing so would be a violation of FRCP 17(a). We note, however, that this court may still raise the issue of third party standing and other jurisdictional issues *sua sponte* even if it was not initially argued in the lower court proceedings. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977).

Bonhomme does not have standing to bring the action. There are significant concerns as to whether Bonhomme would be able to satisfy the prudential limitation against third-party standing. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). The Court has recognized limits on the class of persons who may invoke the courts' decision and remedial powers—otherwise referred to as prudential standing requirements. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Even when the plaintiff has an alleged injury sufficient to meet the 'case or controversy' requirement imposed by Article III, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), the Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Warth*, 422 U.S. at 499.

## II. BONHOMME IS NOT A CITIZEN AND THEREFORE CANNOT BRING SUIT UNDER THE CLEAN WATER ACT.

Bonhomme cannot maintain his suit because he is not a citizen of the United States. Bonhomme is, in fact, a French national and therefore cannot bring a "Citizen Suit" under the Clean Water Act. 33 U.S.C. § 1365.

### A. If Congress Intended to Include Foreign Nationals in the Class of People who Could Bring a Citizen Suit, it Would have Explicitly Stated so.

There are two provisions in the Clean Water Act (CWA) that are at issue here. 33 U.S.C. § 1365(g) ("Citizen Suits) defines a "Citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1362(5) defines the term "person" as an individual, corporation, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

As Bonhomme noted in the lower court proceeding, the term "citizen" in 33 U.S.C. § 1365(g) could be construed to mean any individual without regard to nationality. However, if that were the case, Congress easily could have simply used the term "person," rather than the more specific term "citizen." The term "Citizen" denotes a U.S. citizen, and not merely "any individual." A *prima facie* reading of the term "citizen suit" would indicate that non-U.S. citizens cannot avail themselves of the citizen suit provision. There are many other terms that Congress could have used that do not include the term "citizen" (e.g., civil actions, civil enforcement, individual enforcement, etc.).

33 U.S.C. § 1365(g) and 33 U.S.C. § 1362(5) must be read in conjunction with each other. 33 U.S.C. § 1365(g) provides the definition for the term "citizen" as it is read in that chapter, but uses the term "person" in its definition. The term "person" is defined in 33 U.S.C. § 1362(5) for the remainder of Chapter 26 of Title 33, which includes 33 U.S.C. § 1365(g) ("Except as otherwise specifically provided, when used in this chapter. . . .").

A cursory reading of the plain language of the reading of the statute does denotes that a "person" is an individual, which Bonhomme reads as allowing *any* individual to sue regardless of nationality. The statute, however, must be read as a whole. The term "person" is defined as "an individual. . . of a State or any interstate body." Furthermore, nowhere in the CWA did Congress expressly authorize foreign nationals to commence citizen suits. There is nothing to indicate that the definitional list in 33 U.S.C. § 1362(5) is anything other than exhaustive, and it is noteworthy that it does not include references to foreign nationals. If Congress had meant to include foreign nationals in the list of what defines a "person," for purposes of the Clean Water Act, they would have done so.

Indeed, Congress did as much in other sections of the United States Code. For example, in 16 U.S.C. § 1532, which sets out definitions for the Endangered Species Act, the term "person" in subsection 13 is defined as "an individual, corporation, partnership, trust, association, or any other private entity; or any officer. . . of the Federal Government, of any State, municipality, or political subdivision of a State,

or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States." Like the CWA, the Endangered Species Act also includes a Citizen Suit provision. 16 USC § 1540(g).

Moreover, the Supreme Court has held that other definitions of the CWA should be construed narrowly. In *Solid Waste Agency of N. Cook Cnty v. U. S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001), the Court held that in defining the narrow phrase of "navigable waters" as the broader concept of "waters of the United States," 33 U.S.C. §1362(7), Congress did not deprive the term "navigable" of all meaning. Likewise, the definition of "Citizen" in the Clean Water Act does not deprive the term "citizen" of its meaning. Here, the lower court noted as much. From the list that Congress included in the statute as possible definitions of a "person," it is clear that Congress intended to broaden citizen suit plaintiffs beyond individuals, to include corporations, states, and other domestic entities. That does not mean, however, that Congress intended to broaden "citizen suit" plaintiffs to include those who are not U.S. citizens. Reading the statute otherwise would yield a curious result, where non-U.S. citizens would be able to sue under a "citizen suit." If this was Congress's intent, than Congress would have either expressly included foreign nationals in the definition (as it has in other statutes) or it would have used a term other than "citizen" in writing a private, civil action proceeding.

