C.A. No. 13-01234

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 PROGRESS

BRIEF FOR JACQUES BONHOMME
Plaintiff-Appellant

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JURISDICTION STATEMENT

Appellant Jacques Bonhomme filed a complaint in the United States District Court for the District of Progress seeking review under 28 U.S.C. 1331. On July 23, 2012, the district court granted Shifty Maleau and the State of Progress' motion to dismiss on all counts except that Reedy Creek was a "water of the United States." The district court's order is final, and jurisdiction is proper in the Court pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether Bonhomme is the real party in interest under FRCP 17 to bring suit against Maleau for violating § 301(a) of the CWA, 33 U.S.C. §1311 (a).
(2) Whether Bonhomme – a foreign national – is a "citizen" under CWA § 505, 33 U.S.C. § 1365, who may bring suit against Maleau.
(3) Whether Maleau's mining waste piles are "point sources" under CWA § 502(12), (14), 33 U.S.C. § 1362(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), (12).
(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.

STATEMENT OF THE CASE

Jacques Bonhomme brought suit against Defendant, Shifty Maleau, alleging violation of the Clean Water Act, 33 U.S.C. §1251-1387(2012) under the "Citizen Suit" provision of the statute, CWA §505, 33 U.S.C. §1365. The State of Progress filed a suit against Bonhomme alleging that he violated the CWA by discharging arsenic from his culvert–a point source–into Reedy Creek. Maleau intervened as a matter of right in Progress's action against Bonhomme under CWA § 505(b)(1)(B). Progress and Maleau

moved to consolidate their case with Bonhomme v. Maleau because the facts and law are the same. The District Court granted the motion to consolidate. The defendant in each suit filed motions to dismiss.

The District Court found against Bonhomme and dismissed the case without prejudice under Federal Rules of Civil Procedure 12(b)(6). The District Court found that Bonhomme was not a proper plaintiff and that if Bonhomme could maintain his case, the District Court would find in favor of Maleau in all matters, except that Reedy Creek is a water of the United States. All parties filed appeals on the issues.

STATEMENT OF FACTS

Jacques Bonhomme owns property directly adjacent to Wildman Marsh in Progress. R. at 6. Bonhomme owns a large hunting lodge on this property, which he uses for hunting parties for his business associates. R. at 6. Bonhomme is the President, member of the Board of Directors, and the largest shareholder of Precious Metals, Inc., a Delaware corporation. R. at 7. Shifty Maleau also owns land in Progess. R. at 5. Both Bonhomme and Maleau are in the business of large-scale mining. R at 5-6. Maleau's company operates an open pit gold mining operation Lincoln County, Progress. R at 5. From this Lincoln County mine, Maleau transports his mining overburden to his property in Jefferson County and deposits the overburden in piles. R at 5. A known byproduct of gold mining is the highly toxic chemical arsenic. R. at 6. At a press conference, Bonhomme alleged that Maleau is dumping mine waste on his property in Lincoln County to skirt environmental regulation and make his business more profitable. R. at 6-

7. During an earlier press conference, the Attorney General stated that Progress supports Maleau, and that the Attorney General's office is acting to protect the waters and wildlife of Progress. R. at 6.

The overburden piles from Maleau's mining operation, on his Lincoln County property, are adjacent to a ditch that runs from Maleau's property, through several other properties, including Bonhomme's. R. at 5. This ditch is called "Ditch C-1." R. at 5. The Ditch C-1 was originally built in 1913 to drain the soil from adjacent land so that the land could be used for agricultural purposes. R. at 5. On average, the Ditch C-1 is one foot deep and three feet across, and it maintains consistent water flow for more than ten months of the year on average. R. at 5. Bonhomme has tested the waters of the Ditch C-1 in spots above and below Maleau's overburden piles. R. at 6. Upstream from Maleau's property, there is no arsenic detectable, but below his property, arsenic is present in the Ditch C-1. R. at 6. Moreover, this arsenic decreases in concentration proportionally to the distance from Maleau's property in the Ditch C-1's water flow. R. at 6. The Ditch C-1 runs through Bonhomme's property, through a culvert under a farm road on his property, and terminates by flowing into Reedy Creek. R. at 5.

Reedy Creek originates in a neighboring state: New Union. R. at 5. The water from Reedy Creek is used to supply Bounty Plaza, a large travel service center, just off of Interstate 250. R. at 5. Reedy Creek crosses the border between New Union and Progress just before it reaches Bonhomme's property line. R. at 5. There is a constant, yearlong flow of water through all fifty miles of Reedy Creek. R at 5. Farmers in both New Union

and Progress draw water from Reedy Creek to irrigate their crops. R. at 5. Bonhomme has also tested the waters of Reedy Creek for arsenic, both upstream and downstream from where The Ditch C-1 flows into Reedy Creek. R. at 6. These tests have detected no arsenic above the discharge from The Ditch C-1. R. at 6. However, below the confluence, arsenic has been found in staggeringly high concentrations. R. at 6.

