IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Case No. 13-01234

D.C. NO. 155-CV-2012

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

- v. -

SHIFTY MALEAU,
Defendant-Appellant, Cross-Appellee

D.C. No. 165-CV-2012

STATE OF PROGRESS,
Plaintiff-Appellant, Cross-Appellee,

and

SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee

- v. -

JACQUES BONHOMME,
Defendant-Appellant, Cross-Appellee.

PLAINTIFF-APPELLANT, DEFENDANT-APPELLANT, CROSS-APPELLEE BONHOMME'S BRIEF

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JURISDICTIONAL STATEMENT

The case in controversy arises under the Federal Water Pollution Control Act, 33 U.S.C. §1251 et. seq., commonly known as the Clean Water Act ("CWA") § 101 et seq., a federal statute. Congress granted federal courts the statutory authority to decide cases arising under federal statutes. 28 U.S.C. §1331. This is an appeal of right taken from a final judgment by a federal district court. Therefore, this court has jurisdiction. 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Bonhomme is a real party in interest under Fed. R. Civ. P. 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. § 1331(a).

2. Whether Bonhomme - a foreign national - is a "citizen" under CWA § 505, 33 U.S.C. § 1365, authorized to file suit against Maleau.

3. Whether Maleau's mining waste piles constitute "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1363(12), (14).

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

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

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.

PROCEDURAL HISTORY

After proper notice, Jacques Bonhomme ("Bonhomme") filed a citizen suit against Shifty Maleau ("Maleau") for violating the Clean Water Act ("CWA"). CWA §§ 101 et. seq., 33 U.S.C. §§ 1251 et. seq., Opinion and Order, p. 1. The citizen suit provision allows a person whose interests are or may be adversely affected to file a lawsuit against a private party alleged to violate the CWA when the government does not take action. CWA § 505, 33 U.S.C. § 1365. The cause of action arises from the discharge of arsenic into Reedy Creek and Wildman Marsh which stems from mining waste Maleau piles adjacent to Ditch C-1. Opinion and Order at 2 - 3.

Bonhomme alleges that Maleau configured mine waste piles such that they constituted a "point source" under the CWA. *Id*. at 1 - 2. Bonhomme contends that Maleau's mining waste

piles add arsenic into Ditch C-1, a tributary of Reedy Creek. *Id*. at 2. Therefore, Bonhomme concludes that Maleau violates the CWA because he discharges pollutants into a navigable water without a permit. CWA § 301, 33 U.S.C. § 1311; Opinion and Order at 1 - 2.

The State of Progress subsequently filed a citizen suit against Bonhomme on the grounds that the culvert on his property constitutes a point source by discharging arsenic into Reedy Creek. *Id*. at 2. Maleau intervened as a matter of right under CWA § 505(b)(1)(B), 33 U.S.C. § 1365(b)(1)(B), and the count combined the cases following an uncontested motion to consolidate. Opinion and Order at 2. Following the consolidation, the defendants in both cases filed motions to dismiss. *Id.*

On July 23, 2012, the court issued an order of dismissal on the following issues: Bonhomme cannot bring suit against Maleau for violating CWA § 301(a), 33 U.S.C. § 1311(a) because (1) he is not the real party in interest; (2) he is a foreign national and is not entitled to file a citizen suit under CWA § 505, 33 U.S.C. § 1365; (3) Maleau's mining waste piles are not "point sources" under CWA § 502(12), (14), 33 U.S.C. 1362(12), (14) because they are not conveyances; (4) Ditch C-1 is not a navigable water but a point source; and (5) Reedy Creek is a navigable water, and Bonhomme violates the CWA by discharging pollutants from his culvert, a point source. Order, p. 1 - 3.

STATEMENT OF FACTS

Maleau operates a gold mine in Lincoln County, Progress, adjacent to the traditionally navigable Buena Vista River. Opinion and Order, p. 2. Maleau trucks mining overburden from his property in Lincoln County and places the mining waste piles adjacent to Ditch C-1 in Jefferson County. *Id.* Ditch C-1 is an agricultural waterway averaging three feet across and one foot deep that travels through Maleau's property and several other neighboring agricultural

properties including Bonhomme's property. *Id.* Bonhomme, a French national, owns property abutting Reedy Creek Bonhomme uses a lodge on his property located on the edge of Wildman Marsh to entertain hunting parties for business and personal acquaintances. *Id.* at 2 - 3. Wildman Marsh is a wetland mostly contained within the federally-owned Wildman National Wildlife Refuge. *Id*. at 2. Millions of birds migrate through the wetland biannually, and the wetland generates $25 million in revenue from international hunting activities. *Id*. at 2 - 3.

Arsenic, a gold mining byproduct and pollutant under the CWA, has been detected in both Reedy Creek and Wildman Marsh. *Id.* at 3. Water in Ditch C-1 tested upstream of Maleau's property does not contain arsenic, but water in Ditch C-1 just downstream of Maleau's property line contains arsenic in high concentrations. *Id.* Bonhomme asserts that arsenic flows through Maleau's mining waste piles through channels formed by gravitational erosion that convey arsenic-laden stormwater runoff into Ditch C-1. *Id.* at 1-3. Water flowing through Ditch C-1 is transferred through a culvert on Bonhomme's property into Reedy Creek, which flows directly into Wildman Marsh. *Id.* at 2.

Bonhomme has reduced the number of hunting trips from eight to two per year due to fears over arsenic contamination in Wildman Marsh via Reedy Creek and Ditch C-1. *Id.* at 3. The Attorney General of Progress accused Bonhomme of filing suit against Maleau to stifle competition with Precious Metals International, Inc., an international gold mining company incorporated in Delaware and headquartered in New York of which Bonhomme is President, a member of the Board of Directors and three percent shareholder. *Id.* at 2 - 3. While PMI has paid some fees associated with the lawsuit, PMI does not conduct mining operations nor have any property interests in Progress. *Id*.

SUMMARY OF THE ARGUMENT

1. Bonhomme, not PMI, has standing to bring a citizen suit against Maleau because he is the real party in interest who has been injured by Maleau's violation of CWA § 301(a), 33 U.S.C. § 1311(a).