## III. MALEAU'S MINING PILES ARE NOT POINT SOURCES.

This court should uphold the decision of the lower court as Maleau's mining waste piles are not point sources under CWA § 502(12), (14), 33 U.S.C. § 1362(12), (14).

### A. Maleau's Mining Piles are not Discernible, Confined, and Discrete Conveyances.

The CWA defines discharge of pollutants as "(A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12). This section of the CWA then defines point source as

> any **discernible, confined, and discrete conveyance**, including but limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, or vessel or other floating craft from which pollutants are or may be discharged. [Point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture.

*Id*. at § 1362(14) (emphasis added).

Despite using a broad definition of point sources in order to best enact Congress's intent in passing the CWA, *see Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 188 (2d Cir. 2010) ("The 'definition of a point source is to be broadly interpreted' and 'embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.'" (quoting *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009) (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991)))), the definition of point source is not without limits. "[Courts] have also made clear, however, that the phrase 'discernible, confined, and discrete conveyance' cannot be interpreted so broadly as to read the point source requirement out of the statute." *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 219 (2d Cir. 2009). In *United States v. Earth Sciences, Inc.*, the court held the CWA was designed "regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes," but also held that "[t]he 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 the waters of the United States." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (emphasis added). Maleau's mining piles are not identifiable conveyances of pollution; the piles just represent what is left over from the mining process and do not, themselves, convey pollutants to navigable waters.

Maleau's mining piles contrast with vehicles, people, and pipes that actively discharge products, chemicals, and pollutants because the piles themselves do not and cannot actively discharge anything on their own. For example, in *Concerned Area Residents for Environment v.*

*Southview Farm*, the Second Circuit held that a truck with an attached manure spreader was a point source because it qualified as "rolling stock" or a "container," but the mining piles are neither containers nor spreaders that disseminate pollutants. *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118-19 (2d Cir. 1994).

Similarly, in *League of Wilderness Defenders v. Forsgren*, the Ninth Circuit held that aircraft equipped with tanks and mechanical sprayers that sprayed pesticides were point sources. *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002). The Second Circuit recently held that trucks and helicopters with spray apparatuses were point sources because those apparatuses were the source of the discharged pesticides. *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180, 188 (2d Cir. 2010). Maleau's mining piles differ from each of these point sources. Without the involvement of rainwater, nothing from the piles would be conveyed into any navigable waters. More importantly, surface water runoff that is neither collected nor channeled is a **nonpoint** source and thus not covered by the Clean Water Act. *Cordiano*, 575 F.3d at 221.

### B. Maleau's Mining Piles are Nonpoint Sources because Surface Water Runoff is neither Channeled nor Collected.

Though the definition of a point source has been interpreted broadly, the definition of point source also defines nonpoint sources through exclusion. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165-66 (D.C. Cir. 1982). Therefore, nonpoint sources are any sources of water pollution that are not associated with discrete conveyances. *Id.* Various courts from different circuits have held that surface water runoff, when not channeled or collected, is nonpoint source pollution, and because the runoff from Maleau's mining piles are neither channeled nor collected, it constitutes nonpoint source pollution and falls outside the purview of the CWA.

In *Cordiano*, the Second Circuit held that a berm at a gun club was not a point source because no leaching occurred; there was no evidence that lead from the berm had leached into the soil or surrounding waters. *Cordiano*, 575 F.3d at 223. Bonhomme has presented no facts that pollutants from the mining piles leached into the ground. Additionally, the court held that even if the berm was "described as a 'container,' or 'conduit,' the record contains no evidence that it serves as a 'confined and discrete conveyance' of lead to jurisdictional wetlands by these routes." *Id.* More importantly, the Second Circuit held that

> surface water runoff that is neither collected nor channeled does not constitute point source pollution . . . . Even assuming rain and flooding at the Metacon site may cause lead in the berm to migrate to jurisdictional wetlands via surface water runoff, SAPS has provided no evidence that such runoff is in any way "collected or channeled by man." Thus, there is insufficient evidence that surface water runoff from the berm constitutes a discharge from a point source, and such runoff is outside the ambit of the CWA permit requirement.

