C.A. No. 13-01234 Team 72

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee,

V.

SHIFTY MALEAU,
Defendant-Appellant, Cross Appellee

STATE OF PROGRESS,
Plaintiff-Appellant, Cross Appellee,

And

SHIFTY MALEAU
Intervenor-Plaintiff-Appellant, Cross Appellee,

V.

JACQUES BONHOMME
Defendant-Appellant, Cross-Appellee.

On Appeal From
The United States District Court
For the District of New Union

BRIEF FOR JACQUES BONHOMME
Defendant-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

Appellant Jacques Bonhomme filed a complaint in the United States District Court for the District Court of Progress seeking review under 33 U.S.C. section 1365. On July 23, 2012, the district court granted Shifty Maleau and the State of Progress's motion to dismiss on five of the six counts, and granted Jacques Bonhomme's count that Reedy Creek is a "navigable water of the United States" under 33 U.S.C. section 1362(7). The district court's order is final, and jurisdiction is proper in this Court pursuant to 33 U.S.C. section 1365.

STATEMENT OF THE ISSUES

1. Whether Jacques Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating section 301(a) of the Clean Water Act, 33 U.S.C. § 1331(a).

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

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

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

5. Whether Reedy Creek is "navigable water/water of the United States" under CWA section 502(7), (12), 33 U.S.C. § 1362(7), (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 entered after Jacques Bonhomme sued Shifty Maleau for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387 (2012), under the jurisdiction of the citizen suit provision of that statute, *id.* § 1365. (R. 4). After proper notice, the State of Progress filed a citizen suit against Bonhomme alleging that he had in fact violated the CWA by discharging arsenic from a ditch

running through his property and flowing into Reedy Creek. (R. 5). As a matter of right in Progress's action against Bonhomme, Maleau intervened and then Progress and Maleau moved to consolidate their cases because the facts and the law are the same. (R. 5). The court granted the motion, and then found that Bonhomme is not a real party in interest under Federal Rule of Civil Procedure 17; that he is not a citizen entitled to bring suit under the CWA, 33 U.S.C. §1365, as a foreign national; that Maleau's waste mining piles are not point sources under the CWA, *id.* § 1362(12); that Ditch C-1 is not navigable water; and that Bonhomme violates the CWA by allowing pollutants added by Maleau to flow over his property through Ditch C-1 into the navigable water Reedy Creek. (R. 1).

Progress takes issue with the finding that Ditch C-1 is not a navigable water subject to jurisdiction under the CWA, Maleau takes issue with the finding that Reedy Creek is a navigable water subject to jurisdiction under the CWA, and Bonhomme takes issue with all findings except that Reedy Creek is a navigable water subject to jurisdiction under the CWA. (R. 2). All three parties filed a Notice of Appeal. (R. 1).

STATEMENT OF FACTS

Maleau operates a gold mining and extraction business in the State of Progress. He trucks the waste resulting from his mining operations from his property to a different county within Progress, and places the mining waste into piles next to Ditch C-1. (R. 5). Rain produces runoff from the waste piles, and arsenic, a well-known poison linked with mining and extraction leaches into the water and into the Ditch. (R. 5-6). Ditch C-1 has a defined watermark, in addition to a defined bed and bank, and measures three feet across and averages one foot deep. *Id.*

Ditch C-1 runs three miles before discharging through a culvert that travels under a road on Bonhomme's property and into Reedy Creek. *Id.* Measuring about fifty miles long, Reedy

Creek traverses two different states: it begins in the State of New Union and flows into the State of Progress. Just before Reedy Creek reaches Bonhomme's property, the Creek flows for several more miles before ending in Wildman Marsh, which is contained within a federal wetland. (R. 5-6). Reedy Creek maintains water flow throughout the year, and it has a continuous surface connection with Wildman Marsh. (R. 5). Reedy Creek's water is sold as drinking water, provides a $25 million hunting industry, and two states rely upon it as an irrigation source to the agriculture industry. (R. 5-6).

Bonhomme, a French citizen, is the President and largest shareholder of Precious Metals International, Inc. ("PMI"). (R. 6). PMI and Maleau are competitors in the gold mining industry. (R. 7). Bonhomme owns the property and the hunting lodge constructed on it near the edge of the Wildman Marsh where Reedy Creek flows into the marsh. (R. 6). He uses his hunting lodge primarily to host duck hunting parties where guests often include business acquaintances and other friends. *Id.*

Test results of water samples Bonhomme obtained upstream from Maleau's waste piles detected arsenic at several points: at significant concentrations near Maleau's mining waste piles and at Ditch C-1, and at detectable levels in the waters of Reedy Creek and Wildman Marsh. (R. 6). PMI conducted or paid for these sampling analyses, and is also paying for Bonhomme's attorney and expert witness fees in this case (R. 7).

Due to the arsenic levels found in Reedy Creek and Wildman Harsh, Bonhomme has decreased the number of hunting parties he hosts from eight a year in the past, to two. *Id.*

STANDARD OF REVIEW

The district court granted Maleau's motion to dismiss. This court reviews a district court's grant of motion to dismiss *de novo. See Boone v. Redevelopment Agency of San Jose,* 841 F.2d 886, 889 (9th Cir.), *cert. denied*, 488 U.S. 965 (1988).

SUMMARY OF THE ARGUMENT

Bonhomme may bring suit against Maleau as the real party in interest because he possesses a substantive right under the CWA's citizen suit provision as a person whose interest has been adversely affected by Maleau's unlawful discharge of arsenic into navigable waters. Contrary to what Maleau and the State of Progress argue, PMI is not the real party in interest because it cannot claim an adversely affected interest that ought to be protected under the Act. Alternatively, Bonhomme is the real party in interest because he satisfies the two-part standing requirement. The court therefore erred in concluding that Bonhomme was not a proper plaintiff.

Bonhomme, a foreign national, is a "citizen" as defined under the CWA and is not precluded from bringing suit against Maleau. First, a person's status as a foreign national does not alter the standing analysis when an injury is alleged. Second, the text of the CWA's citizen suit provision grants broad standing that does not preclude injuries of foreign nationals to be within the zone of protected interests the statute seeks to protect. The court therefore erred in concluding that Bonhomme may not file suit under the CWA.

The district court erred in granting Progress' and Maleau's motion to dismiss on whether Maleau's mining waste piles were "point sources" under the CWA. The court found that Maleau's mining waste piles were not point sources under the CWA, which is contrary to the plain language of the CWA, legislative precedent and the intent of Congress in enacting the CWA. Congress' goal was to explicitly monitor and regulate discharge of pollutants from "discernible" and "discrete" conveyances, which Maleau's mining waste piles directly fall under. 33 U.S.C. § 1362(14). Further, the legislative history indicates that mining waste discharges were presented as a potential amendment to the CWA, but Congress found that adding this was duplicative of the CWA's already existing regulatory provisions. The Court should reverse the

district court's conclusion on this matter, and hold that Maleau's mining waste piles are "point sources" under the CWA, which would fall in line with the CWA's goals, plain language and legislative history of Congress in enacting the Act.