2. Bonhomme is a citizen within the meaning of CWA §§ 502(5), 505(g), 33 U.S.C. §§ 1362 (5), 1365(g) because he is a person whose interests are adversely affected by Maleau's violation of the CWA.

3. Maleau's mining waste piles constitute point sources as defined by the CWA because the waste piles are discernible, confined and discrete conveyances from which pollutants are discharged.

4. Ditch C-1 is a water of the United States because Maleau utilizes it to channel arsenic-laden water from his mining waste piles and Ditch C-1 has a significant nexus to Reedy Creek, an interstate water, as one of its tributaries.

5. Reedy Creek is a "navigable water" because it is an interstate water and a tributary of Wildman Marsh, a federally-protected wetland.

6. Bonhomme did not violate the CWA by discharging a pollutant into Reedy Creek because Ditch C-1 is navigable agricultural water and the culvert on his property merely transfers polluted water without the addition of pollutants.

ARGUMENT

1. BONHOMME IS A REAL PARTY IN INTEREST UNDER FED. R. CIV. P. 17 AND THE COURT BELOW ERRED IN GRANTING PROGRESS' AND MALEAU'S MOTION TO DISMISS THE ISSUE.

Bonhomme regularly hosted hunting parties for his friends and colleagues, but has decreased the frequency of these trips due to fears over arsenic contamination in Wildman Marsh via Reedy Creek and Ditch C-1. Because Bonhomme's property interest has been affected by Maleau's violation of the CWA, he has initiated a citizen suit under the Clean Water Act (CWA) § 505(g), 33 U.S.C. § 1365(g) If the Court finds that Maleau has the CWA and compels him to

redress the arsenic discharge from his property, Bonhomme's injury will be remedied and he can continue using his property to his enjoyment.

However, whether Bonhomme can prove that Maleau illegally allowed arsenic to enter the marsh is irrelevant unless Bonhomme is the real party in interest to this suit. Indeed, Fed. R. Civ. P. 17(a)(1) requires that "an action must be prosecuted in the name of the real party of interest."

A real party in interest is the individual whose substantive right the plaintiff seeks to enforce. *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990). *See also Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 28, 83 (4th Cir. 1973) ("a real party in interest is one who possesses the right to enforce and has a significant interest in the claim upon which the plaintiff is suing."). The citizen suit provision provides that, "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under this chapter." § 505, § 1365. The citizen provision therefore creates a substantive right to be enforced by a person harmed due to a violation of the CWA.

Congress intended to make the citizen suit available to any party with standing. See S. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823 ("the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton*"). *Sierra Club v. Morton* held that while both aesthetic and environmental well-beings are entitled to protection, a plaintiff must be personally injured to have standing to bring such a claim. 405 U.S. 727, 734 (1972). Real party in interest objections are generally settled when a party is found to have standing. *Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975); *see also*

Swanson v. Bixler, 750 F. 2d 810, 813 (10th Cir. 1984) ("[w]hether a complainant is the real party of interest . . . is generally resolved by inquiring whether he or she has standing.").

The citizen suit provision of the CWA provides a substantive right for anyone with standing to bring a claim. Because Bonhomme does have standing under the Act, Maleau's contention that Bonhomme is not the real party in interest in this case is wrong. Furthermore, a finding that Bonhomme is the real party in interest is not precluded by res judicata or the "shareholder standing rule."

A. Bonhomme has standing to bring a Citizen Suit against Maleau under CWA § 505(g), 33 U.S.C. § 1365(g) (1972).

Article III of the Constitution requires a party to have standing to bring a case or controversy. U.S. Const. Art. III,§ 2, Cl. 1; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have a standing, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth v. Laidlaw Environmental Svces (TOC) Inc.*, 528 U.S. 167, 180-81 (2000); *Defenders of Wildlife*, 504 U.S. at 560-61. Bonhomme suffers injury in fact because he has decreased the frequency of his hunting trips to Wildman Marsh due to arsenic contamination. Maleau's violation causes Bonhomme's injury and Bonhomme's injury would likely be redressed by a favorable decision. Thus, Bonhomme has standing to bring this citizen suit against Maleau, which further indicates that Bonhomme is actual proper plaintiff as the real party in interest.

1. Bonhomme has suffered a concrete, particularized, and actual "injury in fact."

Along with a large number of other hunters, Bonhomme has regularly visited the marsh to hunt ducks. In fact, he owns property containing a hunting lodge for that purpose.

Unfortunately, he has become afraid to host hunting parties at his property due to the poisonous contaminant emitted from Maleau's property. Bonhomme is concerned with how the dangerous pollutant affects the water it directly contaminates in addition to the wildlife in the area that is indirectly affected. As a result, he has dramatically decreased the frequency of his hunting parties and has been significantly deprived of the recreational benefit which his property and his use of the marsh once provided. He has, therefore, suffered a concrete, particularized, and actual "injury in fact."

A proper environmental plaintiff must allege a concrete injury to him or herself. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000); *see also Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972). Such an injury is adequately alleged by showing that the plaintiff uses the affected area but that the "aesthetic and recreational values of the area will be lessened by the challenged activity." *Laidlaw*, 528 U.S. at 183. *See also Morton*, 405 U.S. at 735. The injury that Bonhomme alleges affects him personally. Of course the environment will benefit from a favorable decision, but this case stands on Bonhomme's own personal loss of recreational use of the marsh for his hunting activities.