Reedy Creek terminates by emptying into Wildman Marsh. R. at 5. Wildman Marsh is a wetland that makes up the majority of Wildman National Wildlife Refuge; owned and maintained by the United States Fish and Wildlife Service. R. at 6. Wildman Marsh is a prime hunting destination for migratory bird hunters, and attracts hunters from all over the world. R. at 6. These hunters add no less than $25 million annually to the local economy. R at 6. Bonhomme has tested the waters of Wildman Marsh for arsenic and found the poison present, albeit in lower levels, throughout the marsh. R. at 6. While no damage to the flora and fauna of Wildman Marsh has been reported, the United States Fish and Wildlife Service has discovered arsenic in three Blue-winged Teal from the marsh. R at 6. Bonhomme became concerned that the arsenic has sufficiently permeated the wildlife of the marsh that it might be too risky to continue hunting there. R. at 6.

STANDARD OF REVIEW

The district court granted Maleau and Progress' motions to dismiss. This Court reviews a district court's grant of motions to dismiss *de novo. Whatley v. CNA Ins. Co.,* 189 F.3d 1310, 1313 (11th Cir. 1999)

ARGUMENT SUMMARY

The trial court erred when it ruled that Bonhomme was not a real party in interest under Rule 17 of the Federal Rules of Civil Procedure. The list of potential real parties in interest found in Rule 17(a) is not meant to be exhaustive and anyone possessing the right to enforce a particular claim is a real party in interest. *FDIC v. Graham,* 2011 WL 1429218 (S.D.Ohio, E. Div. April 13, 2011). The courts have found that the real party in interest is determined by the substantive law. *Suda v. Weiler Corp.,* 2008 WL 413858 (N. Dakota, February 13, 2008). Section 505 of the Clean Water Act (CWA) provides that any "citizen" may commence a civil action. 33 U.S.C. §1365(a). Under the terms of the CWA, "citizen" is any person adversely affected. 33 U.S.C. § 1365(g). If Bonhomme is not the real party in interest, the trial court still erred because it failed to allow reasonable time to replace Bonhomme with a real party in interest under Rule 17(a)(3) of the Federal Rules of Civil Procedure.

Bonhomme, although a foreign national, is a "citizen" under the terms of the CWA who may bring suit against Maleau. The CWA goes further than other legislation in expanding the class of affected parties that can enforce violations. The CWA clearly states that the term "citizen" means any person or persons having an interest which is or may be adversely affected. 33 U.S.C. § 1365(g). Although this construction is unusual, that statute governs and the courts must defer to agency interpretations under the *Chevron* doctrine. *Chevron, U.S.A., Inc. v. NRDC Inc.,* 467 U.S. 837 (1984). Therefore, if Bonhomme is a "citizen" according to EPA the courts must accept that finding. As

Justice Scalia noted in *Bennett v. Spear*, the environment is a matter in which "it is common to think that all persons have an interest." *Bennett v. Spear*, 520 U.S. 154, 165 (1996). Because EPA considers Bonhomme a "citizen" under the terms of the CWA, and the courts must defer to the finding, Bonhomme is a citizen and may bring suit against Maleau.

The trial court erred in determining that Maleau's mining waste piles were not "point sources" under the CWA. A "point source" is any "discernible, confined, and discrete conveyance. . .from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). EPA's stated intent is to embrace as broad a definition as possible when recognizing "point sources." 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990). Maleau's waste piles have been set such that rainfall runoff and gravity created channels whereby arsenic is leached and carried into a navigable water/water of the United States. Because the court has found that "nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are deposited into navigable body." *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 43 (5th Cir. 1908).

The trial court erred in holding the Ditch C-1 is not navigable water/water of the United States because it is a point source. In order for a water to fall under federal jurisdiction, it must be an identifiable body with relatively consistent flowing water for some months of the year. *Rapanos v. United States*, 547 U.S. 715, 739 (2006). The Ditch C-1 meets the test for a discrete and continuous flow which terminates at the confluence

with Reedy Creek. As Reedy Creek is a navigable water/water of the United States, the Ditch C-1, which bears a substantial connection to that large body of water, must also be a navigable water/water of the United States. 40 C.F.R. 122.2

The trial court correctly held that Reedy Creek is a navigable water/water of the United States because it is a tributary of a water that is owned by the United States. Reedy Creek is a tributary of Wildman Marsh which is mostly inside the boundaries of Wildman National Wildlife Refuge. Congress has the power to enact any laws necessary to protect the property of the United States. U.S. Const., art. IV, § 3, cl. 2. This power includes regulation of non-federal property as is reasonably necessary to protect adjacent federal property. *United States v. Lindsey,* 595 F.2d 5,6 (1979). As the waters of Wildman National Wildlife Refuge are indisputably the property of the United States, the water that flows from Reedy Creek may be regulated by the CWA as a reasonable measure to protect federal property.