The District Court erred in concluding that Ditch C-1 was not navigable water under the CWA. Ditch C-1, exhibiting continuous groundwater flow, an ordinary high watermark, and a clearly defined bed and bank comfortably satisfies the definition of a tributary to traditionally jurisdictional water. Further, the case law is clear that the existence of a man-made alteration to the tributary will not remove it from the reaches of CWA jurisdiction, nor will the fact that it concurrently satisfies the definition of a "point source" and tributary. By its significant nexus/surface connection with Reedy Creek, traditionally jurisdictional water, any discharge of pollutants into Ditch C-1 is an unlawful discharge into navigable waters.

Reedy Creek is jurisdictional navigable water under the CWA. The District Court correctly determined that by its interstate nature, or its significant nexus/surface connection with federally owned wetlands, Reedy Creek qualifies as "water of the United States," and thereby jurisdictional navigable water. Further, Reedy Creek's significant economic and regulatory importance satisfies any lingering concerns about the constitutionality of the CWA, regarding Congress's authority under the Commerce Clause, at least as it is applied in the context of this watershed and those similarly situated.

The district court erred in denying Bonhomme's motion to dismiss on whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property because Maleau is the but-for cause of the presence of the arsenic in Ditch C-1. The EPA promulgated and issued the Water Transfers Rule, which establishes that water transferred from one water of the United States to another water of the United States, without subjecting the

water to intervening industrial, municipal, or commercial use does not need a separate NPDES permit. EPA's regulatory power is subject to deference under the *Chevron* test, and the Water Transfers Rule has further been adopted and applied in comparable cases. Bonhomme is not contributing any pollutants to the water coming out of his culvert into Reedy Creek. Maleau's mining waste piles are the cause of the arsenic ending up in Reedy Creek, and the Court should grant Bonhomme's motion to dismiss on this issue.

ARGUMENT

I. BONHOMME MAY BRING SUIT AGAINST MALEAU BECAUSE HE IS A REAL PARTY IN INTEREST POSSESSING SUBSTANTIVE RIGHTS UNDER THE CWA

A. Bonhomme has a substantive right under the CWA, 33 U.S.C. Section 1365, and is the real party in interest to bring a suit against Maleau.

Under Federal Rule of Civil Procedure 17(a), a party has standing to bring suit in federal courts only if he is the real party in interest. *See United States v. 936.71 Acres of Land,* 418 F.2d 551, 556 (5th Cir 1969). A real party in interest is "the party who, by the substantive law, has the right to be enforced." *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.,* 630 F.2d 250, 257 (5th Cir. 1980). In this case, the governing substantive law is the citizen suit provision of the CWA which states that "[a]ny citizen may commence a civil action on his own behalf…against any person…who is alleged to be in violation of [the Clean Water Act]." 33 U.S.C. § 1365(a)(1) (2013). The statute further defines "citizen" as a "person…having an interest which is or may be adversely affected." *Id.* § 1365(g).

Here, Bonhomme claims that Maleau's discharge of arsenic has tainted the wetlands where his hunting lodge is located. (R. 6). As a result, Bonhomme claims an injury to his recreational use of the hunting lodge and its surrounding property because he has reduced the number of hunting parties from eight to two a year due to his fear of arsenic in the waters. *See*

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). Bonhomme is the sole owner of the hunting lodge, and the fact that he uses the lodge to host business hunting parties for clients and PMI associates is irrelevant, despite Maleau's deficient claim to the contrary. (R. 6). Moreover, as the owner of the hunting lodge adjacent to the pollutant-tainted waters, Bonhomme has an even stronger case as an adversely affected party because he is more than merely a frequent visitor to the area. *See Laidlaw,* 528 U.S. at 183-84; R. 6.

B. PMI is not a real party in interest because it does not have a substantive right under the CWA to seek enforcement and thus may not assert such a right.

A party that does not possess a substantive right is not the real party in interest related to that right and thus cannot assert it. *See Acres of Land*, 418 F.2d at 556. Here, PMI does not have a substantive right to bring a CWA violation claim against Maleau under the CWA. Under the CWA's citizen suit provision, § 1365, only a person who has an interest adversely affected may bring a citizen suit claim. 33 U.S.C. §1365(a)(1). In arguing that PMI is the real party in interest who should have brought the present claim, rather than Bonhomme, Maleau has failed to identify what PMI's alleged adversely affected interest is. The interest that plaintiff seeks to enforce must be "a present, substantial interest as distinguished from a contingent interest or mere expectancy." *Acres of Land,* 418 F.2d at 556 (citing *Morgan v. King*, 312 Ky. 792 (Ky. Ct. App. 1950)).

Maleau seems to argue that PMI is the real party in interest because PMI is paying for Bonhomme's legal fees and the sampling and analyses conducted to support Bonhomme's claim that the source of the arsenic comes from Maleau. (R. 7-8). But this does not alter Bonhomme's substantive right against Maleau. *See Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990) ("The real party in interest is the person holding the substantive right sought to be

enforced, and not necessarily the person who will ultimately benefit from the recovery.") (internal citations omitted).

Furthermore, because PMI does not possess any substantive rights against Maleau and Progress, PMI may not bring a subsequent action against Maleau in regard to Maleau's unlawful discharges. Thus, there is no chance that Rule 17(a)'s underlying *res judicata* purpose to protect defendants from subsequent similar suits by entitled parties will be at risk. *See Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78 (4th Cir. 1973), *cert. denied* 415 U.S. 935, 94 S. Ct. 1450, 39 L. Ed. 2d 493 (1974) (citations omitted).

C. Alternatively, Bonhomme is the real party in interest because he has standing.

Rule 17's real party in interest test is satisfied when a party is found to have standing. *See Apter v. Richardson*, 510 F.2d 351, 353 (9th Cir. 1975) (stating that "it is settled that once a party is found to have standing to raise a constitutional point, that ruling disposes of any real party in interest objections as well"); *see also Swanson v. Bixler*, 750 F.2d 810, 814 (10th Cir. 1984). *But see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (describing the three elements of standing).

Bonhomme meets the two-part test that courts have devised to determine whether plaintiffs have standing to sue. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 478 (1982). First, Bonhomme's challenge meets the three elements of Article III standing because he has suffered an injury in fact, which is fairly traceable to the challenged conduct, and the injury is likely to be redressed by the relief he requests. *See Laidlaw,* 528 U.S. at 180 ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."); see also

Montgomery Envtl. Coal. v. Fri, 366 F. Supp. 261, 264 (D.D.C. 1973) ("It would be an unjustified presumption on the Court's part to think that none of the aesthetic and recreational values of the plaintiffs will be lessened by increased pollution of the Potomac River when the river itself passes within the midst of plaintiffs' community.") The injury is ongoing and not merely speculative. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Bonhomme alleges in his complaint that Maleau's discharge of arsenic violates the CWA and has the effect of tainting the waters of Reedy Creek and Wildman Marsh. (R. 6). Thus Bonhomme's alleged injury is fairly traceable to Maleau's acts. *Laidlaw*, 528 U.S. at 180. The Court's grant of the civil penalties, injunctive and declaratory relief will remedy Bonhomme's alleged injuries because Maleau would be required to cease violating the CWA and pay civil penalties for past violations. *See Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992).