*Id.* (internal citations omitted). Just like the berm in *Cordiano*, Maleau's mining piles are not discrete conveyances bringing pollutants to navigable waters, and the surface water runoff caused by rain is not collected or channeled. As a result, this constitutes nonpoint source pollution, and Maleau's mining piles do not fall under the authority of the Clean Water Act.

Two cases from the Fourth Circuit provided the foundation for the Second Circuit's decision in *Cordiano*. First, in *Appalachian Power Co. v. Train*, the Fourth Circuit set aside EPA rainfall runoff regulations and remanded for clarification about the scope of the regulations because Congress's definition of point sources does not include "unchanneled and uncollected surface waters." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). The court distinguished the challenged regulations from regulations that governed contaminated runoff that was normally routed into a collection system, thus constituting a point source. *Id.* In *Appalachian Power Co.*, polluted runoff that was collected and/or channeled fell within Congress's "limited definition of 'point source' to 'any discernible, confined or discrete

conveyance,'" but runoff that was neither collected nor channeled cannot be a point source. *Id.* Runoff from Maleau's mining piles are not routed into collection systems as part of Maleau's mining industry, and they are not point sources.

Second, even though the Fourth Circuit upheld regulations governing coal preparation plants, it did so because the regulations sufficiently distinguished between point sources and nonpoint sources and restricted the regulations from only pertaining to discharge from point sources. *See Consolidation Coal Co. v. Costle*, 604 F.2d 239, 250 (4th Cir. 1979), *rev'd on other grounds*, 449 U.S. 64 (1980), ("The Act restricts the administrator's authority to the regulation of discharges from point sources. Non-point sources are subject only to analysis, study, and publication information. The Act defines a point source as follows: The term 'point source' means any discernible, confined, and discrete conveyance, included but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, (or) rolling stock . . . from which pollutants are or may be discharged. This definition excludes unchanneled and uncollected surface waters."). The Fourth Circuit thereby acknowledged the difference between point sources and nonpoint sources, and held that surface water runoff that is not channeled or collected is not a point source. *Id.*

### C. Runoff from the Mining Piles does not lead into Navigable Waters or Waters of the United States.

Alternatively, assuming *arguendo* that Maleau's mining piles were discrete conveyances of pollution, they would still not be point sources because they did not convey those pollutants to waters of the United States. "The 'definition of a point source' . . . 'embrace[es] the broadest possible definition of any identifiable conveyance from which pollutants might **enter waters of the United States**." *Peconic Baykeeper, Inc.*, 600 F.3d at 188 (emphasis added). Maleau's

mining piles are not identifiable, active conveyers of pollution, and even if they were, the mining piles do not bring pollutants to waters of the United States; thus, they are not point sources.

In *Sierra Club v. Abston Construction Co., Inc.*, strip mining processes created spoil piles which were "highly erodible." *Sierra Club v. Abston Constr. Co., Inc.*, 620 F.2d 41, 43 (5th Cir. 1980).

> Rainwater runoff or water draining from within the mined pit at times carried the material to adjacent streams, causing siltation and acid deposits. In an effort to halt runoff, the miners here occasionally constructed "sediment basins," which were designed to catch the runoff before it reached the creek. Their efforts were not always successful. Rainfall sometimes caused the basins to overflow, again depositing silt and acid materials into Daniel Creek.

*Id.* The Fifth Circuit held that

> [g]ravity flow, resulting in a discharge **into a navigable body of water**, may be part of a point source discharge **if the miner at least initially collected or channeled the water and other materials**. A point source of pollution may also be present where **miners design spoil piles from discarded overburden such that,** during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials . . . . Conveyances of pollution formed either as a result of natural erosion or by material means, and which constitute a component of a mine drainage system, may fit the statutory definition and thereby subject the operators to liability under the Act.

*Id.* at 45 (emphasis added). Though the Fifth Circuit held that spoil piles **could** be point sources when rainfall runoff carries pollutants from mining piles through erosion-created ditches, gullies, and other "conveyances" into **navigable waters**, *id.*, Maleau's mining piles still would not be point sources because the rainwater runoff does not flow into a navigable water. Ditch C-1 is not a navigable water, and therefore the mining piles, by definition, cannot be point sources. *See* Part IV.