Reedy Creek has a significant impact on interstate commerce and the trial court overstated the plurality opinion in *Rapanos* when it restricted waters of the United States to be only within the first category of *Lopez* commerce power. *See United States v. Lopez,* 514 U.S. 549 (1995). Although not navigable-in-fact, Reedy Creek is used by farmers as a source of water for crop irrigation. The farmers' crops are sold on the open market and contribute the national economy. Further, the hunting of migratory birds contributes over $1 billion to the national economy. The waters of Wildman Marsh and the Wildman National Wildlife Refuge are home to large numbers of migratory birds and

Bonhomme uses his hunting lodge to bring associates to the area. Reedy Creek, as a result of its terminus in Wildman Marsh and its unique role in interstate commerce, is a "water of the United States."

Bonhomme did not violate the CWA by adding arsenic to Reedy Creek through a culvert on his property because Maleau's waste piles are the point source for the arsenic in the Ditch C-1. Since Maleau's waste piles are the point source of pollution conveyed to waters of the United States, and the Ditch C-1 is navigable water, Bonhomme cannot be in violation of the CWA. Water tests have shown that Maleau's waste piles are the point source of the arsenic polluting the Ditch C-1 and therefore Reedy Creek and Wildman Marsh. Because of the Congressional policy of reducing pollution to it source, liability would fix to landowner whose activities have been found to be point sources. 33 U.S.C. § 1251(b); *see also Rapanos*, 547 U.S. at 737.

For the foregoing reasons, the Court should find in favor of Jacques Bonhomme and remand the case against Shifty Maleau to the district court for trial.

ARGUMENT

I. The trial court was incorrect when it ruled that Bonhomme was not a real party in interest and dismissed the case.

a. Real party in interest status is determined by substantive law

Rule17 of the Federal Rules of Civil Procedure states that for an action to commence it must be prosecuted in the name of the real party in interest. In defining real party status, Rule 17(a) provides a list of potential real parties in interest. However, the list in Rule 17(a) is not meant to be exhaustive and anyone possessing the right to enforce

a particular claim is a real party in interest even if that party is not expressly identified in the rule. Wright, Miller, and Kane, FEDERAL PRACTICE AND PROCEDURE §1543 (3d ed. 2010). *See also FDIC v. Graham,* 2011 WL 1429218 (S.D. Ohio, E. Div. April 13, 2011). This reading of the rule allows for great discretion in determining who is a real party in interest.

The courts have found that the real party in interest is determined by substantive law regarding who is entitled to enforce the right asserted. *Suda v. Weiler Corp.,* 2008 WL 413858 (N. Dakota, February 13, 2008). Therefore, the meaning and object of the real party in interest principle in the rule is that the action must be brought by a person possessing the right to enforce the claim and having significant interest in the litigation. *See Virginia Electric and Power Co. v. Westinghouse Electric Corp*., 485 F. 2d 78, cert. denied 94 S.Ct. 1450, 415 US 935, 39 L.Ed.2d 493 (Virginia1973). Therefore, the real party in interest is the person entitled to enforce a right under substantive law. *Certain Interested Underwriters at Lloyd's, London, England v. Layne*, 26 F.3d 39,42-43 (6th Cir. 1994).

Turning to the substantive law, section 505 of the 2012 Clean Water Act (CWA), provides that any "citizen" may commence a civil action on his own behalf. 33 U.S.C. §1365(a). However, the Act does not mean "citizen" as in citizen of the United States. Rather, in section 505(g) "citizen" is defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §1365(g). Under substantive law, any person who has an adversely affected right may bring suit under the Clean Water Act and

is, therefore, a real party in interest.

Using the substantive law found in section 505 of the Clean Water Act, Jacques Bonhomme meets the definition of "citizen" and is, therefore, a real party in interest. The liberality with which the courts have determined who is a real party in interest combined with a close reading of the substantive law demonstrates that Bonhomme is a real party in interest and the District Court erred when it granted the motion to dismiss on these grounds.

b. If Bonhomme is not a real party in interest, the District Court failed to allow reasonable time to locate a real party in interest and thus erred in dismissing.

Federal Rule of Civil Procedure 17(a) outlines who is a real party in interest and, therefore, able to bring a suit. The rules continues at section 17(a)(3):

> "no action shall be dismissed on the ground that it is not prosecuted in the name of the real party of interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party of interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

See Toliver v. National Heritage Realty Inc., 2005 WL 2585456 (N.D. Miss. Feb.26, 2006). Further, the Advisory Committee noted in their 1966 Amendments to Rule 15 that:

> "to avoid forfeiture of just claims, revised Rule 17(a) would provide that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed for correction of the defect in the matter stated."

Advisory Committee Notes, 1966 Amendments, Fed.R.Civ.P. 15. By rule, if the District

Court were to find that Bonhomme is not a real party in interest it must give a reasonable time to find the real party in interest before it can dismiss the case.

