Team No. 7

C.A. 155 – 2013
C.A. 165 – 2013

In the United States

Court of Appeals for the Twelfth Circuit

JACQUES BONHOMME,

Plaintiff – Appellant, Cross-Appellee

v.

SHIFTY MALEAU,

Intervenor-Plaintiff-Appellant, Cross-Appellee,

v.

STATE OF PROGRESS

Plaintiff- Appellant, Cross-Appellee

ON APPEAL FROM
THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

BRIEF FOR JACQUES BONHOMME

Plaintiff-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

Cross-Appellee Jacques Bonhomme filed a complaint in the United States District Court for the District of Progress under the citizen suit provision of the Clean Water Act ("CWA") § 505, 33 U.S.C. § 1365. This appeal is from a Final Judgment entered by the district court on July 23, 2012, dismissing all but one of Bonhomme's claims. The district court's jurisdiction is based on 28 U.S.C. § 1331. This Court's jurisdiction is proper under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1311(a).

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

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

4. Whether Ditch C-1 is a "navigable water/water of the United States" under CWA § 502(7), (12), 33 U.S.C. § 1362(12), (14).

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

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

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress denying Bonhomme's motion for summary judgment. (R. at 10). Bonhomme brought a civil suit action under the CWA's citizen suit provision § 505, 33 U.S.C. § 1365, requesting all relief available. (R. at 4). The State of Progress, after proper notice, filed a citizen suit against Bonhomme. (R. at 5). Maleau intervened as a matter of right in Progress's action against Bonhomme under CWA § 505(b)(1)(B). *Id*. Both Progress and Maleau moved to consolidate the two cases because the facts

and law are identical, and Bonhomme did not object to this motion. *Id*. The district court granted the motion to consolidate, and each defendant filed motions to dismiss. *Id*.

The district court held that (1) Bonhomme is not a real party in interest contrary to Fed. R. Civ. P. 17 because he is a front for Precious Metals International, (2) Bonhomme is not a "citizen" entitled to file a citizen suit under CWA § 505 because he is a foreign national, (3) Ditch C-1 is not a navigable water because it is a point source, (4) Reedy Creek is a navigable water/water of the United States, (5) Maleau's mining waste piles are not "point sources" under CWA § 502(12), (14), because piles are not conveyances, and (6) Bonhomme violates the CWA by allowing pollutants added by Maleau to flow into Reedy Creek through his culvert. (R. at 2).

Bonhomme filed a Notice of Appeal challenging five holdings, excluding the holding that Reedy Creek is a water of the United States. *Id*. In turn, Maleau filed a Notice of Appeal challenging the district court's holding that Reedy Creek is a water of the United States under CWA § 502(7). *Id*. Progress filed a Notice of Appeal challenging the court's holding that Ditch C-1 is not a water of the United States. *Id*.

STATEMENT OF THE FACTS

Maleau operates an open pit and extraction mining facility in Lincoln County, Progress adjacent to Buena Vista River, a traditionally navigable water. (R. at 5). Maleau trucks the overburden and slag waste from his operation site to his property in Lincoln County and transfers it to his property in Jefferson County, Progress, situated adjacent to Ditch C-1. *Id*. During rain events, contaminated rainwater runoff from the waste piles are conveyed through channels and gullies created by gravity to Ditch C-1. *Id.* Ditch C-1 is a drainage ditch that runs from Maleau's property to Reedy Creek, passing through several agricultural properties before discharging through a culvert located underneath a farm road. *Id*. Ditch C-1 is three feet across and one foot

deep, on average, and contains running water for most of the year, except during annual periods of drought lasting several weeks to three months. *Id.*

Reedy Creek is about fifty miles long, partly flowing through the State of Progress and discharging into Wildman Marsh. *Id*. In New Union, the river is used as the water supply for a service area on Interstate 250, a federally funded, east-west interstate highway. *Id*. In both New Union and Progress, farmers divert the river for irrigation purposes, and their crops are later sold in interstate commerce. *Id*. Wildman Marsh is an extensive wetland and a vital avian foraging ground for migrating waterfowl during their twice-annual migration from the Arctic to the tropics and back. (R. at 5-6). Due to its size and importance for migratory birds, most of the wetland is contained within a federal refuge owned and maintained by the United States Fish and Wildlife Service ("USFWS"). (R. at 6).

The point where Ditch C-1 discharges into Reedy Creek is located under a farm road on the property of Jacques Bonhomme, a French foreign national. (R. at 5). Bonhomme is the President of Precious Metals International, Inc. ("PMI"), which is a Delaware incorporated company, and is headquartered in New York City. (R. at 6). Bonhomme's property is situated adjacent to the edge of the marsh, near the intersect of Reedy Creek and Wildman Marsh, and it has been used for large hunting parties with his business and social guests primarily for duck hunting. *Id*.

Before filing suit against Maleau, Bonhomme conducted tests of the water in Ditch C-1 and Reedy Creek, taking samples in both waters upstream and downstream of Maleau's property. *Id*. Arsenic, a well-known poison, is commonly associated with gold mining and extraction and was found in Bonhomme's samples. *Id.* Upstream of Maleau's property, arsenic is undetectable in both Ditch C-1 and upstream of the culvert flowing into Reedy Creek on Bonhomme's property. *Id*. But, just below Maleau's property, arsenic is detectible in high concentrations in Ditch C-1.

Id. Arsenic levels dissipate towards Bonhomme's property due to dilution of collected water flowing into the ditch. Similarly, just below the discharge of Ditch C-1 into Reedy Creek, arsenic is detectible in high concentrations. *Id*. Arsenic is also present in Wildman Marsh in lower concentrations due to Reedy Creek feeding into it further downstream. *Id*. So far, there have not been any reports of changes in the flora and fauna surrounding the hunting lodge; however, the USFWS has detected arsenic in three Blue-winged Teal found in Wildman Marsh. *Id*.

Bonhomme alleges that Maleau's mining waste piles are the source of the arsenic present in Ditch C-1, Reedy Creek, and Wildman Marsh. *Id*. Bonhomme claims that the arsenic fouls the water and wildlife in the area, causing him to fear using the marsh for hunting parties. *Id.* As a result, he has decreased his hunting parties from eight to two a year. *Id.* Maleau does not deny these allegations, but argues that the decline in hunting parties is more likely due to the general decline in the economy, causing a decline in profits made by PMI. *Id*.

The Attorney General of Progress filed suit against Bonhomme, and exclaimed that he intended to protect the waters of the state and Maleau, one of the region's largest employers and a citizen of the state. *Id*. The Attorney General claims that Bonhomme only filed suit against Maleau to reduce competition against PMI. *Id.* Bonhomme asserts that the Attorney General only filed suit against him for political payback to Maleau, who gave major contributions to the Attorney General's election campaign. *Id*. Bonhomme further alleges that Maleau is an unfair business competitor, hiring illegal aliens and attempting to circumvent the CWA by relocating mining waste from an area that would more obviously require a permit under the Act to a lesser water, Ditch C-1, in the hopes to avoid regulation under the Act. (R. at 6-7).

STANDARD OF REVIEW

The district court granted Maleau's motion for summary judgment. This Court reviews a district court's grant of summary judgment de novo. *Lefevers v. GAF Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012).