Bonhomme may try to argue that the erosion-created pathways for the rainfall runoff in the instant case are congruent to the facts in *Sierra Club*. While the facts are similar, one major

difference negate's Maleau's mining piles from being considered a point source: Maleau, as the miner, did not initially collect or channel the runoff. In *Sierra Club*, the miner had tried to halt runoff with sediment basins. *Sierra Club*, 620 F.2d at 43. This plan failed as rain flooded the basins resulting in overflow that then led into the creek. In contrast, Maleau never tried to collect, contain, or channel the surface water runoff. In order for erosion channels to be point sources, the miner must have been involved in initially channeling or planning the location of the spoil piles specifically to drain the mines. *Id.* at 45. Maleau had no involvement in having the runoff lead into the Ditch, and therefore the natural surface water runoff is still a nonpoint source.

**IV. DITCH C-1 IS NOT A NAVIGABLE WATERWAY.**

The Ditch is not a navigable waterway, or a water of the United States, as defined by the CWA. This is because Reedy Creek and Wildman Marsh are not navigable waterways. The Ditch therefore has no hydrological connection to any navigable waterways, and is not considered a navigable waterway under any test put forth in *Rapanos*. Even if Reedy Creek or Wildman Marsh is incorrectly found to be navigable, the Ditch still cannot be a navigable waterway because it is a point source, and cannot be both a point source and a navigable waterway.

While evaluating these issues, it is important for this Court to take notice of the fact that binding precedent has been set by the Supreme Court in, *Rapanos v. US,* 547 U.S. 715 (2006), determining the extent of the term navigable waterways. The Court, again took up the issue in *Sacket v. EPA,* 32 S.Ct. 1367 (2012), but that case was decided on other grounds, and the Supreme Court did not reexamine the meaning of navigable waterways. By neglecting to change or clarify its interpretation of navigable waterways as decided in *Rapanos*, the Court sent a

strong signal that *Rapanos* is the final word on this aspect of the CWA. However, there are still numerous unclear and contradictory holdings from lower courts, dating from both before and after *Rapanos*. Additionally, there are rules and decisions from several federal agencies which go further than the Supreme Court allows. Bonhomme may try to confuse the issue by citing to these cases or rules. However, it is a basic tenant of our legal system that the Supreme Court has the last word on interpreting the law. Although the agencies and lower courts may be instructive in how to interpret the Supreme Court, they cannot contradict the holdings of the highest court in any given area. This is not changed simply because the holding of a case may be unclear, as is the case in *Rapanos*, and the holdings of that Court still govern.

### A. Ditch C-1 Is Not A Navigable Waterway Because It Does Not Connect To Any Navigable Waterway and Is Not Traditionally Navigable.

The Ditch is not traditionally navigable since it cannot be used for waterborne transportation, and has not been used for such. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 407 (1940). Since the Ditch is not traditionally navigable it must pass one of the tests enumerated in *Rapanos* in order to be considered a navigable waterway. It is not necessary to parse which test applies because the ditch is not considered a navigable waterway by either the pluralities continuous surface connection test, or Justice Kennedy's significant nexus test. In order to examine these tests it must noted that, as will be discussed below, neither Reedy Creek, nor Wildman Marsh are navigable waterways according to the CWA.

The plurality in *Rapanos* held that the traditional definition of a water of the United States is a "[c]ontinuously present, fixed body of water, as opposed to ordinarily dry channels through which water occasionally flows." *Rapanos* 547 U.S. at 733. However, water systems and wetlands that do not meet this traditional standard can still be considered a navigable waterways if they meet a two-factor test. *Id* at 743. It must be connected to a channel which

"contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters)," and it must also have "a continuous surface connection with that water." *Id*.

In this case neither factor of the test is met. The first factor is not met because the Ditch does not connect to a water of the United States through a channel, or in any other way. Additionally, it does not have a continuous surface connection with any other water, navigable or otherwise. The Ditch is dry for large portions of the year, thus violating the continuous requirement of the second factor, and it goes under a culvert before joining Reedy Creek, thus violating the surface part of that factor. Therefore, the ditch is not a water of the United States as defined by the plurality of the Supreme Court in *Rapanos*.