Courts have found that the Rule 17(a) substitution of plaintiffs should be liberally allowed when the change is formal and not altering the original complaints allegations of facts, events, or participants. *Advanced Magnetics Inc. v. Bayfront Partners Inc.*, 106 F. 3d 11,20 (2nd Cir. 1997). *See also Intown Properties Management Inc v. Transcontinental Insurance Co.,* 271 F. 3d 164,171 (4th Cir. 2001). Here, the court dismissed before any time was given, much less a reasonable time, to substitute a real party in interest if Bonhomme was not such. Bonhomme recognize that "reasonable time" is a matter of judicial discretion and will depend upon the facts of each case. Charles Alan Wright, et al. FEDERAL PRACTICE AND PROCEDURE §1555, at 417 (2d ed. 1990). Since no time was allowed here once the District Court found Bonhomme not to be a real party in interest, the District Court erred.

There are only two instances where a district court could dismiss without giving reasonable time to amend and neither situation is present here. The court noted in *Esposito v. United States,* F.3d 1271, 1276 (10th Cir. 2004) that a district court could dismiss if the plaintiff engaged in "tactical maneuvering." Thus, if the mistake made was not an honest one, the district court was free to dismiss the case. Bonhomme believed and believes that he is a real party in interest; therefore, should the court find a mistake, they are required by rule to allow a reasonable time to amend.

The second instance in which a district court may dismiss without allowing

reasonable time to amend is if the defendant would be prejudiced by substitution. *Sun Ref.& Mktg. Co. v. Goldstein Oil Co.,* 801 F.2d 343,345 (8th Cir. 1986). Here, there would be no prejudice to Maleau if Bonnhomme were accorded reasonable time to amend his complaint to name any of the other property owners whose fields are bisected by the culvert leading water away from Maleu's mining waste piles. Because the District Court dismissed Bonhomme's case before allowing reasonable time to amend and locate the real party in interest, it has committed and error and should be reversed.

Bonhomme is the real party in interest as defined by section 505 of the Clean Water Act. If this court should find that Bonhomme does not meet the low threshold set by section 505, then reasonable time must be granted under Fed. R. Civ. P. 17(a)(3) to substitute a real party in interest in the case against Maleau. Either way, the District Court erred when it dismissed the case for Bonhomme not being a real party in interest.

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

In considering whether Bonhomme is a citizen who may bring suit under CWA § 505, there are several authorities to consult, in the absence of federal court decisions directly on point. Examination of statutory construction, including legislative history and textual interpretation should direct the inquiry. Analogous Supreme Court cases provide further direction on whether Bonhomme satisfies the citizen suit provision of the CWA.

a. Bonhomme meets the definition of "citizen" under 33 U.S.C. §1365 by terms of the statute

The statutory construction of the CWA makes clear that Bonhomme is a citizen

for purposes of the Act. The purpose of the Clean Water Act is to "restore the….integrity of the Nation's waters." 33 U.S.C. § 1251(a). In creating the CWA, Congress expanded the capability of interested parties to be involved with the implementation of the Act on a local level. In stating its goals and policy guiding the Clean Water Act, Congress declared that public participation in enforcement shall be "provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e). In expanding the base of interested parties beyond states and governmental bodies to include the public, Congress created a new categorization for the terms "citizen" and "person" when interpreting the CWA. Accordingly, the terms, as used in the CWA require definition.

The CWA goes further than other legislation in expanding the class of affected parties that can act to enforce violations. CWA § 502(5) defines "person" as any "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5). While this definition specifically includes "any individual," such broad language is not the expansion; the CWA definition of "citizen," however, makes the Clean Water Act unique in annals of environmental legislation. In defining "citizen," Congress fashioned the CWA to ensure that *anyone* with an interest would be empowered to act with regard to enforcement against polluters. The Clean Water Act states"[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." 33 U.S.C. § 1365(g).

Legislative history indicates Congressional intent consistent with this usage as

well; Senator Edmund Muskie, referring to the implications of section 505, stated that the citizen suit provision of the Clean Water Act enables citizens to file suit against any polluter "who is alleged to be, or to have been, in violation of an effluent standard, limitation, or order." 1 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 179 (1973). Congress went further in section 505, however, in suspending diversity of citizenship and amount in controversy requirements for filing of a suit, and by inference claims under CWA are purely federal subject matter controversies. "The district courts shall have jurisdiction, *without regard to* the amount in controversy or *the citizenship of the parties*, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act [33 U.S.C .§ 1319(d)]." 33 U.S.C. § 1365(a)(2), (emphasis added).