SUMMARY OF THE ARGUMENT

The district court erred in holding that Bonhomme is not a real party in interest under Fed. R. Civ. P. 17, that Bonhomme is not a citizen as defined by the CWA, that Ditch C-1 is not a "navigable water/water of the United States," that Maleau's mining waste is not a point source and that Bonhomme is liable under the CWA. The district court did not err in finding that Reedy Creek is a "navigable water/water of the United States" under the CWA.

The district court erred in holding that Bonhomme was not a real party in interest. Fed. R. Civ. P. 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." The function of this rule is to "require[] that the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United Healthcare Corp. v. American Trade Ins. Co., Ltd.*, 88 F.3d 563, 568 (8th Cir. 1996). Under this rule, corporate shareholders are precluded from bringing suit for derivative harm suffered as a result of an injury to the corporation. Maleau and the State of Progress argue that Bonhomme's employer, PMI, is the real party in interest because Bonhomme takes business acquaintances met through PMI on hunting trips to the affected land. However, the facts show that Bonhomme has alleged direct harm to his privately owned land due to a violation of the CWA, 33 U.S.C. §§ 1251-1387 (2012). (R. 4-5). Bonhomme uses the land at issue in his personal capacity for hunting outings with his personal friends and business acquaintances, not negotiations or other business dealings. (R. at

6). The personal use of the land affected shows that the harm suffered by Bonhomme due to the arsenic added to the waters of Ditch C-1 and Reedy Creek was direct.

Furthermore, PMI's payment of Bonhomme's attorney and expert witness fees does not preclude Bonhomme from bringing suit as the real party in interest. Third-party payment of legal fees does not divest the plaintiff of his right to bring suit. Such a scenario is a common occurrence envisioned by the American Bar Association's ("ABA") Model Rules of Professional Conduct Rule 1.8(f). So long as the client gives informed consent, hired counsel faces no conflict of interest, and there is no interference with the lawyer's representation of the named party, a non-party may offer to pay the named party's attorney's fees and other court costs. Bonhomme is quite business savvy, being a member of the Board of Directors of a major corporation. Likewise, a multi-national corporation that is well versed in complex business dealings and litigation such as PMI would almost certainly hire counsel that is familiar with the Model Rules of Professional Conduct. Due to the professional backgrounds of Bonhomme and PMI it is highly probable that the representation was in conformance with Rule 1.8(f), and therefore, did not preclude Bonhomme from bringing suit as the real party in interest under Fed. R. Civ. P. 17.

Bonhomme is a citizen under the CWA because the plain language of the citizen suit provision expands upon the traditional definition of a "citizen." According to the relevant sections, the party bringing suit must simply be a "person" with "an interest which may be adversely affected" by an alleged violation of the CWA. 33 U.S.C. §§ 1365(g), 1362(5). This broad definition of citizen allows for a variety of individuals and legal entities to bring suit under the CWA; therefore, the statute does not preclude foreign nationals from bringing suit. Unless Congress indicates otherwise, it would be unwise and unnecessary for the court to perform the legislative function of reading a restriction into the statute that is not evident from its current

language. Therefore, Bonhomme should be permitted to continue with the current citizen suit alleging direct harm suffered to his privately owned land due to a violation of § 301(a).

Both Reedy Creek and Ditch C-1 are "navigable waters" and "waters of the United States" under CWA § 502(7), (12), and Maleau's discharges into them are illegal. Reedy Creek is an interstate water that, while not traditionally navigable, does provide water for an interstate rest area, agricultural products which are sold interstate, and supports the flora and fauna in Wildman Marsh, which provides millions of dollars of revenue to the surrounding areas. (R. at 5-6). The district court erred in stating that an interstate water must conform to the first prong of *Lopez*, resting on the fact that Reedy Creek affects interstate commerce is enough for it to be classified as a "water of the United States." Though the district court erred in its reasoning, its holding was ultimately correct in finding that Reedy Creek is a "navigable water." (R. at 10).

The district court erred in ruling that Ditch C-1 is not a "navigable water" under the CWA because Ditch C-1 would be classified as a "water of the United States" under both the plurality test and the significant nexus test in *Rapanos v. U.S.* 547 U.S. 715 (2006). Ditch C-1 is a navigable water under the CWA as it maintains a relatively permanent flow of water and has a continuous surface connection and significant nexus with Reedy Creek and Wildman Marsh. at 5). Also, whether Ditch C-1 is a "point source" is not relevant to determining if it is a "water of the United States" under the CWA as the plurality's rational in *Rapanos* is not controlling.

Maleau is violating the CWA because his mining waste piles are "point sources" under the Act. Section 1311(a) states that "the discharge of any pollutant by any person shall be unlawful" unless authorized by a permit. "Discharge of a pollutant" is defined broadly as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). A "point source" is defined as "any discernable, confined and discrete conveyance… from which pollutants are or

may be discharged." *Id.* § 1362(14). The district court failed to understand that the term "point source" was to be construed broadly, and that gullies and naturally created channels that collect and convey pollutants to a "navigable water/water of the United States" satisfy the statutory definition of the term. Because the mining waste piles were situated in such a way to allow gravity to create discrete conveyances to Ditch C-1, and then Reedy Creek, the court erred in concluding that Maleau's waste piles were not a point source subject to regulation under the Act.

Last, liability attaches to Maleau and not Bonhomme because Maleau is responsible for discharging a pollutant into "navigable water/waters of the United States." Because the Act defines "discharge of a pollutant" as the point where the pollutant was added, liability must attach at the point of initial addition to the navigable water or tributary, regardless of how that pollutant is later conveyed to other waters.

ARGUMENT

I. JACQUES BONHOMME IS THE REAL PARTY IN INTEREST AS ENVISIONED BY FED. R. CIV. P. 17(a) AND MAY THEREFORE PROCEED IN THIS SUIT FOR HARM SUFFERED DUE TO A VIOLATION OF THE CWA §301(a), 33 U.S.C. §1311(a)

In the current matter, Jacques Bonhomme is suing Shifty Maleau for violation of the CWA § 301(a), 33 U.S.C. § 1311(a), under the jurisdiction of the citizen suit provision of that statute, CWA § 505, 33 U.S.C. § 1365, over direct harm sustained to Bonhomme's privately owned land located in the State of Progress. (R. at 4). Bonhomme alleges that arsenic has been added to the waters of Reedy Creek through rainwater runoff because defendant has "piled gold mining overburden, waste rock, and dirt adjacent to Ditch C-1 (or "the Ditch") in... Progress." *Id.* Bonhomme alleges that the Ditch carries the arsenic through a culvert under his farm road to discharge into Reedy Creek. (R. at 5).

Fed. R. Civ. P. 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." The function of this rule is to "require[] that the party who brings an action actually possess, under the substantive law, the right sought to be enforced." *United Healthcare Corp. v. American Trade Ins. Co., Ltd.,* 88 F.3d 563, 568 (8th Cir. 1996) (Defendant waived real party in interest defense by failing to raise it in timely fashion)*; accord Rawoof v. Texor Petroleum Co., Inc.,* 521 F.3d 750, 756 (7th Cir. 2008) (corporation's sole shareholder was not the real party in interest because he did not suffer direct, personal harm). The following discussion will explain that because Bonhomme is bringing suit to redress the direct harm suffered to his privately owned land, he has satisfied the requirements of Fed. R. Civ. P. 17(a) as the real party in interest.

A. The shareholder-standing rule does not preclude Bonhomme from bringing suit as the real party in interest under Fed. R. Civ. P. 17 because he has suffered direct harm from the alleged violation of the CWA.