Second, as Part II describes, Bonhomme's claimed injury meets the requirements of prudential standing. *See infra*, Part II.B.

Therefore, contrary to Maleau's claim, the purposes of Rule 17(a) indicates that Bonhomme, rather than PMI, is the real party in interest with respect to Maleau's discharge violations. *See Celanese Corp. v. John Clark Industries*, 214 F.2d 551, 556 (5th Cir. 1954).

II. BONHOMME, A FOREIGN NATIONAL, IS A "CITIZEN" AS DEFINED UNDER THE CLEAN WATER ACT AND MAY BRING SUIT AGAINST MALEAU.

A foreign national is a "citizen" within the meaning of the CWA, and Bonhomme is entitled to bring a citizen suit against Maleau.

A. A person's status as a foreign national does not alter the standing analysis when he has a concrete injury in fact.

Bonhomme's claim against Maleau meets the two-part standing test as a "case or controversy" under Article III, *see infra* Part I.C, and the claim he asserts is within the "zone of

interests" protected by the CWA. *See Assoc. of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 (1970). If a claimant asserts a concrete injury in fact, his status as a foreign national does not change the standing analysis. *Schmidheiny v. Weber*, 146 F. Supp. 2d 701, 704 (E.D. Pa. 2001), *rev'd on other grounds*, 319 F.3d 581 (3rd Cir. 2003); *see also Cardenas v. Smith*, 733 F.2d 909, 913 (D.C.Cir. 1984) ("[F]or purposes of Article III standing, plaintiff's status as a nonresident alien does not obviate the existence of [his] injury; it is the injury and not the party that determines Article III standing."). Maleau has violated the CWA by discharging arsenic that has tainted the wetlands where Bonhomme's hunting lodge is located. (R. 6) Bonhomme claims an injury to his recreational interests because his fear of arsenic in the waters has consequently decreased his use of the hunting lodge for parties he hosts. *Id.*

B. The CWA citizen provision grants broad standing to include injuries of foreign nationals within the zone of interests that the CWA seeks to protect, and does not require a claimant to be a citizen of the United States.

Under the broad statutory language of the CWA citizen suit provision, the fact that Bonhomme is a French national, not a citizen of the United States, does not preclude him as a potential claimant. (R. 8). As Part I.C, *infra*, describes, Bonhomme's claimed injury is within the zone of interests that the CWA protects. The CWA's citizen suit provision grants broad substantive and procedural rights where "[a]ny citizen may commence a civil action on his own behalf…against any person…who is alleged to be in violation of [the Clean Water Act]." 33 U.S.C. § 1365(a)(1); *Metropolitan Washington Coal. for Clean Air v. District of Columbia*, 511 F.2d 809, 814 & n.26 (D.C. Cir. 1975) (interpreting statute's "any citizen" provision as a grant of broad standing for claimants to bring an action under the Clean Air Act) (citing 42 U.S.C. § 1857h-2 (1982)).

In defining a "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 statute is silent on whether the plaintiff bringing a claim must be a United States citizen. Nothing in the text precludes a foreign national from bringing a citizen suit under the CWA.

Rather, it was Congress's intent "that enforcement of [CWA] provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them." *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., LLC*, 278 F. Supp. 2d 654, 667 (E.D.N.C. 2003) (citing S. Rep. No. 92-4 14, at 3746 (1971)). Consistent with the CWA's aspirational purpose is its broad definition of "citizen" as a "person…having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Congress's emphasis on the injury of a potential claimant rather than the identity of the party is consistent with the statute's purpose of remedying violations on a broad scale. *But see Raven v. Panama Canal Co*., 583 F.2d 169, 171 (5th Cir. 1978) (stating that the word "individual" rather than "person" reflects the congressional intent to apply the Privacy Act only to United States citizens and resident aliens and to exclude nonresident aliens) (citing *Stone v. Export-Import Bank of United States*, 552 F.2d 132 (5th Cir. 1977)).

Additionally, unlike cases that dealt with the issue of the extraterritorial reach of statutes and held that requisite standing requirements have been met for nonresident aliens, here, Bonhomme's claim alleges that Maleau violated the CWA for activities carried out in the United States, and Bonhomme asserts an injury he incurred on U.S. territory he owns. *Cardenas*, 733 F.2d at 913 ("[A]n injury endured abroad is not less of an injury for Article III standing purposes because it happened on foreign soil."). Thus, Bonhomme has an even stronger case for standing

than nonresident aliens alleging an injury incurred abroad. The CWA has a "*national* goal of eliminating the discharge of all pollutants." *Citizens Coal Council & Ky. Res. Council, Inc. v. United States EPA*, 385 F.3d 969, 981 (6th Cir. 2004) (citing 33 U.S.C. § 1311(b)(2)(A)) (emphasis added); *cf. Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991) (finding that Canadian workers affected by the loss of sales due to the EPA's ban on asbestos did not have standing to challenge the EPA's final rule under the Toxic Substances Control Act's citizen suit provision conferring the right of judicial review to "any person" because of the Act's "national emphasis").

Finally, case precedent demonstrates the courts' refusal to deny a non-U.S. citizen plaintiff from resorting to U.S. courts to redress injuries protected by environmental statutes when congressional intent banning such claimants is absent. *See People of Saipan by Guerrero v. United States Dep't of Interior*, 356 F. Supp. 645, 652-53 (D. Haw. 1973) ("[alien] [C]itizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights") (quoting *Disconto Gesellschaft v. Umbreit,* 208 U.S. 570, 578, (1908)); *see also Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972) (per curiam) (Canadian environmental group allowed to intervene in federal district court suit testing Interior Secretary's compliance with NEPA prior to granting Alaska pipeline permits); *Enewetak v. Laird*, 353 F. Supp. 811, 818 (D. Hawaii 1973) (stating that *Wilderness Society* is to be interpreted as holding that NEPA provides foreign nationals with certain rights when their environment is endangered by federal actions).

Therefore, Bonhomme is a "citizen" as defined under the CWA, and is entitled to bring a citizen suit against Maleau. The fact that Bonhomme is a French national does not alter the two-part standing analysis because he alleges a cognizable injury.

III. MALEAU'S MINING WASTE PILES ARE "POINT SOURCES" UNDER CWA § 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 THIS ISSUE.