Considering statutory construction, taken at its plain meaning, section1365(g) is unusual in that the requirement is not that the "citizen" be a citizen of the United States, only that they have an interest that is affected.[1] *Id*. The meaning of citizen in section 1365(g), however, is consistent considering the stated intent of "public participation." § 1251(e). Even though the construction is unusual, the United States Supreme Court has

1 See Clean Water Act, § 505(g), 33 U.S.C. § 1365(g) (1982). To establish standing in a citizen suit, a person must meet the definition of "citizen" established in section 505(g) of the Clean Water Act. Id. Section 505(g) provides that a citizen is "a person or persons having an interest which is or may be adversely affected." Id. Most citizen suit provisions in other environmental regulatory statutes provide that "any person" may commence suit. See, e.g., Surface Mining Control and Reclamation Act, § 520(a), 30 U.S.C. § 1270(a) (1982) (authorizing any person to initiate citizen suit); Resource Conservation and Recovery Act, § 7002(a), 42 U.S.C. § 6972(a) (1982) (same); Clean Air Act, § 304(a), 42 U.S.C. § 7604(a) (1982) (same).

held that in the case the wording of a statute is unambiguous, the statute governs, and if there is an ambiguity, the federal agency responsible should fill the gap and in that case the court must defer to the agency's interpretation. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 US 837 (1984). There is, simply, no ambiguity in the CWA definitions of "person" and "citizen." Any party in interest, regardless of alienage, is empowered by the Act to raise an issue of enforcement.

b. Bonhomme is a "citizen" according to the Environmental Protection Agency and the Court must defer to the agency's interpretation under the *Chevron* doctrine.

Should this Court find there is ambiguity in the language of the statute, there are EPA gap fillers available to provide clarification. In a guidance letter, the EPA states that a person "may be an individual, business, municipality or other entity. EPA's Office of Administrative Law Judges, *Citizen's Guide* at 10 (October 2010), http://www.epa.gov/oalj/orders/citizens-guide.pdf. Again, there is no citizenship requirement, in its usual sense, included in the definition.

According to Justice Scalia, the "readiness to take the term "any person" at face value is greatly augmented by….consideration[]: that the overall subject matter….is the environment (a matter in which it is common to think all persons have an interest)." *Bennett v. Spear*, 520 U.S. 154,165 (1996). In determining whether Bonhomme, a foreign national, is a citizen under section 505, a useful analogy may be drawn from *Atlantic States Legal Foundation v. Salt River Pima-Maricopa Indian Community.* In *Atlantic States*, the Court found that under the terms of the Act the Pima-Mariposa Indian Tribe

could be considered a person. *Atl. States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608, 609 (D. Ariz. 1993) . While it may seem discordant to analogize Bonhomme, a French citizen, with an American Indian tribe, the relevance in terms of interest and alienage are identical. An Indian tribe in being treated as a person is considered an alien, as is Bonhomme.[2] The tribe in *Bennett* is also a party in interest, as is Bonhomme, as an owner of property affected by polluter(s). The Supreme Court reaches the conclusion that the controlling element of the definition of "citizen" is "a person having an interest which may be affected," whether following a statutory construction method, or a "zone of interests" test.[3] *Bennett* 520 U.S. at 162-63. Bonhomme, being the owner of property affected by arsenic leaching into the waters flowing onto and across his property, has an affected interest under CWA section 505.

Under any constructions of the Act, Bonhomme is a "citizen," with affected property, and under CWA section 505 he is, therefore, entitled to bring suit against Maleau.

III. The trial court erred when it ruled that mining waste piles were not "point sources" under Clean Water Act §§ 502(12) and 502(14)

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2 What is the relationship between the tribes and the United States?
"The relationship between federally recognized tribes and the United States is one between sovereigns, i.e., between a government and a government. This "government-to-government" principle, which is grounded in the United States Constitution, has helped to shape the long history of relations between the federal government and these tribal nations." US Department of the Interior, Bureau of Indian Affairs website, www.bia.gov/FAQS.

3 A plaintiff must demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant. The plaintiff's claim must also arguably fall within the zone of interests protected or regulated by the statutory provision invoked in the lawsuit. *Bennett v. Spear*, 520 U.S. 154 (1996), *citing Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, (1970).

A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). *See also Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 43 (5th Cir. 1980). This wide-ranging definition seems only to exclude "unchanneled" and uncollected surface water as point sources. *Appalachian Power Co. v. Train,* 545 F.2d 1351, 1373 (4th Cir. 1976). In fact, EPA stated its intent to embrace the broadest possible definition of point source consistent with the legislative intent of the Clean Water Act. 55 Fed. Reg. 47990, 47997 (Nov. 16, 1990). *See also West Virginia Highlands Conservancy Inc., v. Huffman,* 651 F.Supp.2d 512 (S.D. W.Va. 2009).

The power to define what is and what is not a "point source" under CWA is at the sole discretion of EPA and courts should only be involved in definitional matters after full agency review and examination have taken place. *NRDC v. Costle,* 568 F.2d 1369,1382 (U.S. App. DC 1977). Further, in weighing agency determinations, courts must give great deference to the findings of the agency. *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). With EPA exercising sole power over what is a point source, and the court's stated position of deferring to that definition, (s*ee Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) (citing *Barnhart v. Sigmon Coal Co*., 534 U.S. 438,450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002))) the District Court erred when finding that Maleau's mining waste pile did not constitute "point sources" under sections

502(12) and 502(14) of the Clean Water Act.