Courts have imposed certain prudential standing limitations on a party's ability to bring suit in federal court in addition to the constitutional requirements of standing. *See Rawoof,* 521 F.3d 750, 756 (7th Cir. 2008) (plaintiff lacked standing because the harm was suffered by his employer). Fed. R. Civ. P. 17(a) is sometimes equated with these prudential limitations on third-party standing. *See RMA Ventures California v. SunAmerica Life Insurance Co.,* 576 F.3d 1070, 1073 (10th Cir. 2009) ("real party in interest requirement is essentially the codification of a well-established prudential-standing limitation precluding litigants from enforcing the rights of others").

The relevant prudential standing limitation in this case is the doctrine known as the shareholder-standing rule. "This rule holds that a shareholder generally cannot sue for indirect harm he suffers as a result of an injury to the corporation." *Rawoof,* 521 F.3d at 757.

Bonhomme's status as a shareholder of PMI and member of its Board of Directors does not preclude Bonhomme from bringing suit directly against Maleau because, "[t]here is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) (sole shareholders of domestic corporations conducting business in California, had standing to raise a constitutional challenge but were precluded from raising such claims on other grounds); *see also Niemi v. Lasshofer*, 728 F.3d 1252, 1260 (10th Cir. 2013) ("A plaintiff who can identify some way in which he or she suffered personally and directly as a result of the defendant's conduct...can proceed with or without the corporation in the case"). The following discussion will explain how Bonhomme squarely falls into this exception due to the direct harm sustained to his privately owned land.

Bonhomme has a direct interest in bringing suit in order to remedy the harm suffered to his privately owned property as a result of the arsenic discharged into the waters of Reedy Creek and Wildman Marsh from Maleau's waste piles. Bonhomme uses this land primarily for duck hunting trips with both his personal and business friends/acquaintances. (R. at 6). These hunting trips have decreased in frequency by approximately 75% annually due to fear over the effect fouled waters of the wetlands may have on the native water fowl. *Id*. Maleau and the State of Progress erroneously suggest that because the majority of Bonhomme's visitors were met through his association with PMI, the harm suffered to Bonhomme's land is actually harm suffered by PMI. The record makes clear that the trips to the property in question were for the purpose of hunting, not negotiations or other business dealings. *See id* (the property is used "primarily for duck hunting activities"). To assert that business acquaintances cannot take personal trips with one another for the sole purpose of pleasure and recreation is *argumentum ad*

absurdum. PMI has, at best, an indirect interest in the outcome of these recreational hunting trips. On the other hand, the facts show that Bonhomme has suffered a direct injury to his personal property, severely restricting the land's intended use and enjoyment of hunting.

With this in mind, Maleau and the State of Progress allege that PMI is the actual real party in interest under Fed. R. Civ. P. 17(a) as opposed to Bonhomme. However, if "plaintiffs [sic] injury is direct, the fact that another party may also have been injured and could assert its own claim does not preclude the plaintiff from asserting its claim directly" *Excimer Associates, Inc. v. LCA Vision, Inc.*, 292 F.3d 134, 140 (2nd Cir. 2002) (explaining that the critical question is whether or not the current plaintiff suffered direct or derivative harm). Furthermore, "if the plaintiffs are real parties in interest, Rule 17(a) does not require the addition of other parties also fitting that description." *HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1196 (3rd Cir. 1996) (holding that because all partners of the small limited partnership were before the district court, joinder of partnership entity was not required). In this case, the wrongful act of Maleau caused multiple injuries to multiple parties. Although PMI may have also been harmed due to the Maleau's pollutant discharge, its injury is wholly unrelated to the injury of Bonhomme. The district court erred in holding that Bonhomme was not the real party in interest under Fed. R. Civ. P. 17 for the current suit because he has suffered a direct, non-derivative injury to his real property at the hands of Maleau. For these reasons, Bonhomme respectfully requests that this court reverse the holding of the district court, and find that Bonhomme, and not PMI, is the real party in interest.

B. Rule 1.8 of the ABA Model Rules of Professional Conduct implies that third-party payment of fees does not preclude Bonhomme from bringing suit as the real party in interest as envisioned in Fed. R. Civ. P. 17.

The district court further erred when it reasoned that Bonhomme was not the real party in interest because PMI was "buying a plaintiff," (R. at 8), by providing the attorney and expert witness fees for Bonhomme. However, a third-party paying a plaintiff's legal fees does not divest the plaintiff of his right to bring suit. Payment of a third-party's legal fees is a common occurrence envisioned by the ABA's Model Rules of Professional Conduct Rule 1.8, which states in pertinent part:

> **(f)** A layer shall not accept compensation for representing a client from one other than the client, unless**:**
> **(1)** the client gives informed consent
> **(2)** there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and
> **(3)** information relating to representation of a client is protected as required by Rule 1.6

ABA Model Rules of Professional Conduct Rule 1.8(f). Assuming adherence to Rule 1.8(f), the relationship between PMI and Bonhomme's attorney would not preclude Bonhomme from remaining a plaintiff in the present litigation. By placing three conditions on attorneys in order to represent a client whose legal fees are being paid by a third-party, the ABA has expressed that such a relationship is not only allowed by the rules, but is expected in some cases; *a fortiori*, PMI's payment of Bonhomme's legal fees does not strip Bonhomme of his right to bring suit in his personal capacity.

The Supreme Court of New Jersey considered a case concerning the issue of an employee's legal fees being paid for by their employer in the case, *In the Matter of State Grand Jury Investigation*, 983 A.2d 1097 (N.J. 2009). In that case, a grand jury investigation was aimed at a contractor that had allegedly submitted fraudulent invoices for services rendered to a county

government. The investigation was focused on the contractor, as well as three employees. In response to the investigation, the company entered into a retainer agreement with four separate lawyers, three to represent the three respective employees and one to represent all "non-target current and former employees." *Id*. at 1099. The company gave notice to all employees that they were offering to provide counsel, free of charge, but the employee could hire private counsel if s/he so chose. All three employees opted to retain counsel provided by the company. *See id*. at 1101. The court in that case stated, *"*[a] synthesis of *RPCs* 1.7(a)(2), 1.8(f) and 5.4(c) yields a salutary, yet practical principle: **a lawyer may represent a client but accept payment, directly or indirectly, from a third party**..." *Id.* at 1105 (emphasis added).

Although it cannot be clear from the record, it is probable that the representation of Bonhomme by the attorney provided by PMI did not violate the Rules of Professional Conduct. Bonhomme is quite business savvy, being a member of the Board of Directors of a major corporation. Likewise, a multi-national corporation that is well versed in complex business dealings and litigation such as PMI would almost certainly hire counsel that is familiar with the Model Rules of Professional Conduct. Furthermore, unlike the situation in *State Grand Jury Investigation*, Bonhomme is not a potential witness against the third-party; therefore, a conflict of interest between the parties in this case is even less likely. It is not unreasonable to assume that all of the parties involved in this matter maintained an informed, consensual relationship in conformance with Rule 1.8, and therefore, this arrangement should not preclude Bonhomme from proceeding forward in this litigation as the real party in interest under Fed. R. Civ. P. 17(a).

II. A FOREIGN NATIONAL THAT HAS BEEN ADVERSELY AFFECTED DUE TO A VIOLATION OF THE CWA MAY SUE UNDER THE CITIZEN SUIT PROVISION OF THE CWA §505, 33 U.S.C. 1365.