In *Laidlaw*, the defendant owned a hazardous waste incinerator facility and a wastewater treatment plant; that repeatedly discharged pollutants into a river in excess of its permitted limits. 528 U.S. at 175-76. This prompted plaintiff, Friends of the Earth ("FOE") to file a citizen suit, under CWA § 505, 33 U.S.C. § 1365, against Laidlaw, alleging non-compliance of the NPDES permit. *Id.* at 176. FOE averred that its members maintained an injury in fact because the members' "reasonable concerns about the effects of [Laidlaw's] discharges, directly affected those affiants' recreational, aesthetic, and economic interests." *Id.* at 183-84. For example, one member, who lived less than a mile from Laidlaw's facility, claimed that his concerns about the

discharges prevent him from camping, fishing, swimming, and picnicking at the lake. *Id.* at 181-82. Another member, who lived two miles from Laidlaw's facility, she picnicked, bird watched, and waded in the river, but discontinued these activities over concerns about the harmful effects from Laidlaw's discharged pollutants. *Id.* at 182. Yet another member alleged that he canoes in the river, but stays forty miles downstream to avoid Laidlaw's discharge, even though he would rather be further upstream near Laidlaw's facility. *Id.* at 182. The Court held the loss of enjoyment of enjoyment of recreational activities sufficient to establish the necessary "injury in fact" element of the standing analysis. *Id.* at 184-85.

Similarly, Bonhomme owns property near the arsenic contaminated water and as a result has limited his use of that property and the marsh. The contamination prevents Bonhomme from using the property in the primary manner for which he owns it – recreational hunting purposes. However, general averments and conclusory allegations will not be sufficient to find a particularized injury in fact. *Laidlaw*, 528 U.S. at 184. It is compelling that Bonhomme continuously uses Wildman Marsh for his hunting activities, and not just "roughly the vicinity" of the contamination. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 887-89 (1990) (finding that injury cannot be established by averments regarding the use of "unspecified portions of an immense tract of territory"). Furthermore, an "actual or imminent injury" cannot be established by asserting intentions to be fulfilled "some day." *Defenders of Wildlife*, 504 U.S. at 564. Unlike in *Defenders of Wildlife*, this is not a case about Bonhomme's uncertain future intentions. He currently owns property and a hunting lodge near the contaminated area, and continues to utilize the property for recreational purposes. Bonhomme therefore suffers a concrete, particularized, and actual "injury in fact". Injury in fact must be tied to a specific cause to impart liability.

2. The injury suffered by Bonhomme is sufficiently traceable to Maleau's waste piles.

There is no dispute that arsenic contaminating Reedy Creek and Wildman Marsh originates from Maleau's waste piles. As a result of this contamination, Bonhomme has sharply decreased his usage of the marsh and his hunting lodge. The causation element of the standing analysis requires that Bonhomme's injury be "fairly traceable" to Maleau's alleged action. *Laidlaw*, 528 U.S. at 180.

In *Laidlaw*, the court conducted a two-part test: (1) whether defendant's unlawful conduct was occurring at the time the complaint was filed; and (2) whether plaintiff's fear reasonably causes the alleged injury. *Id.* at 184. In *Laidlaw* the defendant was unlawfully discharging pollutants beyond permitted limits at the time the complaint was filed. *Id.* at 184. In its determination that FOE members' fears sufficiently established injury in fact, the *Laidlaw* Court explained, "we see nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms." *Id.* at 184.

Similarly, in the case at hand, Maleau's mining waste piles continue to discharge arsenic Thus, the only question that remains is whether the conceived threat Bonhomme feels as a result of the arsenic contamination is reason enough to prevent him from using the contaminated waterways. Since there is "nothing improbable" about a nearby resident of a contaminated waterway reducing his recreational use of that waterway, a reasonable person could conclude that Bonhomme reduced his recreational use of the marsh for his hunting parties as a result of his fear induced by the arsenic contamination.

The only distinction between Bonhomme and the affiants in *Laidlaw* is that Bonhomme does not actually reside at his property by the marsh; rather, he only uses it for recreational purposes. Although at first glance this may seem to indicate that he would be less injured because he is not confronted with the contamination on a daily basis, as residents may be, that is not necessarily so. In fact, he is likely even more injured than some residents because he owns property specifically for this recreational purpose that can no longer be effectively realized whereas, residents may live by the waterway for its recreational benefits, but fail to utilize it. Those with property for the sole purpose of recreational activity have a substantial investment in the sole purpose of that recreational activity, thus inability to use it as intended may be even more injurious to those people than residents.

Because it is clear that Bonhomme has been injured in fact, and that Maleau's waste piles are the source of that injury, the only element left to consider is redressability.

3. Bonhomme's injury is redressable through a Citizen Suit authorized by the Clean Water Act.

The Citizen Suit allows a plaintiff to redress an injury despite not being afforded direct financial compensation. *Laidlaw*, 528 U.S. at 186 ("[t]o the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."). Notably, "all civil penalties have some deterrent effect." *Id.* at 185; *see also*, e.g. *Hudson v. United States*, 522 U.S. 93, 102 (1997); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778 (1994). If Maleau is ultimately found to be in violation of the CWA, civil penalties will likely be imposed to deter future violations. In fact, Congress intended for "the district court to consider the need for retribution and deterrence . . . when it imposed civil penalties." *Tull v. United States*, 481 U.S. 412, 422-23 (1987); *see also*

Friends of the Earth v. Laidlaw, 528 U.S. at 185. Therefore, it follows that Bonhomme's claim meets the redressability element of standing because once Maleau is deterred from contaminating the water, Bonhomme can resume his hunting parties at the marsh and return to using his hunting lodge.

In sum, Bonhomme was "injured in fact" by Maleau's arsenic contamination and a favorable outcome on Bonhomme's claim would deter Maleau from further contaminating Reedy Creek and Wildman Marsh, allowing Bonhomme to fulfill his recreational desires. Bonhomme, therefore, has standing to bring this suit.

B. Beyond meeting the standing requirement, Bonhomme is the real party in interest.

It is Bonhomme who owns the property on the marsh. It is he who conducts hunting parties consisting of his acquaintances, made both through business and social interactions. Furthermore, it is he who is adversely affected by not being able to engage in such activities due to the arsenic contamination. Therefore, it follows that Bonhomme is, in fact, the real party of interest to the citizen suit against Maleau.