In *United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979) the court found that "the concept of a point source was designed to further [the Clean Water Act] by embracing the broadest possible definition of *any* identifiable conveyance from which pollutants might enter the waters of the United States. *Id.* at 373 (emphasis added). Further, the *Earth Sciences* court noted that the regulations in the Clean Water Act were written without regard to intentionality. *Id.* at 374. In so finding, the court made clear that EPA intended to make the person responsible for the discharge of any pollutant strictly liable. In fact, courts have found that a person can be liable for the discharge of pollutants occurring on their land, whether or not they acted in some way to cause the discharge. *See El Paso Gold Mines Inc.*, 421 F.3d at 1145. Here, Maleau is not the hapless individual whose lands are a point source, but has done nothing. Maleau actively trucked overburden on to land distant from his mining operation, constructed spoils piles adjacent to ditches that collected run off water, and are linked to Reedy Creek. These actions are exactly the type the Clean Water Act was designed to regulate.

In *North Carolina Shellfish Grower's Ass'n v. Holly Ridge Ass'n*, 278 F. Supp. 2d 654 (E.D.N.C. 2003), the court found that because a series of ditches channeled and collected storm water and other pollutants that were subsequently discharged into waters of the United States, the ditches were point sources under the Clean Water Act. *Id.* at 679. The court further found that depressions, rills, and gullies that naturally formed along the ditches on the coastal landing tract as a result of the landowner's active ditching of the

tract were also point sources. *Id.* at 680. The court clearly states that when a landowner alters that landscape those alterations become point sources regardless of any natural changes that result from the alterations. Here, when Maleau transported his mining waste away from the mine site and formed piles at a location near Reedy Creek and fed by the Ditch 1-C he created a situation analogous to the terracing of waterfront property that result in a point source finding in *North Carolina Shellfish*.

Maleau may argue that mining is absent from the twenty-seven categories set forth in section 306 of the Clean Water Act. However, courts have held that these categories were to "form a nucleus of the sources for which guidelines would be developed under section 304." *NRDC v. Train,* 510 F.2d 692,706 (DC Cir. 1975). Although mining is not specifically mentioned in the text of the Clean Water Act, it can be read as to include that industry when one examines the text of section 301(a) which states that "the discharge of any pollutant by any person shall be unlawful unless in compliance with sections 301, 302, 306, 307, 318, 402, and 404 of the Act." 33 U.S.C. 1311(a). When read in conjunction with section 301, section 306 can include mining, because compliance with the permit program becomes a prerequisite for the lawful discharge of any pollutant into the waters of the United States. 33 U.S.C. §1342(k). When Maleau moved his piles of mining waste to the area near the Ditch C-1, he was required under the provisions of the Clean Water Act to secure a permit for his spoils piles,which as a result of his activity, became point sources. 40 C.F.R. 436.

Maleau may further argue that the Clean Water Act's list of point sources do not

include his industrial activity. The examples of point sources listed in the Act include pipes, ditches, tunnels, and conduits. 33 U.S.C. § 1362(14). These features do not themselves generate pollutants, they transport them. *S. Fla.Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95,105 (2004). However, the court found in *Abston Construction Co.*, that "nothing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Abston* 620 F.2d at 45.

Maleau's waste piles have been set such that the configuration has, by rainfall runoff and gravity, created channels whereby arsenic is leached and carried into navigable water, the Ditch C-1. Waste piles are point sources in conditions, lacking cover or a method of treatment, rainwater is permitted to percolate through the spoils, and by erosion, gullies are formed which carry leachate into navigable waters; a perfect description of Maleau's spoils piles on his property in the State of Progress along the Ditch C-1.[4] *Abston* 620 F.2d at 44.

Maleau's waste piles constitute "point sources" under the provisions of the Clean Water Act and the judicial interpretation of the statute. Because of the broad

4 A point source may exist where miners design spoil piles from discarded overburden, such that, during periods of precipitation, erosion….results in discharges into a navigable body of water by means of....gullies or similar conveyances even if the miners have done nothing beyond the mere collection of rock and other materials, see also, *United States v. Agosto-Vega*, 671 F.3d 541 (1st Cir Ct App, 2010), a person who creates the conditions for, and has the ultimate responsibility for, a discharge, may be held liable for the discharge.

definition and a strict liability situation, the District Court erred when it ruled that the waste piles were not "point sources" under the Act and granted Maleau's Motion to Dismiss.

IV. The trial court was incorrect in holding that Ditch C-1 is not a "navigable water/water of the United States" because it is a point source.

The Ditch C-1 is "a water of the United States" because it flows into and bears a substantial connection to Reedy Creek, which, as later established in V, *infra*, is a "water of the United States." Through the Clean Water Act, Congress has prohibited the discharge of pollutants into "navigable waters" which are defined as "the waters of the United States." 33 U.S.C. § 1362(7), (14). "Waters of the United States" includes tributaries to waters covered by the Clean Water Act. 40 C.F.R 122.2. Congress must have intended "navigable waters" to encompass something more than its traditional, natural definition. *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion). The *Rapanos* plurality does not entirely foreclose that point sources cannot be navigable waters.[5] *See United States v. Viestra*, 802 F. Supp. 2d 1166, 1173-74 (D. Idaho 2011). Even if a water is determined to be a tributary to it can still be a point source. *ONRC*