Although his precise domicile is not clear from the record, Bonhomme is a French national who currently owns and maintains land in the State of Progress, United States. (R. at 8). Bonhomme seeks to sue under the jurisdiction of the citizen suit provision, § 505 of the CWA, to redress the alleged injury sustained to Bonhomme's land at the hands of Maleau. 33 U.S.C. § 1365. The district court erroneously prevented the suit from moving forward by holding that Congress did not intend for foreign nationals that own land in the United States to be able to seek recourse under § 505 of the CWA. (*See* R. at 8). The following section will discuss why Congress' expanded definition of the term "citizen" under §§ 505(g), 502(5) of the CWA, 33 U.S.C. §§ 1365(g), 1362(5), allows for suits by a foreign national that have suffered harm to his privately land owned in the United States.

A. The plain language of Sections 505(a) and 502(5) of the CWA permit a foreign national with interests that are adversely affected to sue for a violation of the Act.

When interpreting a statute, it is best to begin by looking at the plain language put in place by Congress. Section 505(a) of the CWA states that, "any citizen may commence a civil action...against any person...who is alleged to be in violation of" the provisions of the CWA. 33 U.S.C. § 1365(a). A "citizen" is defined as "a person or persons having an interest which may be adversely affected." 33 U.S.C. § 1365(g). The definitions section of the CWA 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).

The United States Supreme Court has repeatedly held that "[w]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *E.g. Sebelius v. Cloer*, 133 S.Ct. 1886 (2013).

The plain language of the CWA requires the party bringing suit be a "person," defined in part as an "individual," with "an interest which may be adversely affected." 33 U.S.C. §§ 1365(a), 1365(g), 1362(5). When read *in pari materia*, these sections simply do not require that the individual must be an American citizen. Bonhomme is an "individual" who has alleged that his privately owned land has been "adversely affected" due to a violation of the CWA. This is precisely the type of harm that Congress intended to offer a remedy for under the citizen suit provision of the CWA § 505, 33 U.S.C. § 1365.

B. Congress intended the terms of the CWA to be construed broadly.

In passing the CWA, Congress had in mind the protection of the public health, explaining that, "[t]he objective of this Act [33 U.S.C. §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). With this in mind, the Supreme Court has construed the terms of the CWA broadly. In *United States v. Riverside Bayview Homes, Inc.*, the Court found that "[p]rotection of aquatic ecosystems, Congress recognized, demanded **broad federal authority** to control pollution." 474 U.S. 121, 132-3 (1985) (emphasis added). In that case, the Court read Congress' definition of "navigable waters" as "waters of the United States" to give authority to "regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Id* (the United States Army Corps of Engineers' ("USACE") conclusion that wetlands adjacent to navigable waters were "waters of the United States," and therefore considered "navigable waters" for the purposes of the statute, was reasonable); Similarly, Congress' definition of "citizen" as "a person...which may be adversely affected" should be read to allow persons that would not traditionally be deemed U.S. citizens to bring suit under § 505 of the CWA to protect the aquatic ecosystems of the United States.

Further proof of Congressional intent of the expansive nature of the terms of the CWA occurred in *United States v. Brittain*, 931 F.2d 1413 (10th Cir. 1991). In that case, the defendant was criminally convicted of discharging pollutants into waters of the United States under the CWA, 33 U.S.C. §§ 1311(a) and 1319(c)(1). The court found Congress' addition of "responsible corporate officers" to the CWA's definition of "person" was an expansion of liability, stating, "Congress perceived this objective (of protecting the Nation's waters) to outweigh hardships suffered by 'responsible corporate officers' who are held liable in spite of their lack of 'consciousness of wrong-doing.'" *Brittain*, 931 F.2d at 1419. In other words, the court found that the public health interest outweighed the hardship of criminal liability against corporate officers that are responsible for their companies' actions, even when the officer lacks any specific intent to violate the CWA; *a fortiori*, that same public health interest of keeping the nation's navigable waters clean and protecting the native waterfowl should outweigh the defendant's hardship of facing potential civil liability for alleged violations of the CWA.

C. The district court's reliance on *Solid Waste Agency* was erroneous because unlike that case, the present issue of the determination of who may sue under an act of Congress does not present constitutional issues.

Finally, the district court erroneously relied on the reasoning of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), in barring Bonhomme's suit under the § 505 of the CWA. In that case, the USACE argued that § 404 of the CWA, 33 U.S.C. § 1344(a), conferred federal authority over an abandoned sand and gravel pit in Northern Illinois that provided a habitat for migratory birds. The Court felt this would raise serious constitutional and federalism issues, stating that, "[p]ermitting respondents to claim federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" would result in a significant impingement of the States' traditional and primary power over land and

water use." *Solid Waste Agency*, 531 U.S. at 174. The Court construed the statute to avoid these potential constitutional issues by holding that an abandoned gravel pit was not included in the term "navigable waters." *See id.* Unlike that case, the present issue raises no such constitutional questions because allowing foreign nationals (or any other individual, for that matter) to sue in federal court is well within Congress' authority under its Enforcement Power; therefore, the district court's reliance on *Solid Waste Agency* was unfounded.

Congress may preclude foreign nationals from seeking redress under § 505 of the Clean Water Act if it so desires. However, without any evidence of such a narrow construction, it would be unnecessary and unwise for the court to perform the legislative function of placing a restriction into the statute that is not evident from its plain language. Furthermore, this court should follow the trend of broad application of the CWA to further the purpose of protecting the integrity of our aquatic ecosystems. For these reasons, Bonhomme respectfully requests that this court allow his suit to proceed to trial by reversing the holding of the United States District Court for the State of Progress that a foreign national may not bring a citizen suit under the CWA § 505, 33 U.S.C. § 1365.

III. BONHOMME SUFFICIENTLY ALLEGED THAT MALEAU HAS DISCHARGED POLLUTANTS FROM A POINT SOURCE IN VIOLATION OF THE CWA.

Congress passed the CWA in 1972 with the stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the statute's principle provisions is 33 U.S.C. § 1311(a), which states, "the discharge of any pollutant by any person shall be unlawful" unless authorized by a permit. "Discharge of a pollutant" is defined broadly as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12); *see also Rapanos v. United States*, 547 U.S. 715, 723 (2006). A "pollutant" is also defined broadly, covering not only traditional categories of contaminants, but

also "dredged spoil,… rock, sand [and] cellar dirt." *Id.* § 1362(6). "Navigable waters" are defined in the Act as "the waters of the United States, including territorial seas." *Id.* § 1362(7).

The term "point source" is defined in the Act as "any discernable, 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." *Id.* § 1362(14). The definition of a point source "was designed to…embrac[e] 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). Nonpoint sources are not defined in the Act, however, and are not regulated by the Act. *See* S.Rep.No.92-414, 92d Cong., 2d Sess., reprinted in (1972) U.S. Code Cong. & Admin. News, pp. 3668, 3744. Maleau's mining waste piles satisfy the statutory requirement for a "point source" under the CWA, therefore the district court erred when it granted Progress' and Maleau's motion to dismiss on this issue.

A. Bonhomme correctly alleges that Maleau's mining waste piles are point sources subject to regulation under the CWA.

Maleau argues that the mining waste piles are not point sources because piles of dirt and stone are not a "discernable, confined and discrete conveyance" under 33 U.S.C. § 1362(14). However, case law supports Bonhomme's contention that mining waste piles that convey pollutants collected by rainwater into jurisdictional waters are a point source.