However, this test is superfluous because, as will be shown below, the concurrence is the governing standard, and it is Justice Kennedy's significant nexus test which should be applied. Under that test the Ditch is not a navigable waterway. Justice Kennedy states that the correct test for "a water or wetland [is that it] must possess a significant nexus to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring) (citing *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs,* 531 U.S. 159, at 576 (2001)). One hundred percent of the liquid water from the Ditch goes into Reedy Creek and one hundred percent of the liquid water in Reedy Creek goes into Wildman Marsh, neither of which is navigable or could reasonably be made so. Therefore, there is no nexus with a navigable waterway either significant or otherwise, and the Ditch cannot be considered a navigable waterway under Justice Kennedy's test.

Bonhomme may argue that these tests apply only to wetlands, but this is not the case. The tests were established to determine if waters or wetlands, which are not traditionally

considered navigable, are considered navigable waterway under the CWA. Since the Ditch cannot be used for transportation, it does not meet the traditional definition of a navigable waterway. *Appalachian Electric Power Co.*, 311 U.S. at 407. Yet its application under the CWA must still be evaluated. In order to do this one or both of the *Rapanos* tests must be applied.

Moreover, the Ditch could easily meet the traditional definition of a wetland since it is not a permanent body of water, but rather an intermittent flow of water that is occasionally wet and occasionally dry. The EPA defines wetlands as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 230.3(t) (2013). The Ditch meets this criteria and therefore should be considered under the same tests used to determine if other wetlands are navigable waterways.

All of the water in the Ditch empties into Reedy Creek, which in turn empties into Wildman Marsh. However, since neither of these features are navigable waterways, the Ditch does not have a nexus or a continuous surface connection to a navigable waterway, and therefore cannot be considered a navigable waterway under the Supreme Courts jurisprudence in *Rapanos*.

**B. Ditch C-1 Is Not A Navigable Waterway Because It Is A Point Source And It Cannot Be Both A Point Source And Navigable Waterway.**

As discussed below, the Ditch, and or the culvert at its terminus are point sources. Features such as the Ditch are explicitly named as point sources by the CWA. Section 502 of the CWA defines point sources as "any discernible, confined and discrete conveyance, including but not limited to any pipe, **ditch**, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which

pollutants are or may be discharged." CWA § 502(14) (emphasis added). The courts must look first to the language of the statute, rather than its interpretation by the Army Corps. In this case, ditches such as the Ditch in question which convey pollutants, are explicitly named as point sources, and therefore must be considered as such, regardless of the claims of any agency. This has been confirmed by the plurality in *Rapanos*. *Rapanos* 547 U.S. at 736.

Even before this principle was enumerated in *Rapanos,* courts considered ditches and culverts such as the one in question to be point sources. For example in *Dague v. City of Burlington,* the Second Circuit found that a culvert connecting a polluted area to a body of water was a point source. *Dague v. City of Burlington,* 935 F.2d 1343, 1354 (2d Cir.1991), *rev'd in part* 505 U.S. 557 (1992). Such point sources do not need to be the original source of an alleged pollutant, they only need to convey the pollutant to 'navigable waters. *South Fla. Water Management Dist. v. Miccosukee Tribe,* 541 U.S. 95, 105 (2004).

The Supreme Court has established in *Rapanos* that a point source cannot simultaneously be a navigable waterway since the definition of a point source includes the "discharge of pollutants", and the definition of discharge of a pollutant means "any addition to navigable waters." CWA § 502. Since a point source is defined by its relation to a navigable waterway the two cannot be one in the same and must be, as the Supreme Court has found, "separate and distinct categories." *Rapanos*, 547 U.S. at 736. Moreover, the separate classification of such "ditches, channels and conduits" as point sources has been found by the court to mean that they are "by and large not waters of the United states." *Id.*

Because the Supreme Court has held that point sources are not navigable waterways, and the ditch is a point source, it is not a navigable waterway under the CWA.

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

### A. Reedy Creek Is Not A Navigable Waterway Under Justice Kennedy's Test In *Rapanos*.

Reedy Creek is not a traditionally navigable waterway. For many years navigable waterways were considered waterways, which are "navigable in fact." *The Daniel Ball*, 77 U.S. 557, 563 (1870). Reedy Creek is not navigable in fact because a boat has never been used on it, and could not be so used without significant improvements. However, the CWA uses navigable as a defined term, and the Supreme Court has made clear that the navigable waterways can include some waterways that are not traditionally navigable. *Rapanos*, 547 U.S. at 740. The Supreme Court in *Rapanos* set out several tests to determine if waters which are not traditionally navigable, are considered navigable waterways under the CWA. *Rapanos*, 547 U.S. at 742, 759. Since Reedy Creek is not traditionally navigable one of the *Rapanos* tests must be used to determine if it is a navigable waterway under the CWA.