In order to bring a suit under section 502 of the CWA, Bonhomme must allege that Maleau's mining waste piles are "point sources" under section 502(14) of the CWA, and that runoff from these mining waste piles is considered a "discharge of a pollutant" under section 502(12). 33 U.S.C. § 1362 (12), (14). The term "point source" is defined as:

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

33 U.S.C. § 1362(14). There is key language in the definition of point source that requires a finding that Maleau's mining waste piles are point sources, along with reading this section in conjunction with other pertinent parts of the statute. *Consolidation Coal v. Costle,* 604 F.2d 239, 250 (4th Cir. 1979). The mandate of the CWA further affirms regarding Maleau's mining waste piles as point sources. *United States v. Earth Sciences,* 599 F.2d 368, 372 (10th Cir. 1979).

Bonhomme alleges that the mining waste piles are point sources and that the runoff that occurs during precipitation events into Ditch C-1 leading to Reedy Creek violates the CWA. (R. 8) Thus, the district court erred in dismissing this issue from consideration based on a motion by Progress and Maleau.

A. Maleau is in violation of the CWA because his mining waste piles directly fall under the language of § 502(14)'s definition of a point source.

In working to interpret a statutory provision, a court should first look to the plain language of the statute itself. *Cosmetic Ideas, Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 616 (9th Cir. 2010). In the case of the CWA, U.S.C. section 501(a) expressly sets out the EPA's

ability to prescribe regulations as law. Section 502(14) has three main areas that give guidance and support towards interpreting Maleau's waste piles as a point source under the statute. The use of the key phrases "including but not limited to" and the open-ended "or" both affirm that Maleau's mining waste piles should fall under the definition of a point source. The specific exception at the end of the section for returns from irrigated agriculture likewise asserts that if Congress meant to exclude waste mining piles, it would have done so explicitly, as it did consider exemptions from the definition in writing the statute.

Section 502(14) sets out the definition of a "point source" and uses the phrase "including but not limited to" in setting out examples of point sources. 33 U.S.C. § 1362(14). As the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* established, "The meaning of a word must be ascertained in the context of achieving particular objectives, and the words associated with it may indicate that the true meaning of the series is to convey a common idea." 467 U.S. 837, 861 (1984). It would be exhaustive and time-consuming for Congress to list out every single example of a point source, and in this case, Maleau's mining waste piles can be construed to fall under a point source solely because the piles are discrete and discernible conveyances. The phrase "including but not limited to" needs to be read along with the disjunctive "or" to signify further alternatives to the examples listed explicitly in the statute. *Earth Sciences, Inc.,* 599 F.2d at 375. Courts have interpreted the disjunctive "or" to mean that the EPA did not restrict alternatives, but rather fostered broader interpretations of the section in order to encourage a strong enforcement policy of the Act. *Id.* at 376.

Finally, the EPA set out under the CWA to encourage the definition of a "point source" to be interpreted broadly. *Dague v. City of Burlington*, 935 F.2d 1343, 1354 (2d Cir. 1991); *Earth Sciences*, 599 F.2d at 373. The definition of "discharge of a pollutant" in section 502(12)

refers to "any point source" without limitation. *Dague*, 935 F.2d at 1354. In *Chevron*, the Supreme Court found that the listing of ". . . overlapping, illustrative terms was intended to enlarge, rather than to confine, the scope of the agency's power to regulate. . ." in looking at the definition of "source". 467 U.S. at 838. Similarly to the situation in *Chevron*, where the Court interpreted the term "source" in context of the Clean Air Act to be broader than the specific examples listed in the text of the statute, the term "point source" in the CWA should be assessed in the same way. *Id.*

The court in *United States v. Ottatti & Goss, Inc.* found a point source in waste materials that collected in a ditch, then entered a brook, which culminated by emptying into navigable water. 630 F. Supp. 1361 (D.N.H. 1985). Similarly, in *Sierra Club v. Abston Const. Co., Inc.,* the court found that "spoil piles" set up from coal strip mining constituted point sources under the Act because the ditches that were built to catch the polluted runoff from the piles were subject to overflow from rainfall. 620 F.2d 41, 45 (5th Cir. 1980). The leaching of pollutants from these spoil piles were found as point sources, in the same way that Maleau's mining waste piles are set up next to Ditch C-1. (R. 4).

The court in *U.S. v. Earth Sciences, Inc.* found a gold leaching process to be a point source when rain and snow events caused the gold leachate to leak into a creek when the sumps overflowed. 599 F.2d at 370. The gold mining piles were point sources that leached pollutants into a body of water, similarly to Maleau's mining waste piles conveying pollutants to Ditch C-1, and subsequently Reedy Creek during rain events. Applying the definition of a point source to Maleau's *discrete* and *identifiable* piles of mining waste is the appropriate application of the "point source" definition under the plain language of the Act, and is consistent with similar precedential cases that hold waste piles to be point sources. *See S. Fla Water Mgmt. Dist. v.*

Mcosukee Tribe of Indians, 541 U.S. 95, 103 (2004) ("[F]or an addition of pollutants to be from a point source, the relevant inquiry is whether-but for the point source-the pollutants would have been added to the receiving body of water.").

B. The legislative mandate of the CWA necessitates a finding of Maleau's mining waste piles as a point source.

The legislative mandate of Congress in implementing the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's water." 33 U.S.C. § 1251 (2013). The CWA sets a national goal to eliminate the discharge of pollutants into the navigable waters of our country. *Id*. The Act purports to limit discharges from any discernible source. The hallmark of the Act is to regulate, to the fullest extent possible, discharge from any identifiable source. *Earth Sciences*, 599 F.2d at 373. Maleau's mining waste piles are discernible sources for the purposes of the Act, and it is contrary to the intent of Congress in enacting the Act to allow these waste piles to go unregulated. Congress addressed the difficulty of monitoring non-point sources, such as run-off from highways or farming operations, and made it clear that Congress would have regulated these non-point sources if it had a feasible manner to do so. *Id*. The model of a point source was established to incorporate the "broadest possible definition of any *identifiable conveyance* from which pollutants might enter the waters of the United States." *Id*. (emphasis added).

In the same vein, the legislative history is relevant for determining Congress's intent. *Id*. at 372. Congress classified nonpoint source pollution generally as disparate runoff caused by rainfall, with the Senate Report specifically designating the main nonpoint sources as sediment, fertilizer, and pesticide runoff from agricultural activities, and rainfall events that cause extensive runoff of highways, buildings and parking lots. *Id*. at 373. An amendment was proposed that would have explicitly regulated mining discharges from point sources, but Congress rejected this

addition because Congress found it to be duplicative of the Act's existent regulatory provisions. *Id.* at 372. The mining waste piles on Maleau's property are identifiable, and fall within the Congressional intent of the Act to regulate any identifiable source of pollution from entering any navigable water of the United States.