In *Sierra Club v. Abston Construction Co., Inc.,* the Fifth Circuit addressed the question of causation in determining whether a discharge resulted from a point source. 620 F.2d 41, 45 (5th Cir. 1980). The Sierra club brought a citizen suit under the CWA alleging that mining spoil piles eroded by rainfall into "ditches, gullies and similar conveyances," resulted in channeling polluted runoff into nearby navigable water. *Id*. Defendants denied taking any direct action that resulted

in the discharge of the pollutants and argued the eroded channels were not point sources. The Fifth Circuit determined that "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* In further support of the Fifth Circuit's statement, the Supreme Court has held that an owner of a point source does not have to actively add pollutants to water to be liable under the CWA. *South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

In *Abston,* the court found merit in the United States' amicus curiae that "surface runoff collected or channeled by the operator constitutes a point source discharge." 620 F.2d 41 at 44. The court reasoned that a point source could exist when "miners design spoil piles from discarded overburden such that, **during periods of precipitation, erosion of spoil pile walls result 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 material." *Id.* at 45 (emphasis added). Important to the *Abston* court's holding was its ability to point to an affidavit in the record that noted that gullies and ditches had formed on the side of the piles and sedimentation and pollution was carried through those "discernible, confined and discrete conveyances to [the navigable waterway]." *Id.* at 46.

Here, the record states that "[w]hen it rains, rainwater runoff flows down the piles and percolates through them, eventually discharging through channels eroded by gravity from the configuration of the waste piles into Ditch C-1, leaching and carrying arsenic from the piles into the water in the Ditch." (R. at 5). Samples taken downstream of Maleau's property in Ditch C-1 and downstream of the culvert flowing into Reedy Creek detect high concentrations of arsenic. *Id.* The samples prove that contaminated runoff flow from the mining waste piles is channeled

into gullies, cut in the earth by running water, and is ultimately conveyed to Ditch C-1. Thus, the natural channels and gullies are point sources as contemplated by 33 U.S.C. § 1362(14), conveying arsenic to Ditch C-1.

B. The cases relied upon by Maleau are factually distinguishable and in fact support Bonhommes's assertion that the overburden piles are a point source.

The cases relied upon by Maleau do not support his claim that the piles cannot be point sources under the CWA. Maleau cites *Consolidated Coal Co. v. Costle* to support his position, which states that the "definition [of a "point source"] excludes unchanneled and uncollected surface waters." 604 F.2d 239, 249 (4th Cir. 1979). However, the information cited from that case is only dicta taken from *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). *Appalachian Power* is factually distinguishable from the instant case, and once examined in the correct light, actually supports Bonhomme's contention that the mining waste piles are point sources.

In *Appalachian Power*, the defendant asserted that rainfall runoff from areas used to store construction material were not point sources subject to regulation under the CWA. *Id*. The defendant stated that those areas used to store construction materials were not normally routed to a "point source" for draining. Here, waste piles are being positioned in such a way that the creation of natural eroded channels is imminent, and the resultant contaminated rainwater runoff will be conveyed to Ditch C-1. In *Appalachian Power*, it was unlikely that construction materials would all of a sudden create gullies, ditches, or other channels to collect the water runoff into a single identifiable source and convey it to a navigable waterway. Even the defendants in *Appalachian Power* acknowledged, "contaminated runoff discharge from coal storage and chemical handling areas fell within this definition [of a point source] and should be subject to reasonable controls." *Id.* at 1373. As stated above, the mining waste piles have in fact created

eroded channels from which arsenic can be conveyed to Ditch C-1. (R. at 9). The record states that an observer can point to an identifiable source - the mining waste - that is causing arsenic laden water to discharge into Ditch C-1. (R. at 5). Thus, the district court erred when it compared this case's fact to those of *Appalachian Power* because that case is factually distinguishable.

C. The district court failed to recognize that Congress's definition of point source was to be interpreted broadly.

The district court erroneously held that the mining waste piles are not point sources because a pile of dirt does not match any of the listed examples of point sources in the Act. (R. at 9); § 1362(14). However, as the Ninth Circuit highlighted in *Northwest Envtl. Def. Ctr. v. Brown*, Congress's definition of "point source" was not to be interpreted narrowly, and that "there are many other forms of periodic, though frequent, discharge of pollutants into the water through point sources such as barges, vessels, feedlots, trucks and other conveyances." 640 F.3d 1063, 1071 (9th Cir. 2011).

As stated above, nonpoint sources are not defined, nor regulated by the CWA. Nonpoint sources are generally considered to be uncollected water runoff that is difficult to identify any one source from which these pollutants are discharged. For instance, the Tenth Circuit in *Earth Sciences* noted that Congress classified nonpoint sources as those that resulted from pollution runoff caused primarily by rainfall around activities that use or cause pollutants. 599 F.2d 368 at 373. Such runoff cannot be pinpointed to one identifiable point of discharge. *Earth Sciences*, 599 F.2d 368 at 373. However, once pollutant discharges can be identified as coming from a single source, that source is a point source subject to regulation.

The EPA's NPDES regulation attempts to define the extent to which surface runoff could constitute a point source, stating that the definition of "discharge of a pollutant" includes "additions of pollutants into waters of the United States from: surface runoff **which is collected**

or channeled by man." 40 C.F.R. § 122.2 (emphasis added). For instance, the Second Circuit in *Concerned Area Residents for the Environment v. Southview Farm* found that liquid manure that flowed from a swale into a ditch constituted a discharge from a point source. 34 F.3d 114 (2d Cir. 1994). The court noted "the liquid manure was collected and channelized through the ditch or depression in the swale of field 104 and thence into the ditch leading to the stream." *Id*. at 119. Here, there is also evidence that arsenic is collected and channelized through eroded gullies. (R. at 5). This channelized contaminated runoff is directly discharged into a tributary of navigable water, Ditch C-1, as discussed below. Like the liquid manure in *Concerned Area Residents*, arsenic is collected and channelized by the eroded gullies to the Ditch leading to Reedy Creek.

In sum, a point source requires that pollutants reach navigable water by a "discernible, confined and discrete conveyance." § 1362(7). This court should find that Maleau's mining waste piles are an identifiable point source of arsenic being discharged into Ditch C-1 and then reaching Reedy Creek. By creating piles of mining waste in such a way that gravity creates eroded channels conveying arsenic to a tributary of navigable water satisfies the EPA's threshold of being "collected or channeled by man." 40 C.F.R. § 122.2.

IV. REEDY CREEK IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER SECTIONS 502(7), (12) OF THE CWA AND 33 U.S.C. § 1362(7), (12) AS IT IS AN INTERSTATE WATER WHICH LARGELY AFFECTS INTERSTATE COMMERCE.

The CWA was created for the broad purpose of protecting the nation's waters by prohibiting discharges of pollutants into those waters. 33 U.S.C. 1311(a) ("[T]he discharge of any pollutant by any person shall be unlawful."). The Act, however does permit certain exceptions to this prohibition, such as section 404, which allows for the discharge of "dredged or fill material into the navigable waters" with a permit from the USACE. *Id.* at § 1344. The Act defines "navigable waters" as "waters of the United States, including the territorial seas." *Id.* at § 502(7); 33 U.S.C.