The correct test to apply is Justice Kennedy's. In his binding concurrence Justice Kennedy stated that "to constitute 'navigable waters' under the act a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact or could reasonably be made so." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring). When such a test is applied to Reedy Creek it becomes clear that it is not a navigable waterway.

Neither Reedy Creek, nor any water it is connected to could reasonably be made navigable in fact. To be navigable in fact, it must be susceptible to boat travel or could reasonably be made so. *Appalachian Electric Power Co.*, 311 U.S. at 407. Although details are scarce in this area, it has been stipulated that Reedy Creek could not be used for waterborne transportation even with "reasonable improvements". The same is true for Wildman Marsh and Ditch C-1, the only other water bodies to which Reedy Creek is in any way connected.

This is an extremely unusual type of hydrological connection. In almost all other cases the water in Wildman Marsh would connect in some way to a river or an ocean. Such a connection to a navigable waterway may theoretically render both Wildman Marsh and Reedy Creek navigable waters under Justice Kennedy's test. However, in this very unusual situation, there is no evidence that the water from Reedy Creek goes anywhere other than the Marsh. Maleau will concede that there is a significant nexus between Reedy Creek and Wildman Marsh, but without a connection to a navigable waterway this is irrelevant. Justice Kennedy stated that in order for wetlands to "possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' . . . the wetlands, either alone or in combination with similarly situated lands in the region, [must] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring). In this case there is no connection of any kind between Reedy Creek and navigable waterways. Therefore, under Justice Kennedys test, Reedy Creek is not a navigable waterway under the CWA.

**B. Justice Kennedy's Test In *Rapanos* Is The Correct Test To Apply.**

Bonhomme may argue that Justice Kennedy's test is not the correct test to apply, however this is incorrect. "When a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose." *Marks v. United States,* 430 U.S. 188, 193 (1977). This rule of statutory interpretation was applied to navigable waterways in the CWA by *United States v. Gerke Excavating, Inc.,* 464 F.3d 723, 724 (7th Cir. 2006). In the instant case, Justice Kennedy's opinion best fits this test. In almost every case, any holding that Justice Kennedy would reach restricting federal authority would gain the

support of himself plus the four justices of the plurality, and any holding he reached authorizing federal power would be supported by himself and the four dissenters. Therefore, his holdings would be in the majority in all but a few rare instances.[1]

Since Justice Kennedy's opinion would be supported by a majority of the justices it is the binding opinion of the Court. *Marks,* 430 U.S. at 193. This has been upheld by every Circuit Court who has heard the issue and decided on a binding interpretation of *Rapanos*. *See, e.g.*, *United States v. Gerke*, 464 F.3d 723 (7th Cir. 2006); *N. California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007); *United States v. Robison,* 521 F.3d 1319 (11th Cir. 2008). Numerous other courts have heard the issue and declined to interpret *Rapanos* claiming that the factual situation presented to them demonstrated CWA authority under any test. *See, e.g.*, *United States v. Johnson,* 467 F.3d (1st Cir. 2006); *United States v. Bailey,* 571 F.3d 791 (8th Cir. 2009); *United States v. Lucas,* 516 F.3d 316 (5th Cir. 2008)**,** cert. denied**,** 129 S. Ct. 116 (2008**).** Importantly, no Circuit Court to date has ruled that Justices Kennedy's holding is not binding, or that any other holding should overrule it in a case where they may contradict.

Bonhomme may also argue that Justice Kennedy's test is only meant to apply to wetlands, or lands with saturated soils. However this is not the case. His test was designed to apply to any peripheral areas that are not traditionally navigable, but may impact water quality. Justice Kennedy and the Court in *Solid Waste* before him stated that it applies to, "waters or wetland." *Rapanos* 547 U.S. at 759. Citing (*Solid Waste Agency of N. Cook Cnty.,* 531 U.S. at 576). The term "or waters" clearly demonstrates that Justice Kennedy meant something other than just wetlands, and this is born out by logic. It would make no sense to have one test for

[1] It is possible that Justice Kennedy would vote against Federal authority if there were a slight surface hydrological connection. In that case he would be opposed 8-1. However, the dissent stated that the Army Core should be given more leeway. It is unlikely that the Army Core would choose to bring an action in that very limited case, and therefore unlikely that Justice Kennedy would ever be in the minority.

wetlands and another for peripheral waters, since both are governed by the same statutory definitions and the same scientific principles of pollution dispersal.