1. Res Judicata does not impede Bonhomme from being the real party in interest.

The purpose of Fed. R. Civ. P. 17(a) is rooted in the principle of res judicata. *Farrell Const. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 142 (5th Cir. 1990). ("[The] 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."). Res judicata is not implicated in the case of a citizen suit because regardless of who brings the suit, all aggrieved parties share the same benefit. Similarly, the situation does not lend itself as one where the wrong person could be erroneously compensated, because no private plaintiff is compensated. Therefore, the res judicata

principle does not prevent the finding that Bonhomme is the real party in interest. The fact that he has standing settles any relevant issues.

2. The "Shareholder Standing Rule" does not apply between Bonhomme and PMI.

The "shareholder standing rule" prevents shareholders from pursuing a claim since that shareholder does not have a “direct, personal injury independent of the derivative injury common to all shareholders." *Rawoof v. Texor Petroleum Co., Inc*, 521 F.3d 750, 757 (7th Cir. 2008). That is not applicable here, because the injury to Bonhomme is direct. Of course, shareholders may be slightly injured because PMI business associates are no longer able to engage in recreational activity at Wildman Marsh and Bonhomme's hunting lodge. However, that injury is remote and is not comparable to the direct injury that Bonhomme personally faces in losing his ability to hunt and host related parties to share in the recreational activities in a social setting. Therefore, the “shareholder standing rule” does not play a meaningful role in determining whether Bonhomme is the real party in interest.

C. Precious Minerals International, Inc. is not the real party in interest.

Precious Minerals International, Inc. ("PMI") is not the proper plaintiff because the company does not suffer any “injury in fact" from Maleau’s violation of the CWA, nor does PMI own any property affected by Maleau’s actions. Bonhomme owns the property affected and uses it from which he hosts hunting parties. To be sure, some of these hunting parties consist of business acquaintances, but others do not. It is Bonhomme's full right to associate with whomever he chooses and just because he invites professional colleagues does not make his own personal injury any less real.

It is therefore clear that Bonhomme is the proper plaintiff and the real party in interest to his citizen suit brought against Maleau. Bonhomme has standing to bring a citizen suit since he is

"injured in fact" by having to reduce his recreational activity due to a toxic pollutant in the waterway. It is clear that Maleau's actions have caused the toxic pollutant to contaminate the waterway. Finally, a successful ruling for the plaintiff will redress Bonhomme's injury in the deterrent effect it would have on Maleau. Finding Bonhomme to be the real party in interest would not create a res judicata issue. Further, the "shareholder standing rule" is not at risk of being improperly applied because it is not applicable in this case. Therefore, Bonhomme is the real party in interest under Fed. R. Civ. P. Rule 17(a) and the court erred in granting the motion to dismiss on this issue.

2. BONHOMME IS A "CITIZEN" AS DEFINED IN CWA §§ 505, 502(5), 33 U.S.C. §§ 1354, 1362(5) AND THE COURT BELOW ERRED IN GRANTING PROGRESS AND MALEAU'S MOTION TO DISMISS THE ISSUE.

The "citizen suit" provision of the CWA provides that "any citizen may commence a civil action on his own behalf . . . (1) against any person . . . who is alleged to be in violation . . . under this chapter." CWA § 505(a), 33 U.S.C. § 1365(a). To be certain, "[f]or the purposes of this section the term 'citizen' means a person or persons having an interest which is or may be adversely affected." CWA § 505(g), 33 U.S.C. § 1365(g). In the Act's definition section it is further stated that, "when used in this chapter . . . [t]he term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any intrastate body." CWA § 502, 33 U.S.C. § 1362. Thus, by definition a "citizen suit" authorizes any individual, with an interest adversely affected by a violation of the CWA, to maintain a cause of action against the violator.

Bonhomme’s interest in hunting at Wildman Marsh has been adversely affected by arsenic contamination to the water which originated from Maleau’s property, in violation of the CWA. Thus, under the “citizen suit” provision, Bonhomme is an entitled to bring a claim against Maleau, as a citizen.

However, Maleau and Progress have argued that "citizen suits" are only available to United States citizens. Because Bonhomme is a French national, and not a citizen of the United States, the district court denied Bonhomme the right to maintain his claim against Maleau. This determination was made in error. There is no provision in the Clean Water Act that prohibits a foreign national from bringing a citizen suit. Reading such a stringent requirement into the Act requires an unnecessarily narrow interpretation of the "citizen suit" provision which goes against the purpose of the Act.

Congress explicitly indicated the purpose of the Clean Water Act in stating, "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. Defining "citizen" more narrowly than the definition offered in the Act is contradictory to the Act's purpose. Rather, the broad language of the citizen suit provision is meant to allow for a broad category of potential plaintiffs. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981) ("This broad category of potential plaintiffs necessarily includes . . . plaintiffs seeking to enforce these statutes as private attorneys general."). Additionally, it is clear that Congress meant to generally expand the availability of the citizen suit rather than to narrow it. This is evidenced by the reduction of jurisdictional requirements to bring the suit based on citizenship, or otherwise: "[t]he district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." § 505(a), §1365(a). Rather, the citizen suit provision is constructed to allow any entity with standing to bring suit under the Act. *Middlesex Cnty.*, 453 U.S. at 16 (holding that citizen suits apply only where the plaintiff has suffered injury); *see also* S. Rep. No. 92-1236 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3823 ("Anyone may initiate a civil suit against any person who is alleged to be in violation of an

effluent limitation . . . but [sic] limits the right to bring actions to persons directly affected by a violation of the proposed Act."). Thus, even if Congress meant to limit the term "citizen" more than expressly stated in its definition, there is no compelling basis for reaching that conclusion.

3. MALEAU'S MINING WASTE PILES ARE "POINT SOURCES" UNDER § 502(12), (14), 33 U.S.C. § 1362(12), (14) AND THE COURT BELOW ERRED IN GRANTING PROGRESS' AND MALEAU'S MOTION TO DISMISS ON THE ISSUE.

Maleau conducts gold mining and extraction operations in Lincoln County, Progress, which produces mining overburden. Maleau transports the overburden from Lincoln County to Jefferson County and places the overburden in piles adjacent to Ditch C-1. Rainfall percolates through the piles and runs through channels formed by gravitational erosion due to the configuration of the piles. The runoff from the mining waste piles flows into Ditch C-1, resulting in the addition of arsenic to Reedy Creek through Ditch C-1.