C. Public policy weighs strongly in favor of finding that Maleau's mining waste piles are point sources under the Act.

When working to interpret a statutory provision, courts must give deference to the Agency's goal in enacting the regulation, as well as consider the effect their judicial review will have in the future. *Consolidation Coal*, 604 F.2d at 243. As established in *Chevron,* the agency, while engaged in rulemaking, must consider varying interpretations of terms and the wisdom of its policy on a regular basis. 467 U.S. at 838. The court is in no way empowered to substitute its judgment for that of the Agency enacting a statute. *Id*. In this case, the statute is clear in its plain language and legislative history to lend a court to find an application that Maleau's mining waste piles are consistent with the definition of a point source under the Act, and he therefore violated the Act by discharging pollutants without a permit. To allow Maleau to continue polluting waters freely and without any regard for the CWA's regulations would set a precedent for other individuals or companies to pollute waters, and frustrate the intent and goal of Congress in enacting the Act.

In reviewing an agency's construction of a statute the only question for the court, if Congress has not directly spoken to the issue, is whether the agency's answer is based on a permissible construction of the statute. *ONRC Action v. Bureau of Reclamation*, No. 1:97–cv–03090–CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012). The court has a responsibility to further the EPA's goal in enacting the Act, and holding that Maleau's mining waste piles are not point sources would be contrary to precedent and establish an inconsistency in the Act's requirement

of national uniformity in reducing pollutants from any identifiable source unless a permit is granted. *Consolidation Coal*, 604 F.2d at 243. Holding otherwise would lead to an overly expansive exercise of judicial review power, and lead to further complications of the Act down the line by allowing courts to interpret a point source at their discretion. *Id.* Maleau's mining waste piles fall within the plain language of the CWA section 502(14)'s definition of a point source, and is further found a point source by looking to legislative history and the public policy in Congress's intent in enacting the Act.

IV. DITCH C-1 (*ISSUE IV.*) AND REEDY CREEK (*ISSUE V.*) FIT COMFORTABLY WITHIN THE STATUTORY DEFINITION OF "WATERS OF THE UNITED STATES," THUS QUALIFYING THEM AS "NAVIGABLE WATERS" SUBJECT TO CWA JURISDICTION.

Reedy Creek, an interstate water, falls squarely within the purviews of the CWA by virtue of its geographic status and significant nexus with a wetland terminus situated on federally owned land. Ditch C-1, a deceptively named body of water exhibiting fairly continuous groundwater supplied flow, also comes under CWA jurisdiction, by the "tributaries rule," reflecting the CWA's necessary breadth to account for the complexity of hydrologic connectivity thereby ensuring adequate protection, maintenance, and restoration of the Nation's waters.

The CWA establishes comprehensive regulation of a market commodity by seeking to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2012). To further this lofty goal, the CWA prohibits the "discharge of any pollutant" into "navigable waters." *Id.* §§ 1311, 1344. Yet, the CWA broadly defines "navigable waters" as "the waters of the United States," betraying an intent to eliminate navigability as a necessary jurisdictional prerequisite. *Id.* § 1362(7); *see Rapanos v. United States*, 547 U.S. 715, 734 (2006) (suggesting that Congress's use of the more general "waters of the United States" to define the narrower term "navigable waters" canonically suggests a intent to cover non-navigable

waters); James Willard Hurst, *Dealing With Statutes* 57 (1982) ("[W]here statute uses generic rather than specific words there seems reason to presume that the legislature intends an expansive rather than a restrictive reading."). Moreover, Congress's authority to regulate the nation's waters is grounded in its commerce power and therefore does not depend on water's "navigability," but instead on whether the water may be said to affect interstate commerce. *Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979) ("The cases that discuss Congress's paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation . . . ."). Thus, while navigability may be sufficient to satisfy the CWA's jurisdictional standard, it is not at all necessary. *See id.*

The EPA and U.S. Army Corps of Engineers (Corps) have promulgated identical regulations interpreting and defining "waters of the United States." Since Congress's manifest intent was expansive – covering water affecting interstate commerce to the furthest extent Constitutional – the regulations discuss "waters of the United States" without absolute reference to qualities of traditional navigability. *Leslie Salt Co. v. United States*, 896 F.2d 354, 357 (9th Cir. 1990); *see also N. Cal. River Watch v. City of Healdsburg*, No. C01-04686WHA, 2004 WL 201502, at 6* (N.D. Cal. Jan. 23, 2004). The regulations encompass "waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce"; "[a]ll *interstate waters* including interstate wetlands"; "[a]ll other waters such as intrastate lakes, rivers, [and] streams (including intermittent streams) ... the use, degradation, or destruction of which *would affect or could affect interstate or foreign commerce*. . ."; and all "*[t]ributaries*" of

any of the above. *See* 40 C.F.R. §§ 122.2, 232.2 (2013); 33 C.F.R. § 328.3(a)(l)-(4) (2013) (emphases added).

In light of these regulations, the Supreme Court has recognized CWA jurisdiction over traditionally covered waters and non-navigable waters with a significant nexus or continuous surface connection to jurisdictional waters. *Rapanos*, 547 U.S. 715 (considering wetlands, potentially adjacent to non-navigable tributaries of jurisdictional waters, and exerting jurisdiction over relatively permanent standing or continuously flowing bodies of waters, reaching non-navigable wetlands in the case of a continuous surface connection with navigable waters) (Scalia, J., plurality opinion); *id.* (exerting jurisdiction over wetlands and any other waters where they, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, or biological integrity of navigable waters, creating a significant nexus- since wetlands perform various ecological sink functions) (Kennedy, J., concurring); *see id.* (stating essentially that the significant nexus test will be the controlling rule of law, but satisfaction of either it or the plurality's surface connection test will provide grounds for jurisdiction) (Stevens, J., dissenting); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (considering wetlands adjacent to jurisdictional waters, 33 C.F.R. § 328.3(a)(7), and recognizing jurisdiction where wetland physically abutted the navigable waterway); *but see SWANCC v. Army Corps of Engineers*, 531 U.S. 159 (2001) (finding the CWA to not cover small, isolated, and non-navigable intrastate waters).

Parsing through these definitions and interpretations still proves controversial; the ambiguity of Congress's expansive definition of "navigable waters" is far from doctrinally sound. Chief Justice Roberts has noted that future interested parties may be in the dark on "precisely how to read Congress's limits on the reach of the Clean Water Act" forcing them "to

feel their way on a case-by-case basis." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). Yet, describing the law as "feeling through the dark" exaggerates the matter; interested parties must simply classify waters along a spectrum ranging from traditional navigability – to interstate – to non-navigable and intrastate, yet having a "significant nexus" or "adjacency" to interstate or navigable water – to the Constitutional limits of CWA Commerce Clause reach, as defined by *SWANCC*, 531 U.S. 159. *See, eg.*, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States *&* Carabell v. United States (EPA Guidance Memo), December 2, 2008, *available at* http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanosl20208.pdf [hereinafter *EPA Guidance Memo*]. A jurisdictional analysis under the CWA merely requires reference to the established purposes of the CWA, namely to press the outer bounds of its Constitutional authority to regulate the nation's waters. *See id*.