§ 1362(12). This very term, "navigable waters," has created much confusion among landowners and legal scholars, and is crucial in this case: if Ditch C-1 and Reedy Creek are "navigable waters" under the CWA, then Maleau will have violated section 404 of the CWA, as he did not first obtain a permit to discharge arsenic into a navigable water.

While the term "navigable water" may, at first blush, seem to be restricted to waters of the United States that are navigable in fact, Congress intended this term to have a much broader scope. Not wanting to narrow the scope of what can be defined as a "navigable water" under the CWA, the Committees for Public Works in the House as well as the Senate intentionally left the term somewhat vague and did not intend to follow the narrow scope of "traditionally navigable waters."[1] The USACE, the agency which oversees the permitting process for discharges in navigable waters under the CWA, interprets "waters of the United States" broadly to include other waters used in 'interstate or foreign commerce' or for industrial purposes," "tributaries" of these waters, and "wetlands adjacent" to the types of waters listed, even when "separated … by man-made dikes or barriers." 33 C.F.R. § 328.3(a)(1), (3), (5), (7); (c). While the trial court did correctly state that the traditional definition of navigable waters was whether it could be used for "waterborne transportation or could be so used with reasonable improvements," as seen above this definition has been broadly expanded under the CWA and subsequent Supreme Court cases. (R. at 9).

[1] *See, e.g.,* Brandee Ketchum, *Like the Swamp Thing: Something Ambiguous Rises From the Hidden Depths of Murky Waters—The Supreme Court's Treatment of Murky Wet Land in Rapanos v. United States*, 68 La. L. Rev. 983, 987 (2008) (discussing the intent of the House and Senate for the broad definition of "navigable waters of the United States"); William W. Sapp, et al., *The Float a Boat Test: How to Use it to Advantage in this Post-Rapanos World*, 38 Env. L. Rep. News & Analysis 10439, 10441 (July, 2008) "the legislative history of the Act reveals that Congress intended for the scope of the CWA to cover nearly all of the nation's waters."

Because Reedy Creek is essential for interstate commerce in the area, it would easily satisfy the requirements of a navigable water under the CWA. The water from Reedy Creek flows through New Union and into Progress, making it an intrastate water. (R. at 5,6). In the State of New Union, it is used as a water supply for a service area on Interstate 250, a federally funded east-west interstate highway, which sells gasoline and food. (R. at 5). Farmers along Reedy Creek use the water from the creek to irrigate their crops, which are then sold interstate. *Id.* Reedy Creek feeds into Wildman Marsh, an important migration area for "over a million ducks and other waterfoul," and the area attracts hunters from "Progress, New Union, and five neighboring states," adding over $25 million to the local economy from these intrastate hunters. (R. at 6). All of these factors, when viewed together, demonstrate with certainty that Reedy Creek is a vital source of water in the area, and generates millions of dollars of revenue for the surrounding intrastate area.

Contrary to the trial court's ruling, the Supreme Court in *Rapanos* did not rule that "rivers must be highways of interstate commerce to fall within the definition of 'navigable waters' under the CWA," or that a waterway must fit squarely within the first prong of *U.S. v. Lopez*.[2] (R. at 9). While the plurality opinion in *Rapanos* did argue that the "extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of land" and that "the Corps' interpretation stretches the outer limits of Congress's commerce power and raises difficult questions about that power," at no point in the *Rapanos* opinion was *Lopez* ever even cited, and these discussions are merely dicta and have no binding

[2] The Supreme Court identified three broad categories of activity which Congress could regulate" 1) Channels of interstate commerce, 2) instrumentalities, persons or things in interstate commerce, or 3) those activities which have a substantial relation to or substantially affect interstate commerce. *U.S. v. Lopez*, 514 U.S. 549, 558-9 (1995).

authority. *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006). Even if the plurality explicitly articulated their desire for navigable waters to fall only under the first prong of *Lopez*, it would not be binding law as the majority of the Court would not agree. *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'"). In his concurrence, Justice Kennedy specifically states that *Gonzales v. Raich* would apply, stating that the "possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act's text and structure." *Id. citing Gonzales v. Raich*, 545 U.S. 1, 17 (2005) ("[W]hen a general regulatory stature bears a substantial relation to commerce, the *de minimis* character arising under that statute is of no consequence" (internal quotation marks omitted)). Because Justice Kennedy did not agree with the plurality, and because the plurality was only stating dicta, navigable waters do not have to fall strictly within the first prong of *Lopez*.

The district court is also incorrect in stating that *U.S. v. Earth Sciences* is no longer good law in the wake of *Rapanos*. (R. at 9). In *U.S. v. Earth Sciences*, the Tenth Circuit ruled that, while the Rito Seco is not navigable in fact and is not used to transport goods or materials, there was still "at least some interstate impact from this stream and that is all that is necessary under the Act." *Earth Sciences*, 599 F.2d at 375. While the Court in *Rapanos* did bring up concerns about the scope of navigable waters from a Commerce Clause perspective, this was only dicta and not a binding decision. Regardless, Reedy Creek is an interstate water, thus easily falling under EPA's definition of a "water of the United States." 40 CFR 122.2.

V. DITCH C-1 IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER SECTIONS 502(7), (12) OF THE CWA AND 33 U.S.C. § 1362(2), (14).

A. Ditch C-1 is a navigable water under the CWA as it maintains a relatively permanent flow of water and has a continuous surface connection and significant nexus with Reedy Creek and Wildman Marsh.

The district court ruled that Ditch C-1 couldn't be a navigable water as "it has never floated a boat and it is too small to do so in the future." (R. at 9). While this may be factually accurate, it is not ultimately conclusive as to whether Ditch C-1 is a "navigable water" under the CWA. The CWA has adopted a much broader definition of the term "navigable water" to include "tributaries" as well as other water features one would not normally think of as "navigable," such as "prairie potholes" or "wetlands." 40 CFR 122.2.

A recent trilogy of Supreme Court cases have set the bounds for what is a "navigable water" under the CWA. The first of these to be decided was *Riverside Bayview*, where the Court used the *Chevron* deference test[3] to determine whether the USACE's regulations extending their jurisdiction to "all wetlands adjacent to navigable or interstate waters and their tributaries" was an acceptable interpretation of the CWA. *U.S. v Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985). Here, the Court ruled in favor of the USACE, finding their judgment that adjacent wetlands qualify as "waters of the United States" was not unreasonable. *Id.* at 135.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, the USACE again tried to expand the definition of "navigable waters" to include isolated, intrastate waters which provide habitat for migratory birds under the USACE

[3] *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 842-43 (1984). When a court is reviewing an agency's interpretation of a statute, it must first look to whether Congress was clear on the intent of the statute. If Congress was clear and unambiguous, the court and the agency must honor that intent. In the event that Congress is silent or ambiguous on the specific issue, the court must determine whether the agency's interpretation is "based on a permissible construction of the statute."

"Migratory Bird Rule." 531 U.S. 159 (2001). After *SWANCC*, it was clear that the USACE could extend their jurisdiction under the CWA to wetlands which are adjacent to traditionally navigable waters, but not to wetlands that were isolated from a traditionally navigable water, even if it affected interstate commerce. *Id.* at 171-72.