### C. Wildman Marsh Is Not a Navigable Waterway.

Bonhomme may further argue that Reedy Creek is navigable by virtue of its nexus to Wildman Marsh. However, in order to prove this they would need to demonstrate that Wildman Marsh is itself a navigable waterway despite the fact that it is not navigable by boat and does not have a hydrological connection to any navigable waterways. There are three possible ways that Bonhomme may attempt to prove that Wildman Marsh is a navigable waterway under the CWA. They may claim that that (1) Wildman Marsh is home to migratory birds, (2) Wildman Marsh is a water of the United States because it supports commerce at a highway rest stop, or (3) The Marsh is a water of the United States simply because it is federal land.

(1) The Marsh is not a navigable waterway simply because migrating birds land there. The Supreme Court has stated that migratory birds alone do not give federal CWA authority over isolated wetlands. *Solid Waste Agency of N. Cook Cnty v. United States Army Corps of Eng'rs,* 531 U.S. 159, 163 (2001) [herinafter *SWANCC*]. In *SWANCC*, the Army Corps argued that migratory birds affect interstate commerce and the water where they land is therefore within CWA regulatory authority. The Supreme Court definitively struck this down saying that the CWA has limits short of the Commerce Clause. *SWANCC,* 532 U.S. at 173. Therefore, it is not relevant that the migratory birds here affect interstate commerce, since it is the limits of the CWA, not the limits of the Commerce Clause that restrain federal authority in this area.

The court was clear in *SWANCC* that the migratory bird rule should not apply, and this is not changed here simply because there is a definite dollar value of the birds. This is the only

thing separating the fact pattern here from other migratory bird cases, and authority cannot be extended on this ground.

(2) The fact that water for the rest stop comes from Reedy Creek is not relevant to this proceeding. The EPA defines navigable waters as in part, "intrastate lakes, rivers, and streams, which are utilized by interstate travelers for recreational or other purposes." EPA regulatory definition, 38 Fed. Reg. 34165. However, the Supreme Court refused this argument in *Rapanos*, claiming that this definition was too broad, and that commerce power did not necessary create CWA authority. *Rapanos*, 547 U.S. at 724. The plurality pointed out that the CWA was not meant to extend to the outer limits of the Commerce Clause, but was instead self-limited by terms such as "navigable." *Id*. They correctly reasoned that if Congress had intended the CWA to extend to the outer limits of federal authority they would have used clear, unambiguous language, and not self limited themselves to navigable waterways. *Id.*

Moreover, the CWA is based on natural hydrological connections. To say that water moved by people can create federal authority stretches the CWA beyond its authority and the congressional intent behind it. In this case the water used as drinking water at the rest stop is piped out of the Creek, then most likely filtered, and piped again to another location. All of this movement only happens because of energy introduced by people, in this case probably the federal transportation authority. To say that one branch of government or even a private person, can pick up and move water to another location, and thus gain federal authority over that location is tantamount to saying that the CWA has absolutely no limits. By that standard, any employee of the Army Corps in *Rapanos* could have gotten jurisdiction over Rapanos's wetlands simply by picking up a bottle of water from the Atlantic Ocean and dumping it into Rapanos's backyard.

The Supreme Court has established that the CWA has limits, and by saying that water can be artificially moved to expand CWA authority downstream from where that water is moved undermines all of those limits and defies logic.

(3) The Marsh is not a navigable water simply because it is federal land. Navigable waters are a defined term under the CWA. *Rapanos* 547 U.S. at 730. In order to have legal authority, the federal government must show that the waters in question fall within the statutory or regulatory definitions set forth by Congress and empowered federal agencies. Here the EPA has stated that navigable waters are

> (1) all navigable waters of the United States, as defined in judicial decisions prior to the passage of the 1972 Amendments of the Federal Water Pollution Control Act, (FWPCA) (Pub. L. 92-500) also known as the Clean Water Act (CWA), and tributaries of such waters as; (2) interstate waters; (3) intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes; and (4) intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce.