The CWA prohibits the discharge of pollutants into navigable waters without a permit. CWA § 402, 33 U.S.C. §§ 407, 1342. Discharge of a pollutant means "any addition of any pollutant to navigable waters from any point source . . . " 33 U.S.C. § 1362(12)(A). A point source is: "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged . . . " CWA § 502, 33 U.S.C. § 1362. Point sources can include "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft . . . " *Id.* Because Maleau's mining waste piles are point sources, the District Court erred in granting Maleau's motion to dismiss on this issue.

Mining waste piles can be considered point sources under certain circumstances. *Sierra Club v. Abston Const. Co.*, 620 F.2d 41 (5th Cir. 1980). In *Sierra Club*, the dispute arose over whether or not mining spoil piles that discharged pollutants during periods of rainfall were point sources in the absence of "affirmative action." *Id.* at 42 - 44. The court held that "Gravity flow,

resulting in a discharge into a navigable body of water, may be part of a point source discharge if the miner at least initially collected or channeled the water and other materials." *Id.* at 45. Additionally, the court did not require affirmative action on the polluter's behalf and held that a point source may also exist: "where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials." *Id.*

Like in *Sierra Club*, Maleau intentionally collected mining overburden and created piles that resulted in discharge of a pollutant during a period of precipitation. The arsenic flowing from Maleau's mining waste piles into Ditch C-1 and subsequently into Reedy Creek travels through channels formed by gravitational erosion of the waste piles. As the *Sierra Club* court succinctly stated: "surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution." *Id.* at 47.

Maleau argues that the mining waste piles do not fit the definition of a point source and cites *Consolidated Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) and *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). However, both of these cases are distinguishable from the case at hand.

In *Consolidated Coal*, the court heard a dispute about the applicability of a regulation for coal mining preparation plants. *Consolidated Coal*, 604 F.2d at 249. A series of lawsuits filed by various coal mining companies challenged the regulation on several grounds, including the vagueness of its provision regarding pollutants which may be discharged by point sources under certain situations. *Id.* at 250. Ultimately, the court held that the regulation only added regulations to discharges from point sources at coal preparation plants and did not change the statutory

definition of point sources by the CWA. *Id.* The court's interpretation excluded runoff from "unchanneled and uncollected surface waters" as constituting point sources under the CWA's definition. *Id.* at 249. Maleau also relies on *Appalachian Power*, a case in which the Fourth Circuit considered new regulations for point sources discharging heat. 545 F.2d at 1355 - 56. The relevant dispute focused on new regulations for rainfall runoff that did not adequately distinguish between point sources and nonpoint sources. *Id.* at 1373 - 74. The court agreed with the *Consolidated Coal* decision that "uncollected and unchanneled" rainfall runoff does not fall under the definition of a point source, set aside the regulation and remanded with instructions for the Environmental Protection Agency ("EPA") to clarify that the new regulations applied to point sources only. *Id.*

Unlike the uncollected and unchanneled surface waters exempted in *Consolidated Coal*, Maleau purposely collected his mining waste into piles. The resulting contaminated water flowing into Ditch C-1 from these piles traveled down channels created by gravitational erosion. Thus, Maleau's mining waste piles do not meet the point source exemption discussed in *Consolidated Coal* and *Appalachian Power*, and these cases do not control. Indeed, both cases relied upon by Maleau support the assertion that the mining waste piles are point sources.

Maleau's mining waste piles are discernible, confined separately and discretely located apart from the mining operation in Lincoln County. Therefore, Maleau's mining waste piles meet the criteria for point sources under the CWA if they discharge pollutants into a navigable water or water of the United States. Assuming the arsenic resulted from stormwater runoff channeled through Maleau's mining waste piles, the district court erred in granting Maleau's motion to dismiss because a material issue of fact remains as to whether or not the mining waste piles constitute point sources under the CWA.

4. DITCH C-1 IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER CWA § 502(7), (12), 33 U.S.C. § 1362(7), (14), AND THE COURT BELOW ERRED IN GRANTING MALEAU'S MOTION TO DISMISS ON THE ISSUE.

Water polluted with arsenic runoff from Maleau's mining waste piles flows into Ditch C-1 and from Ditch C-1 into Reedy Creek. Ditch C-1 maintains a steady flow of water except during periods of drought ranging from a few weeks to three months. Additionally, Ditch C-1 is three feet wide by one foot deep. Ditch C-1 primarily functions to drain water from the agricultural properties through which it runs.

Congress granted the authority to regulate effluent discharges into navigable waters by point sources with the passage of the CWA. CWA § 502(7) broadly defines navigable waters as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Attempting to clarify, the EPA issued a regulation offering examples of waters of the United States. 40 C.F.R. § 122.2. These examples include waters currently or potentially used in interstate commerce, tributaries of interstate waters, and waters used for industrial purposes. *Id.* Ditch C-1 qualifies as a water of the United States under these definitions and thus is subject to the provisions of the CWA. Therefore, the district court erred in granting Maleau's motion to dismiss on this issue.

A. Because Maleau uses Ditch C-1 for industrial purposes by channeling the arsenic-laden stormwater runoff from his mining waste piles into it, Ditch C-1 is a water of the United States subject to regulation by the CWA.

The EPA passed a regulation clarifying the CWA's definition of waters of the United States to encompass "[a]ll other waters . . . the use, degradation, or destruction of which would affect or could affect interstate . . . commerce including any such waters . . . [w]hich are used or could be used for industrial purposes by industries in interstate commerce . . . " 40 C.F.R. § 122.2(c)(3). If Maleau's utilization of Ditch C-1 affects or could affect a water that is or could be used for industrial purposes in interstate commerce, Ditch C-1 is a water of the United States

subject to the jurisdiction of the CWA. Because Maleau uses Ditch C-1 for industrial purposes - mainly, to channel stormwater runoff from his mining waste piles - and Maleau's mining business inevitably affects interstate commerce, Ditch C-1 qualifies as a water of the United States.