In the most recent case, the Supreme Court only further muddied the waters on this subject. In *Rapanos v. U.S.*¸ the Court consolidated two Sixth Circuit decisions, *U.S. v. Rapanos* and *Carabell v. U.S. Army Corps of Engineers*, both involving wetlands that did not have an adjacent surface water connection to a navigable in fact water, but instead had various connections to ditches or drains which then led to a navigable in fact water. *Rapanos*, 547 U.S. at 730, 762-3. Attempting to find a middle ground between the outer boundaries set by *Riverside Bayview* and *SWANCC*, the Court ended up with a fractured 4-1-4 decision with no clear majority opinion on any specific interpretation: a four-justice plurality opinion written by Justice Scalia, a single-Justice concurrence by Justice Kennedy, and a four-justice dissent written by Justice Stevens. *Id.* at 715, 759, 787.

Writing for the plurality, Justice Scalia acknowledged that "navigable waters" in the CWA should be broader than the "traditional understanding of that term," but this term must have limits. *Id.* at 731. Justice Scalia also sets out a two-part test in determining if the CWA has authority over a wetland: whether the water body connected to the wetland is "a relatively permanent body of water connected to traditional interstate waters, and also that this connection is a "continuous surface connection." *Id.* at 742. While Justice Kennedy agreed with the ultimate result of the plurality's decision, he did not agree with their reasoning. He instead adopted his now infamous "significant nexus" approach: a wetland would possess a "significant nexus" and thus be covered under the CWA if the wetland "either alone or in combination with similarly

situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Id.* at 780. Kennedy also did not agree that the CWA should only cover wetlands with a continuous surface connection, stating that both *SWANCC* and *Riverside Bayview* do not support this conclusion. *Id.* at 772-4. In Justice Steven's dissent, the other four-justice decision, he argued that in regulating wetlands the CWA was viewed as a "'total restructuring' and 'complete rewriting' of the existing water pollution legislation," and that the USACE should have been given *Chevron* deference. *Id.* at 804.

With no clear majority in the *Rapanos* decision, lower courts have had no clear guidance and have had to "feel their way on a case-by-case basis." *Id.* at 758. Perhaps Judge Martin of the Sixth Circuit put it best in articulating his frustration with *Rapanos*: "…the ability to glean what substantive value judgments are buried within concurring, plurality, and single-Justice opinions would require something like divination to be performed accurately." *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009). It remains that there are two possible tests under *Rapanos* to determine if a water is a "water of the United States:" the plurality test, that "the waters of the United States include only relatively permanent, standing or flowing bodies of water…connected to traditional interstate navigable waters," or the significant nexus test, where a water of the United States is one that possesses a significant nexus to waters that are or were navigable in fact or that could reasonable be so made. *Rapanos*, 547 U.S. at 742, 780.

Ditch C-1 is "a drainage ditch dug into saturated soils to drain them sufficiently for agricultural use," and is "3' across and 1' deep on average." (R. at 5). The Ditch always contains running water, except for periods of drought lasting from several weeks up to three months, and the water in Ditch C-1 is mainly derived from draining groundwater and also some rainwater runoff after rain events. *Id.* The Ditch runs for three miles before emptying into Reedy Creek. *Id.*

Ditch C-1 would classify as a tributary or Reedy Creek under either the plurality's test or the significant nexus test. Under Justice Scalia's plurality test, "water[s] of the United States" are those tributaries which are "relatively permanent" with a continuous surface connection to a navigable water. *Rapanos*, 547 U.S. at 731. The Court gives more specific guidance to the term "relatively permanent:"

> By describing "**waters**" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, **such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months ...** It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's "intermittent" and "ephemeral" streams—that is, streams whose flow is "[c]oming and going at intervals ... [b]roken, fitful," or "existing only, or no longer than, a day; diurnal ... short-lived"—are not.

U.S. v. Brink, 795 F.Supp.2d 565 (S.D.Tx. 2011) *citing Rapanos* at 733, n. 5 (internal citations omitted) (emphasis added). While the plurality decision does not set out an exact standard for distinguishing between a "relatively permanent" stream and an "intermittent" or "ephemeral" one, they do state that "common sense and common usage distinguish between a wash and a seasonal river. *Id.* A number of cases post-*Rapanos* have helped in clarifying what a "relatively permanent" water is. *U.S. v. Brink* discusses a number of these cases: a creek was ruled to be a tributary under the CWA when the channel held waster continuously for only two months out of the year (*U.S. v. Moses*, 496 F.3d 984, 989 (9th Cir.2007), *cert. denied* 554 U.S. 918, 128 S.Ct. 2963, 171 L.Ed. 886 (2008)); a canal would constitute a "relatively permanent" non-navigable "tributary" if it held flowing water six to eight months out of the year on a seasonal basis (*U.S. v. Vierstra*, 803 F.Supp.2d 1166 (D.Idaho, March 18 2011)); and a bayou can be identified as a "relatively permanent, standing or flowing" body of water (*Gulf*

Restoration Network v. Hancock County Dev., LLC, 772 F. Supp.2d 761, 769-70 (S.D.Miss. Feb. 22, 2011)). 795 F.Supp2d 565 (S.D.Texas June 6, 2011).

There is no doubt that Ditch C-1 would be a "water of the United States." It maintains running water at all times, save for periods of drought lasting up to three months. (R. at 5). Justice Scalia explicitly states that periods of drought to not disqualify a body of water from being a "water of the United States" *Rapanos*, 547 U.S. at 733. Even after *Rapanos*, courts have ruled that a water feature can still be "a water of the United States" even if it only has water present there two to eight months out of the year. *Moses* at 989. Ditch C-1 contains water at least nine months out of the year, and sometimes is only lacking water for several weeks. (R. at 5). Because of this, Ditch C-1 is a "navigable water" under the CWA.

Ditch C-1 would also classify as a "navigable water" under Justice Kennedy's "significant nexus" test: the water and groundwater flowing in Ditch C-1 flow directly into Reedy Creek, which then flow directly into Wildman Marsh. *Id.* All of these waters are clearly connected to each other through surface flows, and all are "navigable waters" under the CWA. According to Justice Kennedy, a water will have a "significant nexus" if it "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as navigable." *Rapanos*, 547 U.S. at 780. Ditch C-1 flows directly into Reedy Creek, so it clearly contributes to the amount of water in both the Creek and in Wildman March.

B. Whether Ditch C-1 is a "point source" or not is not relevant to determining if it is a "water of the United States" under the CWA.

The trial court erred when it stated that *Rapanos* is "definitive precedent" for the assertion that "a ditch cannot simultaneously be two elements in the water pollution offense." (R. at 9). While Justice Scalia, writing for the plurality, did point to the CWA's definition of a "point source" as "any discernable, confined and discrete conveyance." *Rapanos*, 547 U.S. at 735 *citing*

33 U.S.C. § 1362(14). The plurality then goes on to say that the CWA defined the discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source." *Id. citing* 33 U.S.C. §1362(12)(A) (emphasis removed). Because there are two separate definitions, the plurality believes that "point sources" and "navigable waters" are two "separate and distinct categories" and that point sources are not waters of the United States. *Id.* This would, indeed, be "definitive precedent" if a majority of the Court agreed with it, but in this instance, only four out of the nine Justices agreed, and it is therefore not binding. *Marks*, 430 U.S. at 993.