The primary point of contention in the instant case is whether the CWA may lawfully reach a hydrologic system providing drinking water, irrigation, and lifeline to a $25 million hunting industry when that system consists of an interstate stream and tributary terminating in wetlands owned by the United States. (R. 5-6). Appellant's argument against exerting jurisdiction because the CWA exceeds the scope of the Commerce Clause absent a "channel of commerce" is inappropriately focused on this watershed's lack of traditional navigability. *See Rapanos*, 547 U.S. at 738 (suggesting, in dicta, that due to federalism concerns Congress may be without authority to regulate wetlands adjacent to non-navigable tributaries under the Commerce Clause because that could encompass vast intrastate and non navigable-in-fact waters, "stretch[ing] the outer limits . . . and rais[ing] difficult questions about the scope of that ultimate power"). Yet, the CWA's authority under the Commerce Clause is not so limited, particularly

after discussion in *Kaiser Aetna* regarding water's substantial affect on interstate commerce. 444 U.S. at 174. By deemphasizing the key role that regulation of the instant watershed has in facilitating the CWA's comprehensive regulatory regime of water pollution (a scheme economic in nature) appellant's argument must fail. *See Raich v. Gonzales*, 541 U.S. 1 (2005) (noting that failing to regulate the purely intrastate uses of marijuana under the Controlled Substances Act, an economic Act, presents a loophole that would render the statutory scheme as a whole meaningless, and thus Congress has robust power to regulate *even intrastate activities where they are an essential part of a comprehensive statutory framework regulating an activity that has substantial effects on interstate commerce*) (emphases added); *cf. GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 638-40 (5th Cir. 2003) (predating *Raich*, but finding that the Endangered Species Act's protection of species is economic in nature, and thus that the regulation of an intrastate species is lawful even under the more stringent and outdated *United States v. Lopez*, 514 U.S. 549 (1995) (finding intrastate effects on interstate commerce in the aggregate only when the intrastate activity itself is economic in nature)).

The proper inquiry, then, is whether the aggregated effect of the failure to regulate watersheds of the instant type will have substantial effects on the CWA's regulation of interstate commerce. *Cf. Raich*, 541 U.S. 1; *GDF Realty Investments, Ltd.*, 326 F.3d at 639. Since this watershed is distinguishable from the non-jurisdictional waters in *SWANCC*, by virtue of having a greater aggregated effect on the CWA's ability to regulate interstate commerce, it must be jurisdictional. *See SWANCC,* 531 U.S. 159 (suggesting, before *Raich*, that the regulation of small, isolated, and intrastate ponds based merely on migratory bird stop-overs would not have a substantial aggregate effect on the CWA's ability to regulate interstate commerce).

Thus, despite the scattered analyses coming in the wake of the CWA's enactment, ascertaining the jurisdictional status of a body of water is a fairly straightforward application of the agency's interpreting regulations (owed deference by the Court) with reference to the purposes of the CWA and the relevant Constitutional limits as defined by *SWANCC* and *Raich*. *See Rapanos*, 547 U.S. at 738-39 (implying that agency theories of jurisdiction embodied in regulation based on a permissible construction of an ambiguous statute like the CWA will likely receive deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) so long as that regulation presses the "Constitutional envelope" *less* than *SWANCC*) (emphasis added).

It is against this backdrop of expansive Commerce Clause authority that the instant Court ought proceed regarding Reedy Creek and Ditch C-1, as it has been the operable path of the vast majority of courts assessing the exercises of CWA jurisdiction since *Rapanos*. *See, e.g.*, *Precon Devt. Corp. v. U.S. Army Corps of Engineers*, 633 F.3d 278(4th Cir. 2011) (finding that 448 acres of similarly situated intrastate wetlands could easily have a significant nexus with a traditionally jurisdictional river miles away given a proper ecological analysis); *United States v. Cundiff*, 555 F.3d 200 (6th Cir. 2009) (extending jurisdiction over wetlands given a significant nexus with non-navigable tributaries of a traditionally jurisdictional water, demonstrated by the flow path of a chemical poison, and finding surface connection absent perpetual flow); *United States v. Lucas*, 516 F.3d 316 (5th Cir. 2008) (finding jurisdiction over continuous band of non-navigable wetlands and streams physically abutting and affecting the physical integrity of traditionally jurisdictional waters); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007) (exerting CWA jurisdiction over non-navigable, intrastate pond which both seeped into traditionally jurisdictional river and significantly affected its physical, biological, and

chemical integrity); *United States v. Vierstra*, No. 1:10–cr–204–REB, 2011 WL 1064526 (D. Idaho Mar. 18, 2011) (finding jurisdiction over intrastate, non-navigable, man made canal with an ordinary high water mark, defined bed and bank, and seasonal flow to and from traditionally jurisdictional waters sufficed both the surface connection and significant nexus tests); *ONRC Action v. Bureau of Reclamation*, No. 1:97–cv–03090–CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012) (finding jurisdiction over an interstate, and man-made with a defined bed and bank, drain perennially providing water to downstream lakes and rivers, thereby generating a federal revenue, because of its interstate nature as well as its status as a tributary having a significant nexus and relatively permanent surface connection with traditionally jurisdictional waters, while also noting that there is no legal issue where a drain could ostensibly satisfy both the CWA's definition of a point source and tributary).

A. Reedy Creek, an interstate water of profound economic importance, is "navigable water" subject to CWA jurisdiction.

By its plain language 40 C.F.R. section 122.2 brings "all interstate waters" under CWA jurisdiction, and the EPA and Corps intend to assert jurisdiction over all such waters. *EPA Guidance Memo* at 24. Both precursor statutes of the CWA and separate provisions within the CWA similarly subject interstate waters to federal jurisdiction. *See id.* at 25. The Corps and the EPA immediately interpreted the CWA to cover interstate waters, and the Supreme Court has not since questioned their jurisdictional status. *See id.* Still, by ambiguously using the term interstate, the regulations might be seen as relying on traditional notions of navigability, and thus "channels of commerce" as the basis for federal jurisdiction, when in actuality Commerce Clause authority is instead established by *Raich*. 541 U.S. 1; *see Kaieser Aetna*, 444 U.S. at 174. Accordingly, despite having no tangible legal reason to suspect that the CWA does not in fact subject "all interstate waters" to federal jurisdiction in the post-*Rapanos* era (given their integral role in a

transboundary-resource management scheme), a tentative court might require at least some evidence of an individual "impact on interstate commerce" to qualm potentially lingering concern of "over-extending" the Commerce Clause. *See ONRC Action*, 2012 WL 3526828, at *12; *see also* Dale Goble, *The Compact Clause and Transboundary Problems: "A Federal Remedy For the Disease Most Incident to a Federal Government*, 17 Envtl. L. 786, 788 (1986) (discussing the severe difficulties inherent in comprehensively regulating transboundary resources, such as water, without extensive federal jurisdiction). Of course, given the Court's holding in *Raich*, the instant watershed is regulable because failing to do so would undermine the CWA's regulatory regime over the water commodity. *See Raich*, 541 U.S. 1.