Discharges of stormwater runoff from industrial uses generally require a permit. CWA § 402(p)(2)(B), 33 U.S.C. § 1342(p)(2)(B). Limitations to the permitting requirements exclude stormwater runoff from mining operations, but only if the runoff flows from conveyances designed to divert stormwater runoff. § 402(1)(2), § 1342(l)(2). However, this exception to the permitting requirement does not apply if the stormwater runoff comes in contact with "any overburden . . . byproduct, or waste products located on the site of such operations . . . " *Id.* The addition of arsenic to Ditch C-1 from stormwater runoff channeled through Maleau's mining waste piles therefore constitutes discharge from an industrial use subject to the CWA. Although Maleau transfers mining waste from his facility in Lincoln County where the open pit mine is located, because Maleau compiles waste on his property in Jefferson County a reasonable person could conclude that Maleau's Jefferson County property is a site that makes up part of his mining operation.

Maleau's only relief from this permitting requirement is to claim that his mining operation functions wholly intrastate and has no effect on interstate commerce. Even if Maleau conducts gold mining operations solely within the State of Progress, gold extracted from this mine inevitably makes its way into interstate commerce either directly or by affecting gold prices nationwide and perhaps internationally. The Commerce Clause grants Congress the authority to pass legislation regulating interstate commerce. U.S. Const. art. I, § 8, cl. 3. The Supreme Court has upheld the constitutionality of statutes that regulate entirely intrastate activities if those

activities impact interstate markets for goods. *Wickard v. Filburn*, 317 U.S. 111, 128 - 29 (1942). Such statutes must regulate activity that "substantially affects" interstate commerce to meet the threshold for constitutionality. *United States v. Lopez*, 514 U.S. 549, 558 - 59 (1995).

In *Wickard*, the Supreme Court found constitutional a statute regulating the amount of wheat a farmer could produce even for personal consumption. 317 U.S. at 128 - 29. The court justified its holding by reasoning that Congress could reasonably believe that "wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices . . . " *Id.* at 129. On the other hand, the Supreme Court in *Lopez* declined to extend Commerce Clause authority to a federal statute prohibiting guns in school zones because the nexus between the statute and the economic activity it purported to regulate was too far attenuated. 514 U.S. at 567. Distinguishing *Wickard*, the court in *Lopez* declines to "pile inference upon inference" to find an interstate economic impact linked to the activity regulated whereas a direct link exists between regulation of wheat and interstate prices of wheat. *Id.*

Here, Maleau's gold production more closely resembles the activity found to constitute interstate commerce in *Wickard*. A clear nexus exists between intrastate gold production and gold prices nationwide. Additionally, the Attorney General accused Bonhomme of trying to stifle competition between PMI and Maleau. Because PMI has no mines or property in Progress, the Attorney General's statement indicates Maleau competes in the gold market at least nationwide and probably globally. Therefore, Maleau's gold mining constitutes an industrial activity that affects interstate commerce. Because Maleau uses Ditch C-1 to channel arsenic-laden stormwater runoff from his mining waste piles in association with industrial activity, Ditch C-1 is a water of the United States under the CWA.

B. Ditch C-1 is a tributary of Reedy Creek, a water of the United States, and thus subject to the provisions of the CWA.

Navigable waters encompass a wide range of waters - both interstate and intrastate - in order to further the goals of the CWA. Some bodies of water always fall under federal jurisdiction, including interstate waters and waters used in interstate commerce. Others fall under federal jurisdiction in certain circumstances when a "significant nexus" exists between a water of the United States and a body of water that under other circumstances would not fall under the jurisdiction of the CWA. *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (Kennedy, J., concurring); *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985); *Accord Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167 - 68 (2001).

The EPA further defines waters of the United States as encompassing "tributaries of . . . all interstate waters . . . " 40 C.F.R. §122.2(b), (e). Reedy Creek begins in the State of New Union and ends at Wildman Marsh in the State of Progress, and therefore is an interstate water subject to the jurisdiction of the CWA. A more thorough discussion of Reedy Creek's status as a water of the United States follows herein. However, even if the court determines that Reedy Creek is not a water of the United States, a significant nexus exists between Reedy Creek and Wildman Marsh bringing Reedy Creek under the jurisdiction of the CWA.

Neither the CWA nor the EPA regulations define tributaries. When statutes do not provide specific definitions, courts sometimes use dictionary definitions to determine the plain meaning of a statute. *Rapanos*, 547 U.S. at 716. A tributary is defined as "a stream that flows into a larger stream or river or into a lake." *Tributary Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/tributary (last visited Dec. 1, 2013). The common definition of a stream is "a body of running water." *Stream Definition*, Merriam-Webster.com,

http://www.merriam-webster.com/dictionary/stream (last visited Dec. 1, 2013). Ditch C-1 maintains a continuous flow of water except for small lengths of time during periods of drought. Tributaries fall under the jurisdiction of the CWA if a significant nexus exists between a water of the United States and the tributary. *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir.2006). In *Hubenka*, the court held that " the potential for pollutants to migrate from a tributary to navigable waters downstream constitutes a 'significant nexus' between those waters" and upheld the Army Corp of Engineers tributary rule. *Id.*

A significant nexus exists between Ditch C-1 and Reedy Creek, and Ditch C-1 flows continuously into Reedy Creek except for during limited periods of drought. A significant nexus also exists between Ditch C-1 and Wildman Marsh, a water of the United States. Therefore, Ditch C-1 functions as a tributary to Reedy Creek which flows uninterrupted into Wildman Marsh and is thus a water of the United States subject to the jurisdiction of the CWA.

C. Ditch C-1 is not a point source.

Maleau asserts that Ditch C-1 is a point source and therefore not a water of the United States. Specifically, Maleau relies on the definition of a point source as including ditches. CWA § 502(14), 33 U.S.C. § 1362(14). While it is true that the CWA does provide ditches as an example of a conveyance that could constitute a point source, Maleau's logic relies heavily on several flawed assumptions.