5 Ditch C-1 is man-made but is not foreclosed from being "a navigable water" on that ground. The definition of a tributary to a "water of the United States" does not rest on whether the body is natural or manmade. *See United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007). Thus, manmade ditches and drainage systems can be tributaries of "waters of the United States." *See Precon Dev. Corp., Inc.*, 663 F.3d at 292. The Supreme Court has not conclusively held that ditches cannot be navigable waters. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 599 F. Supp. 2d 209, 217 (D.D.C 2010), *rev'd on other grounds* 663 F.3d 470 (still noting that some ditches may be covered by CWA). While again, case law on this point is light, the clear trend is to apply the Kennedy significant nexus test to these ditches and establish a connection from the ditch to "a water of the United States." *See, United States v. Robinson*, 521 F. Supp. 2d 1247 (N.D. Ala. 2007) (adopting Kennedy's concurrence as applicable to waters generally)

Action v. U.S. Bureau of Reclamation, Civ. No. 97-3090-CL, 2012 U.S. Dist. LEXIS 118153, at *60 (D. Or. Jan. 17, 2012). In the *Rapanos* plurality, Justice Scalia uses the phrase "not significantly overlapping" to describe the categories of point sources and this language does not at all foreclose that the Ditch C-1 might be classified as both a point source and navigable water. The issue of whether a point source can simultaneously be "a navigable water" is one of much debate, even seven years after *Rapanos* was decided. See, Jon Devine, et al, *The Intended Scope of Clean Water Act Jurisdiction*, 41 Envtl. L. Rep. News & Analysis 11118, 11119 (2011). Thus, the trial court overstated the *Rapanos* plurality because that case vaguely states that "by and large, [ditches] are not 'waters of the United States'" when discussing the separation of ditches as point sources. However, there are more stable grounds for finding that the Ditch C-1 is "a navigable water/water of the United States."

The Ditch C-1 meets the test for a discrete and continuous flow established in *Rapanos*. In order for a water to be under federal jurisdiction it must be a discrete and identifiable body with relatively consistent, flowing water for some months of the year, excluding natural periods of draught and dryness. *Rapanos*, 547 U.S. at 739 (plurality opinion). However, the five concurring and dissenting justices from *Rapanos* do not agree with this interpretation in that they found that the requirement of a continuous flow "illogical." *See id*. at 770. (Kennedy, J., concurring) (finding that "torrents" of seasonal rain waters ineligible, while continuous trickles covered by plurality); *see also id*. at 801

(Stevens, J., dissenting) (same).[6] Because none of the opinions held a majority of the justices, the narrowest grounds upon which the most justices would agree must be the controlling law. *See Marks v. United States*, 430 U.S. 188, 193 (1977).[7] A tributary of a tributary can be covered by CWA jurisdiction because it bears a significant nexus to a "water of the United States." *Stillwater of Crown Point Homeonwer's Ass'n, Inc. v. Kovich*, 820 F. Supp. 2d 859 (N.D. Ind. 2011). However, the "significant nexus" must be shown by ecological evidence suggesting that the body of water in question makes a substantial impact on chemical, biological, and physical integrity of the water it flows into. *Rapanos*, 547 U.S. at 780, 784, 786 (Kennedy J. concurring). Laboratory tests are not required, but a substantial impact must be established either qualitatively or quantitatively. *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 294 (4th Cir. 2011) (citing *Rapanos*, 547 U.S. at 784, 786).

The Ditch C-1 enjoys a healthy flow of water consistently for average of ten out of twelve months of the year. The ditch maintains water on average one foot deep and three feet across. The ditch is fed by rainwater on occasion but gets its source primarily from groundwater; therefore, it meets the *Rapanos* plurality opinion test as not being

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6 *See, e.g.*, *United States v. Robinson*, 521 F. Supp. 2d 1247 (N.D. Ala. 2007) (one of many cases adopting Kennedy's concurrence as applicable to waters generally).

7 The majority of courts have found that satisfying, at least, the Kennedy test from *Rapanos* is sufficient to establish jurisdiction. *See, e.g.*, *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006); *United States v. Gerke Excavating*, 464 F.3d 723, 724-25 (7th. Cir. 2006); *United States v. Robinson*, 505 F.3d 1208, 1221-22 (11th Cir. 2007); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007); *United States v. Lucas*, 516 F.3d 316, 325-27 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 209-10 (5th Cir. 2009); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 292 (4th Cir. 2011); *United States v. Donovan*, 661 F.3d 174, 176 (3d Cir. 2011)

mere storm runoff. Under Justice Kennedy's concurrence, the ditch is even more clearly "a water of the United States"

The Ditch C-1 contributes water flow to Reedy Creek for a substantial part of every year. The water carried by the Ditch C-1 delivers the arsenic added by Maleau into Reedy Creek and subsequently into a federally owned wildlife refuge. The ecological impact of arsenic cannot be overlooked because it is universally known to be a toxic chemical. The chemicals contributed to Reedy Creek, and therefore, Wildman Marsh by Ditch C-1 establish a biological connection. At least three birds in the marsh have tested positive for arsenic. Surely, poisoning birds in a federal wildlife refuge constitutes a biological impact substantial enough to meet the "significant nexus requirement."