Following *ONRC Action*, it is important to emphasize Reedy Creek's direct impacts on interstate commerce, despite the uniquely integral role of the class of transboundary waters in the CWA scheme regardless of individual economic significance. Reedy Creek is sold as drinking water, relied on for its ecological contributions to a $25 million hunting industry, and divided amongst two states for irrigative contribution to the agriculture industry. (R. 5-6). Looking at the CWA as applied in the instant context and compared to the Controlled Substances Act from *Raich* (where failing to regulate the purely intrastate uses of marijuana presented a loophole that would render the statutory scheme as a whole meaningless), the CWA is a similarly comprehensive regulatory scheme aimed at protecting water quality (a commodity essential to both public health and the economy) that would be severely undercut by failing to regulate an interstate stream like Reedy Creek. Pollution of Reedy Creek will seriously threaten human and ecological health by 1) failing to protect the Bounty Plaza drinking water supplies sold in interstate commerce, 2) poisoning marshlands used to generate federal revenues, and 3) potentially damaging food sources by irrigating crops with arsenic laden water; surely Congress

sought to eliminate precisely such a hazardous and wide-scale threat to interstate commerce and public health. Despite clear jurisdiction over all "interstate waters," failing to regulate the economically integral Reedy Creek in particular would severely undermine the CWA's regulatory regime, thus quieting any potential Constitutional concerns that may still exist.

B. In the alternative, Reedy Creek's significant nexus and surface connection with a National Wildlife Refuge of momentous economic importance subjects it to CWA jurisdiction.

Regarding a National Wildlife Refuge, "each refuge shall be managed to fulfill the mission of the System, as well as the specific purposes for which that refuge was established." 16 U.S.C. § 668dd(a)(3)(A) (2012). The instant refuge was likely established to ensure adequate conservation of wildlife to support long-term hunting revenues, and that intuitively involves clean water. It makes sense, then, to apply a plain language reading of "waters of the United States" to the instant National Wildlife Refuge because in establishing the Refuge the federal government corroborated potential intent in the CWA to protect and conserve all waters held in trust ("waters of the United States"). *See id.*

In this scenario it is federal ownership of the marsh that establishes jurisdiction over Reedy Creek. "Navigable waters" are "waters of the United States," and the court must presume the legislature means what it says. *Conn. Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992).

Despite federal ownership, the instant intrastate wetlands are jurisdictional by analogy to the non-jurisdictional ponds in *SWANCC*; here, the wetlands support the same migratory bird "economy" relied on by the losers in *SWANCC*, but also a $25 million dollar local hunting industry likely generating federal revenue. 531 U.S. 159 (pinpointing as the only potential effect on the economy being migratory birds); (R. 5). Such a difference brings the instant case more in line with *ONRC Action*, where revenues above and beyond the birding industry were at stake.

2012 WL 3526828 (noting that lakes and rivers downstream were involved in various sectors of the economy). By its federal ownership and its substantial affect on interstate commerce, alone and when aggregated with similarly situated money-generating intrastate wetlands, Wildman's Marsh is a jurisdictional water under the CWA.

Non-navigable waters are jurisdictional post-*Rapanos* where they have either a continuous surface connection or substantial affect on the biological, chemical, or physical integrity of traditionally jurisdictional water. Reedy Creek will fall under CWA jurisdiction if it exhibits such behavior with the instant jurisdictional wetland. The record indicates the Reedy Creek maintains a continuous surface connection with the federal wetlands, R. 5, as was the case in *City of Healdstrom*, *Vierstra*, and *ONRC Action*, and thus satisfies the plurality's test in *Rapanos*. Since the arsenic traces a path from Reedy Creek into the wetland, resembling *Cundiff* where the path of a contaminant sufficed as a "chemical effect," there is also a significant nexus. Further, since wildlife has exhibited arsenic poisoning, biological integrity is implicated. Reedy Creek, by bearing a significant nexus and continuous surface connection with jurisdictional waters, is brought under the CWA's jurisdiction over "navigable waters."

Given Reedy Creek's jurisdictional status, Ditch C-1 is assessed by the court in the context of a tributary.

C. Ditch C-1, a non-navigable tributary of Reedy Creek, is a jurisdictional "navigable water" under the CWA.

A tributary is a stream that contributes flow to a larger stream or other body of water. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (citing Random House College Dictionary 1402 (rev. ed. 1980)). It is well established that CWA jurisdiction may extend to man-made water bodies, like channels and ditches. *Id.* at 533.

The EPA, as of September 1, 2013, has yet to promulgate a regulation defining "tributaries," though the agency has elaborated on the term in internal guidance memorandum explaining that it can be a non-navigable water body whose waters flow into a traditional navigable water directly or indirectly by means of other tributaries. *EPA Guidance Memo* at 11. Justice Kennedy directs that an ordinary high water mark may be a reasonable measure of whether a tributary has a significant nexus with jurisdictional water. *Rapanos*, 547 U.S. at 761.

The record shows that Ditch C-1 has a both a defined bed and bank as well as an ordinary high watermark, R. 5, similar to the jurisdictional channel and ditch at issue in *Vierstra* and *ONRC Action*. Since Ditch C-1 flows for the better part of the year, it has a more apparent surface connection with Reedy Creek than the seasonal tributaries at issue in *Cundiff*. Thus, Ditch C-1 gains jurisdiction under the plurality test of *Rapanos*, and, for reasons similar to why Reedy Creek has a significant nexus with Wildman's Marsh, Ditch C-1 exhibits a significant nexus with Reedy Creek by affecting its chemical integrity (evidenced by the path of the arsenic).

While Appellants point to the fact that Ditch C-1 may concurrently satisfy the definitions of a "point source" and tributary, that argument lacks merit following its explicit rejection in *ONRC Action*. 2012 WL 3526828 at *2 (discussing *Rapanos*, 547 U.S. 715 (Kennedy, J., concurring)). The CWA seeks to prevent pollution, and a rule limiting liability for discharging pollutants into tributaries would cut against that purpose. *See id.* Further, given its groundwater-fed flows, Ditch C-1 is more aptly considered as a stream than a ditch, reinforcing its qualifications under the tributary rule. *See EPA Guidance Memo* at 11. Ditch C-1, as a tributary of Reedy Creek (a jurisdictional water), fits comfortably within the jurisdictional purviews of the

CWA, as it must in order to prevent degradation of the nation's waters by holding proper parties liable.

Both Reedy Creek and Ditch C-1 qualify as "navigable waters," under the CWA thereby subjecting Maleau to the CWA's restrictions regarding the addition of pollutants from a point source.