All parties refer to Ditch C-1 colloquially as a ditch. Mere nomenclature, however, does not change the nature of Ditch C-1 as a water of the United States. Ditches come in a variety of shapes and sizes with varying characteristics and to consider them as one category regardless of their individual characteristics runs contrary to the purpose of the CWA. Courts have accepted that bodies of water may be referred to as one type but function as another. *S. Florida Water*

Mgmt. District v. Miccosukee Tribe of Indians, 541 U.S. 95 (2006). For example, in *Miccosukee* the Supreme Court considered whether a canal through which phosphorous-laden water was pumped constituted the discharge of a pollutant from a point source. *Id.* at 102. Ultimately, the court held that the canal was a water of the United States within the definition of the CWA and remanded for consideration of the distinctness of the canal from a pumping station under the unitary waters theory. Like the case at hand, although a type of water may fall under the definition of a point source under certain circumstances, the character of the water in a specific situation is more significant in determining whether it is a water of the United States or a point source.

Additionally, some agricultural waters do not require permits under the CWA. 40 C.F.R. § 122.3. This provision specifically exempts "return flows from irrigated agriculture . . . " 40 C.F.R. § 122.3(f). Ditch C-1 functions primarily to drain excess water from the agricultural properties it serves. Most farmers whose agricultural properties lie adjacent to Reedy Creek divert the Creek for irrigation purposes. Although not expressly indicated in the record, a reasonable inference follows that Ditch C-1 drains irrigated water from Bonhomme and his neighbor's properties. Therefore, Ditch C-1 falls under the express exemptions for permitting requirements under the CWA.

Lastly, the EPA outright excludes irrigated agricultural waters from the definition of a point source. 40 C.F.R. § 122.2. "Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel . . . from which pollutants are or may be discharged. *This term does not include return flows from irrigated agriculture or agricultural storm water runoff.*" *Id.* [emphasis added].

Thus, Ditch C-1 is either a water of the United States because Maleau utilizes it for industrial uses for his mining piles waste runoff or an agricultural waterway used to drain excess runoff. In either instance, Ditch C-1 is not a point source.

Ditch C-1 is not a point source but rather a water of the United States. The district court erred in granting Maleau's motion to dismiss on the issue when it determined that Ditch C-1 was a point source under the CWA.

5. REEDY CREEK IS A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER CWA § 502(7), (12), 33 U.S.C. § 1362(7), (12), AND THE COURT BELOW DID NOT ERR IN FINDING AGAINST MALEAU ON THIS ISSUE.

In CWA §502(7), (12), Congress expanded the definition of "navigable waters" beyond the traditional navigable-in-fact standard to be "the waters of the United States." 33 U.S.C. § 1362(7), (12). Congress based the expansion under its Commerce Clause powers. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). EPA regulations define "the waters of the United States" to include "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce … [and] all interstate waters." 40 C.F.R. § 122.2. In *Rapanos*, the Supreme Court limited the reach of the EPA's authority to define "the waters of the United States." 547 U.S. 715, 758 (2006). However, the court applied that limitation only to isolated, intrastate wetlands, and not to interstate flowing streams. *Id.* at 730. Reedy Creek flows continuously, beginning in New Union and terminating in Progress, and serves as the water source for farmers and an interstate highway service area. Therefore, the district court correctly held that Reedy Creek is a "water of the United States."

Prior to *Rapanos*, the Supreme Court addressed the EPA's definition of "the waters of the United States" in two important decisions: *U.S. v. Riverside Bayview Homes, Inc.* and *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs* ("*SWANCC*"). In *Riverside Bayview*, a

developer sought to fill in a privately-owned wetland, and the Corps of Engineers ("Corps") sought to enjoin the developer. 474 U.S. at 124. The Corps, having authority under the CWA to regulate "navigable waters," included "wetlands … adjacent to other covered waters" as part of "the waters of the United States." *Id.* The court held the Corps interpretation of "waters of the United States" reasonable because it deferred to the agency's expertise and found some connection to the statute. *Id.* at 139.

In *SWANCC*, the Corps sought to regulate intermittent ponds as "waters of the United States" because they occasionally supported migratory birds, which in turn constituted interstate commerce. *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs,* 531 U.S. 159, 164 (2001). The court held the Migratory Bird Rule unreasonable because the occasional support of migratory birds fell outside the meaning of interstate commerce.531 U.S. at 174. The court also held that the EPA's inclusion of wetlands interpreted the statute correctly only when the wetland formed a "significant nexus" with a "navigable water." 531 U.S. at 168. The court reasoned that in *Riverside Bayview*, it based its ruling for adjacent wetlands on Congressional approval of the regulation, and it found no such approval for isolated wetlands. 531 U.S. at 167.

In this case, Wildman March fits within the CWA's scope of a water of the United States in conformance with the Supreme Court's rulings in *SWANCC* and *Riverside Bayview*. Mainly, the wetland is located mostly upon federally-owned land. Second, the wetlands have a wildlife presence sufficient to establish a viable relationship to interstate commerce unlike the wetland in *SWANCC*. Finally, the concrete interstate impact and significant nexus between Reedy Creek and Wildman Marsh establish the wetland's status as a water of the United States in accordance with *Riverside Bayview*.

Finally, in *Rapanos*, the EPA sought to regulate isolated intrastate wetlands as "waters of the United States," and the court followed two paths: Justice Kennedy's concurrence maintained the "significant nexus" test followed in *Riverside Bayview*, and the plurality sought to limit the definition to "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as "streams, ... oceans, rivers, and lakes." *Rapanos v. U.S.*, 547 U.S. 715, 739 (2006) (internal quotation marks omitted). However, both the concurrence and the plurality sought to determine the "point at which water ends and land begins." *Id.* at 725 (quoting *Riverside Bayview*).

Reedy Creek, as a continuously flowing stream, falls well within both the plurality's and concurrence's test of what constitutes a "water of the United States." Reedy Creek also meets the plain meaning of the CWA, in that it is a stream that flows between two states, and is therefore a water of the United States. Additionally, because a significant nexus exists between Reedy Creek and Wildman March, Reedy Creek is a water of the United States. Also, Reedy Creek functions as a tributary of Wildman Marsh, a wetland falling under the jurisdiction of the CWA. Therefore, the district court correctly found Reedy Creek to be a water of the United States under the CWA.