EPA regulatory definition, 38 Fed. Reg. 34165. As discussed above, this definition greatly exceeds the scope of agency authority in this area. However, even under this vastly over expansive definition and the relevant case law, petitioner can point to no passage that gives authority over all waters that are connect to federally owned waters. With no statutory or judicial authority, the federal government simply has no authority to regulate these waters. To say that the federal government can regulate without the authorization of Courts, Congress, or even explicit agency approval would set a dangerous precedent, and would greatly undermine constitutional and democratic protections in our society.

## VI. BONHOMME IS LIABLE FOR DISCHARGE INTO REEDY CREEK BECAUSE THE DITCH AND CULVERT ARE POINT SOURCES.

The lower court's decision should be upheld because Bonhomme himself violates the Clean Water Act by adding arsenic to Reedy Creek through his culvert.

### A. Ditch C-1 and Bonhomme's Culvert are Point Sources under the Clean Water Act.

Maleau's mining piles, as illustrated in Part III, are not point sources under the Clean Water Act. While the mining piles do not meet the definition of point sources, Ditch C-1 and Bonhomme's culvert does fall under the definition of a point source. The Clean Water Act defines point source as

> any discernible, confined, and discrete conveyance, including but limited to any pipe, **ditch**, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operations, or vessel or other floating craft from which pollutants are or may be discharged. [Point source] does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1362(14) (emphasis added).

> However, when stormwater runoff is collected in a system of **ditches, culverts, and channels and is then discharged into a stream or river, there is a "discernable, confined and discrete conveyance" of pollutants, and there is therefore a discharge from a point source**. In other words, runoff is not inherently a nonpoint or point source of pollution. Rather, it is a nonpoint or point source under § 502(14) depending on whether it is allowed to run off naturally (and is thus a nonpoint source) or is collected, channeled, and discharged through a system of ditches, culverts, channels, and similar conveyances (and is thus a point source discharge).

*Northwest Envtl. Defense Center v. Brown*, 640 F.3d 1063, 1070-71 (9th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 1326 (2013) (emphasis added).

The runoff from Maleau's piles is collected in Ditch C-1, channeled through the Ditch and the culvert, and "then discharged into a stream or river . . . and there is therefore a discharge from a point source" because there is a "discernable, confined and discrete conveyance of pollutants." *Id.* Bonhomme is therefore responsible for the pollutants added to Reedy Creek

because they are added through a point source on his property in the form of Ditch C-1 and the culvert.

In *Dague v. City of Burlington*, the Second Circuit held that railroad culvert through which contaminants from a landfill that leached into groundwater and then into a pond which conveyed those contaminants into a marsh was a point source even though "any pollutants in water flowing through the culvert ha[d] already entered waters of the United States before they flow[ed] through the culvert." *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd in part*, 505 U.S. 557 (1992). The Second Circuit thus held that "discharge of a pollutant refers to **any point source** without limitation." *Id.* at 1355 (emphasis added). Consequently, even if Ditch C-1 was a navigable water, Bonhomme would still be liable for the discharge into Reedy Creek through his culvert because it is a point source.

Bonhomme's culvert is similar to the culverts in question in *Aiello v. Town of Brookhaven*, in which culverts that transferred groundwater leachate to a pond constituted point sources and imposed liability under the Clean Water Act. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d 81, 118 (E.D.N.Y. 2001). Bonhomme's culvert, not Maleau's mining piles, is the discrete and discernible conveyance of pollutants into Reedy Creek.

**B. Bonhomme is Liable for Polluting Reedy Creek with Arsenic.**

Bonhomme is liable for polluting Reedy Creek through Ditch C-1 and the culvert. The U.S. Supreme Court "has held that the Clean Water Act 'makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Rapanos v. United States*, 547 U.S. 715, 744 (2006) (quoting *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004)). Even though Maleau's mining piles are allegedly the original source of the chemicals added to Reedy Creek, Bonhomee is liable for

adding pollution because Bonhomme's Ditch and culvert **convey** the pollutants to Reedy Creek. *See also Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1144 (10th Cir. 2005) (holding that the owner of property containing an inactive gold mine could be liable under the Clean Water Act for discharges of pollutants from an abandoned mine shaft even though the owner never conducted any mining operations).

## CONCLUSION

For the foregoing reasons, the district court's grant of a motion to dismiss in favor of the Respondent - Appellee Cross Appellant, should be affirmed.