Justice Kennedy, the fifth vote in *Rapanos* for remanding the case, vehemently disagreed with the plurality's logic. He points out that the plurality makes several incorrect presumptions: "first, that the point-source examples describe "watercourses through which *intermittent* waters typically flow," and second, that point sources and navigable waters are "separate and distinct categories." *Rapanos*, 547 U.S. at 771 (original emphasis added). These presumptions are wrong in that nothing in the point source definition requires an intermittent flow and certain bodies of water could easily be both a point source and a water under the CWA. *Id.* Also, even if the plurality's misguided interpretation were binding, Ditch C-1 would still not classify as a point source because it maintains a relatively permanent flow of water, which would make it not intermittent and therefore not a point source.

VI. MALEAU VIOLATED THE CWA BECAUSE HE IS THE BUT-FOR CAUSE OF ADDING ARSENIC TO REEDY CREEK.

As stated above, the CWA states, "the discharge of any pollutant by any person shall be unlawful" unless authorized by a permit. 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined broadly as "any addition of any pollutant to navigable waters from any point source." §1362(12). As stated previously, both the EPA and the USACE have extended CWA jurisdiction to waters used in interstate commerce, tributaries of waters used in interstate commerce, and

wetlands adjacent to waters used in interstate commerce or their tributaries. *See* 33 C.F.R. § 328.3, 40 C.F.R. § 122.2. Because Maleau is the cause of the addition of arsenic to Reedy Creek, a navigable water, he is liable for the "discharge of a pollutant" under the Act.

A. Liability under the CWA lies with the person who owns or operates the point of discharge.

It is common that a pollutant passes through several types of conveyances before finally being discharged into navigable water. David Drelich, *Restoring the Cornerstone of the Clean Water Act*, 34 Colum. J. Envtl. L. 267, 318-19 (2009). Because the Act defines "discharge of a pollutant" as the point where the pollutant was added, liability must attach at the point of initial addition to the navigable water or tributary, regardless of how that pollutant is later conveyed to other waters. As one commentator states, "[t]he location of a 'discharge' occurs at the initial conveyance where any person's failure to control pollutants will foreseeably result in the entry of the pollutants into a water of the United States." *Id*. at 318. Regardless if this court determines Ditch C-1 is not a tributary, Maleau would still be liable, and not Bonhomme, because liability for a discharge of a pollutant attaches to the owner of the source of pollutant.

In *Sierra Club v. El Paso Gold Mines, Inc.*, a citizen suit was filed against a landowner, El Paso Gold Mines, Inc., whose abandoned mine shaft allegedly discharged pollutants into Cripple Creek, a navigable water. 421 F.3d 1133 (10th Cir. 2005). El Paso never conducted any mining activity on the property, but the inactive mine is connected through a series of underground drainage tunnels and shafts to Cripple Creek, allowing a passage way from the mine shaft to the navigable water. In that case, El Paso argued that the Act did not apply to purely passive owners because the definition of "discharge" requires an "addition of any pollutant," implying affirmative conduct by the landowner. *Id.* at 1137. The Tenth Circuit concluded "[t]he introduction of "point source" into the statutory scheme to define "discharge" and give context to

"addition" can only mean that we look to whether the point source is actively adding pollutants to navigable waters." *Id*. at 1145. The court went on to state, "[a]nd if the point source is 'discharging,' the 'person' who owns or operates the point source is liable under the Act." *Id*.

Though *Sierra Club* dealt with whether a passive owner could be held liable, the court's conclusions are applicable to this case. First, the court emphasized that the person who is liable under the Act is the one who owns or operates the source of the pollutant. *Id*. Here, the source is the waste piles and Maleau owns these waste piles. The waste piles created eroded pathways that conveyed the arsenic, constituting a point source, and discharging into Ditch C-1. According to the Tenth Circuit, liability under that Act would attach at this point. *Id.* The fact that the pollutant is further conveyed by a tributary to Reedy Creek is of no moment. It is that initial conveyance where the person failed to control the discharge of a pollutant that is important. Bonhomme does not have control of the waste piles, nor does he own the property that they are situated on.

According to the court in *Friends of Sakonnet v. Dutra,* the "'[p]oint source' is in the definition of 'discharge of a pollutant' to distinguish kinds of pollution, not to establish the source of liability. 738 F. Supp. 623, 627 (D.R.I. 1990). Liability must lie with the person or persons causing 'the addition of any pollutant to navigable waters.'" *Id.* at 630. The court reasoned that to isolate the words "point source" from the rest of the Act would lead to absurd results and that in order to achieve that stated objective of restoring and maintaining the chemical, physical and biological integrity of the nation's waters, "Congress has placed liability with those in control of the pollutants being discharged." *Id*. at 630 *citing* 33 U.S.C. § 1251(a)(1).

B. The pollutant does not have to be directly discharged into navigable water in order for Maleau to be liable under the CWA; it is sufficient that Maleau knew or should have known the arsenic would reach Reedy Creek.

Even if Ditch C-1 is not found to be a tributary of Reedy Creek, Maleau is still liable under the CWA for the discharge of arsenic into the navigable water. In *United States v. Velsicol Chemical Corp*., the court rejected the argument that a pollutant must be directly discharged into navigable water for liability to attach. 438 F. Supp. 945, 947 (W.D. Tenn. 1976). In *Velsicol*, the defendant argued that its alleged discharge into the city sewer system, which then discharged into the Mississippi River, was not a discharge into navigable water because the defendant did not directly discharge into the River. *Id*. The court stated that "[t]he fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from the scope of this Act." *Id.* The court emphasized that the "Defendant knows or should have known that the city sewers lead directly into the Mississippi River and this is sufficient to satisfy the requirements of discharging into 'water of the United States.'" *Id.*

Here, pollutants from Maleau's waste piles are being conveyed into Ditch C-1, which in turn, empties into Reedy Creek. (R. at 8-9). The point at which arsenic is added to Ditch C-1 is the point at which a pollutant is discharged into navigable water. The arguments put forth by Progress and Maleau are erroneous as Maleau is the only party controlling the point source in this case. Bonhomme merely owns the point at which the two waters meet. He has not in any way added a pollutant to the waters, as the pollutant was already present by the time the waters flowed through his property. As the *Velsicol* and *Dutra* courts found, it is irrelevant that Maleau's pollutants travel through other conveyances with different ownership.

An EPA regulation also provides support that it is the owner of the point of discharge who is to be held liable under the Act. The EPA has interpreted the phrase "addition of pollutant" to

mean "surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances **owned** by a…person which do not lead to treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works." (emphasis added). Though this EPA interpretation does not substitute for the plain language of the act, the regulation does emphasize that liability attaches to the owner of the point of discharge of the point source. Though the water flows through Bonhomme's property, it was Maleau's actions that led to the addition of arsenic. Thus, even if Ditch C-1 is not found to be a tributary, the fact that but-for Maleau's mining waste piles, arsenic would not be discharged into Reedy Creek after being conveyed through Ditch C-1 satisfies the requirements for liability under §1311(a).

CONCLUSION

For the foregoing reasons, we respectfully ask this court to reverse district court's erred holdings that Jacques Bonhomme is not the real party in interest, that a foreign national that has been adversely affected by a violation of the CWA may not sue under the citizen suit provision of the Act, that Ditch C-1 is not a "navigable water/water of the United States," that Maleau's mining waste is not a point source and that Bonhomme is liable under the CWA. Additionally, we request this court to uphold the district court's finding that Reedy Creek is a "navigable water/water of the United States" under the CWA.

Respectfully submitted,

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