6. BONHOMME DOES NOT VIOLATE THE CWA BECAUSE MALEAU INDIRECTLY ADDS ARSENIC TO DITCH C-1 VIA HIS WASTE PILES AND THAT THE COURT BELOW ERRED IN DENYING HIS MOTION TO DISMISS ON THIS ISSUE.

Congress created the CWA to clean up and prevent pollution primarily from industrial and municipal polluters. *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 646 (1993). The CWA focuses on controlling point sources because they allow the best control over those industrial polluters. *Id.* Where courts have held that water movement from a polluted body of water to an unpolluted body constituted an "addition" under the CWA, the movement involved the intentional diversion of water by either a public body or industrial operator. *See*

South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95 (2004) (water management district); *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (hydroelectric dam operator); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2nd Cir. 2001) (municipal water supplier). The CWA was not intended to hold a private landowner who holds the last piece of land at the end of a stream or agricultural ditch liable for all the pollution in a body of water, and to do so would frustrate public policy.

A. Ditch C-1 is a navigable body of water, and its confluence with Reedy Creek cannot be a point source under the CWA.

Bonhomme's culvert merely transfers polluted water from Ditch C-1 into Reedy Creek, which are part of the same body of water. When Ditch C-1 joins Reedy Creek, that confluence cannot be considered a point source, even if the confluence is a culvert. The court has held that a diversion from a single body of water back into itself is not a discharge under the CWA. *L.A. Cnty. Flood Control Dist. v. Natural Res. Defense Council, Inc.* 133 S.Ct. 710, 712-13 (2013); *See also Miccosukee*, 541 U.S. 95, 109 (2004). While the court has held that the transfer of water from one body to another can constitute a discharge, those facts involved the intentional diversion of water from one body to another. *Catskill Mountains Chapter* , 273 F.3d at 484. Bonhomme does not intentionally transfer the water from Ditch C-1 into Reedy Creek; the ditch merely crosses his property. Maleau adds arsenic to Ditch C-1 and thereby adds that arsenic into Reedy Creek, making Maleau liable for the pollution entering Reedy Creek and its tributary Ditch C-1.

In *L.A. County Flood Control Dist.*, the district channeled water from an improved section into an unimproved of the same river. 133 S.Ct. 710, 713. The court held that the mere channeling of the river does not constitute a discharge under the CWA. *Id.* Similarly, Ditch C-1

is not removed and then returned to a water body, but "simply flows from one portion of the water body to another." *Id.* In Bonhomme's case, one stream flows into another stream. However, the cases are similar because the culvert occurs at the confluence of two water bodies, and Bonhomme, like the flood control district, merely restricts and channels an existing body of water, rather than artificially diverting a stream.

Furthermore, the culvert on Bonhomme's property constitutes a water transfer between navigable Ditch C-1 to navigable Reedy Creek, and the CWA excludes water transfers from its permitting requirements. 40 C.F.R. § 122.3(i). Under § 122.3(i), a water transfer is "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." *Id.* Only when the transfer activity introduces a pollutant is a permit required. *See Catskill Mountains Chapter*, 273 F.3d at 484. Bonhomme merely conveys the waters of Ditch C-1 into Reedy Creek, makes no use of the water, and introduces no pollutants. Therefore, Bonhomme does not violate the CWA.

Maleau, however, adds the arsenic to Ditch C-1, and because Ditch C-1 is a tributary of Reedy Creek and forms a "significant nexus" with it, Maleau's addition to Ditch C-1 constitutes a discharge into Reedy Creek. In *Rapanos*, Justice Kennedy's concurrence held that any body of water that formed a "significant nexus" with a navigable body of water could also be considered a navigable body of water under the CWA. 547 U.S. at 742. Therefore, if the court finds Maleau's addition of arsenic to Ditch C-1 itself to not be a discharge, the court should find that the addition of arsenic to Ditch C-1 will result in a discharge into Reedy Creek via a tributary.

B. Ditch C-1, if not a navigable body of water, is an agricultural ditch, and is exempted from regulation under the CWA.

Ditch C-1 drains the agricultural properties through which it runs. It serves to drain groundwater from the saturated soil to facilitate agriculture, and the water in it comes from those

properties. The CWA exempts "agricultural stormwater discharges and return flows from irrigation agriculture" from the definition of point source. CWA § 502(14), 33 U.S.C. § 1362(14). If a landowner pollutes a body of water within the regulatory scheme of the CWA, it can be exempted. *Fishermen Against Destruction of Environment, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002). Therefore, even if Ditch C-1 is not a water of the United States, it is not a point source because it falls under an express exception to the permitting requirements of the CWA.

In *Closter Farms*, a farm pumped polluted agricultural runoff into a regulated body of water. *Id.* at 1296. The court held that the CWA exempted polluted agricultural runoff. *Id.* The court reasoned that because the purpose of the pumping was agricultural and therefore specifically exempted the farm from the CWA. *Id*. However, if the farm pumped water polluted from a non-agricultural source, the only way that it would be exempted is if those sources had permits under the CWA. *Id.* Therefore, if Ditch C-1 is an agricultural ditch, Bonhomme should either be exempted from the CWA for discharge agricultural runoff, or the court should find Maleau's addition of arsenic to be in violation of the CWA.

CONCLUSION

Bonhomme has standing to bring a citizen suit against Maleau for a violation of the CWA because he suffers injury in fact as a result of arsenic discharged from Maleau's unpermitted point sources into Reedy Creek and Wildman Marsh. For the reasons stated above, we respectfully request that the Court REVERSE the granting of Maleau's motion to dismiss and REMAND the case for further proceedings. Additionally, because Bonhomme merely transfers polluted water through the culvert on his agricultural property and does not contribute additional

pollutants to Reedy Creek via Ditch C-1, he has not violated the CWA. Therefore, we respectfully request that the Court REVERSE and grant Bonhomme's motion to dismiss.

December 4, 2013

Respectfully submitted,

Team 71