V. MALEAU VIOLATES THE CWA AS THE 'BUT-FOR' CAUSE OF THE PRESENCE OF ARSENIC IN DITCH C-1 AND REEDY CREEK.

The CWA outlaws the "the discharge of any pollutant" into "navigable waters" from a "point source" without a permit. 33 U.S.C §§ 1311(a), 1342(a)(1). The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). At issue here is whether Maleau's addition of arsenic to Ditch C-1 from his waste mining piles violates the CWA as the 'but-for' cause of that arsenic ending up in Reedy Creek. (R. 4-5). At the center of this debate is the meaning of "addition," and what constitutes the discharge of a pollutant, and the EPA has directly spoken to this issue in developing the Water Transfers Rule. This rule is consistent with a reasonable interpretation of a statute, under the *Chevron* test, and falls within EPA's regulatory purview. Maleau's mining waste piles fall under this rule as being the cause of arsenic being transferred from one body of water to another, and therefore Bonhomme's "addition" of the arsenic to Reedy Creek through a culvert on his land does not require and permit, and further does not violate the CWA.

A. EPA's adoption of the Water Transfers Rule falls within the Agency's regulatory power in carrying out Congress's intent in developing the CWA.

EPA issued an Interpretive Memorandum on August 5, 2005 in response to the Supreme Court's decision in *Miccosukee,* regarding applying NPDES permitting requirements to water transfers. *Catskill Mts. Chapter of Trout Unlimited, Inc. v. United States EPA*, 630 F. Supp. 2d

295, 301 (S.D.N.Y. 2009). This Interpretive Memorandum was aimed at affirming the EPA's longstanding practice of not subjecting water transfers to NPDES requirements. The Interpretive Memorandum concluded, "Congress intended for water transfers to be subject to oversight by water resource management agencies and State non-NPDES authorities, rather than the permitting program under . . . the CWA." *Id.* Subsequently on June 7, 2006, the EPA proposed to codify the Water Transfers Rule, and defined "water transfers" as "an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use." *See* Proposed Water Transfers Rule, 71 Fed. Reg. at 32,887 (Jun. 7, 2006). The Proposed Rule further stated that EPA's grounds for adopting the Water Transfers Rule were "bas[ed] on the legal analysis contained in the [I]nterpretive [M]emorandum." *Id.* at 32,887.

EPA published its final Water Transfers Rule on June 13, 2008, stating that discharges from a water transfer do not require NPDES permits. *See NPDES Water Transfers Rule*, 40 C.F.R. § 122.3(i)(2008). The final Rule defines "water transfer" as:

> "[A]n activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred."

Id. In developing and publishing this rule, EPA further established that it was consistent with EPA's proposed rule, based on the August 5, 2005 Interpretive Memorandum. *Catskill Mts.*, 630 F. Supp. 2d at 303.

The Supreme Court established in *Chevron* that deference to an Agency's interpretation of a statute only applies where Congress has authorized that agency to make rules carrying the force of law. *ORNC Action*, 2012 WL 3526828 at *28. The Court set up a two-step test in *Chevron,* where a court should first apply the traditional tools of statutory interpretation to

determine if the intent of Congress is clear, and if so, that intent must be given effect as law. *Chevron*, 467, U.S. at 844. If the statute is ambiguous, and there are two or more reasonable interpretations, the role of the court is to determine that the interpretation adopted is in line with expressed intent of Congress. *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1219 (11th Cir. 2009).

B. EPA's development of the Water Transfers Rule is consistent with Congress's authorization of EPA to make rules and therefore Maleau's arsenic transferred via Bonhomme to Reedy Creek does not transfer liability to Bonhomme.

Prior to this, it is important to note that the Supreme Court had held that "all the water bodies that fall within the [CWA's] definition of navigable waters . . . should be viewed unitarily for purposes of NPDES permitting requirements," and therefore "permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable body of water." *Miccosukee*, 541 U.S. at 105-06, 124. The Supreme Court fostered the application of a Water Transfer Rule before EPA had even submitted it's first Interpretive Memorandum on water transfers in 2005.

The first court to review the applicability of the Water Transfer Rule was the Eleventh Circuit Court of Appeals in *Friends of the Everglades* on June 4, 2009. The court upheld the Water Transfers Rule as a reasonable interpretation of an ambiguous statute, and further found that the promulgation of this rule was within the EPA's authority. *Friends of the Everglades*, 570 F.3d at 1226-27. The facts of this case were comparable to the issue at hand – three pumps transferred polluted water to a lake, and the court found EPA's argument persuasive that no permit was necessary for the water in this case because the water was already polluted when it passed through the pumps. *Id.* at 1214, 1228. The Eleventh Circuit held that "[t]he EPA's regulation . . . is a reasonable, and therefore permissible, construction of the language. Unless

and until the EPA rescinds or congress overrides the regulation, we must give effect to it." *Id.* at 1228.

Similar to the precedent-setting case in the Eleventh Circuit, Maleau's mining waste piles are the but-for cause of the addition of arsenic to Reedy Creek. It is already established that Maleau's mining waste piles are point sources, and therefore require a permit. Following the Water Transfer Rule, Bonhomme's culvert is simply transferring Maleau's arsenic from Ditch C-1 to Reedy Creek, and this transfer is not required to have an NPDES permit according to the Water Transfers Rule. The water is not altered in passing through Ditch C-1 on Bonhomme's property into Reedy Creek. (R.7). Since EPA's development of the Water Transfers Rule is appropriate, it should be upheld and applied to this case, holding that Bonhomme is not violating the CWA by failing to have a permit to discharge arsenic-riddled water that he had no responsibility in polluting.

CONCLUSION

This Court should hold that Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating section 301(a) of the CWA because as an "adversely affected party," he has a substantive right to bring a claim under the CWA. Additionally, Bonhomme is a "citizen" under CWA section 505. The existence of an injury, not the party's identity determines Article III standing, and both the broad statutory language of the citizen suit provision and case precedent underscore the fact that Bonhomme, even as a French national, falls within the zone of interests that that the citizen suit provision seeks to protect.

This Court should further find that Maleau's mining waste piles are "point sources" under the CWA because this finding is in line with the plain language of the statute, Congress's intent in enacting the CWA, and the legislative history and precedent. Ditch C-1 should be found as a

"navigable water/water of the United States" under CWA section 502(7) because it is a tributary with a significant nexus/surface connection with traditionally jurisdictional waters. This Court should affirm the finding that Reedy Creek is in fact traditionally jurisdictional water because of its interstate nature and significant nexus/surface connection with federally owned wetlands. Finally, this Court should hold that Bonhomme does not violate the CWA by adding arsenic to Reedy Creek through the culvert on his property because the Water Transfers Rule applies to these two bodies of water, and Maleau is the "but-for" cause of the arsenic in the water flowing into Reedy Creek.

Respectfully Submitted,

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Jacques Bonhomme

We hereby certify that the brief for _____ is the product solely of the undersigned and that the undersigned have no received any faculty or other assistance in connection with the preparation of the brief. We further certify that the undersigned have read the Competition Rules and that this brief complies with these Rules.

Date: December 1, 2013