For the above reasons, the Court should overturn the trial court's finding that Ditch C-1 is not "a navigable water/water of the United States." The Ditch C-1 is a tributary to Reedy Creek, maintaining physical surface connection for more than three quarters of the year, and it impacts the physical and biological integrity of Reedy Creek; which, in turn, has had an impact on the wildlife in the federally owned wildlife refuge. Furthermore, the trial court has overstated the holding in *Rapanos* that point sources can never be navigable waters because it is not a proper reading of the plain language of the opinion and therefore should be overturned.

V. The trial court correctly held that Reedy Creek is a "navigable water/water of the United States" under 33 U.S.C. § 1362(7),(12) because it is a tributary of a water that, in fact, belongs to the United States.

Reedy Creek is a tributary of Wildman Marsh which, is mostly inside the

boundaries of a federally owned wildlife refuge, and is therefore within the jurisdiction of the Clean Water Act. Furthermore, Reedy Creek is a plainly an interstate water which bears a substantial relation to an interstate commerce activity and possibly harms an instrumentality of interstate commerce.

The Clean Water Act defines "navigable waters" as "waters of the United States, including territorial seas." 33 U.S.C. § 1362 (7),(14) (2012). Congress must have intended "navigable waters" to encompass something more than its traditional definition. *Rapanos v. United States*, 547 U.S. 714, ** (2006) (plurality opinion). EPA has defined "navigable waters" to include wetlands, all interstate waters, and tributaries to both. 40 C.F.R 122.2. To be under the jurisdiction of the CWA, "a water" does not have to be navigable-in-fact if it is a tributary of a "water of the United States." *United States v. Moses*, 496 F.3d 984, 998 (9th Cir 2007). "A 'stream which contributes its flow to a larger stream or other body of water' is a tributary." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (quoting Random House College Dictionary 1402 (rev. ed. 1980)).

a. Wildman Marsh dominates the Wildman National Wildlife Refuge, which is property belonging to the United States, therefore tributaries must be under the jurisdiction of the CWA.

Wildman Wildlife Refuge is property that belongs to the United States and therefore falls within the plain meaning of the CWA. Congress has prohibited the discharge of pollutants into "the waters of the United States." 33 U.S.C. § 1362(7). "Waters of the United States" embraces wetlands and their tributaries. 40 C.F.R 122.2.

Congress has the power to enact any laws necessary to protect the property of the United States. U.S. Const., art. IV, § 3, cl. 2. This power includes regulation of non-federal property as is reasonably necessary to protect the adjacent federal property. *United States v. Lindsey*, 595 F.2d 5,6 (1979). Because the refuge is owned by the United States, the refuge is a covered body under the Act. There is no other construction possible for "waters of the United States."

The waters of the marsh belong to the United States government. There is no dispute that Reedy Creek contributes water directly into the refuge, neither do the parties contend that Wildman National Wildlife Refuge is not wholly owned by the United States. Therefore, any water that flows directly into the refuge must be covered as a tributary to "the waters of the United States" under the CWA. Regulation of the water flowing into the refuge is a reasonable measure to protect the wetlands because the addition of any toxic or harmful substance to a wildlife refuge would be counterproductive to the goal of creating a refuge.

Reedy Creek meets both tests of the *Rapanos* decision to constitute "a water of the United States" as a tributary of a federal water. The Court in *Rapanos* was a plurality and no single holding enjoyed a majority of the justices; therefore, the points on which the most justices agree should be the point of law. *See Marks*, 430 U.S. at 193 (1977). The justices in *Rapanos* would agree that the constant flow of Reedy Creek would establish jurisdiction, therefore, this must be the test. *See Rapanos*, 547 U.S. at 732-33 (Scalia, J.); *id.* at 770 (Kennedy, J., concurring); *id*. at 800-01 (Stevens, J., dissenting).

The justices disagree as to whether ephemeral streams could constitute a "water of the United States," but they all agree that a constant stream satisfies that definition. Because Reedy Creek maintains a consistent, year-round flow it must be within the jurisdiction of the Clean Water Act.

Reedy Creek bears a substantial impact on the physical, chemical, and biological integrity of the National Wildlife Refuge waters. To be under the jurisdiction of the CWA, a tributary *must* make a substantial physical, chemical, and biological impact upon the "waters of the United States." *See Rapanos*, 574 U.S. at 780, 784, 786 (2006) (Kennedy, J., concurring) (emphasis added). This impact could be measured qualitatively or quantitatively, and does not require laboratory tests to be established. See, *Precon Development Corp., Inc.* 633 F.3d at 294.

Reedy Creek empties directly into the Wildman National Wildlife Refuge with a continuous surface; a clear indication of a physical connection. Second, arsenic has been detected in the water of Reedy Creek and, although in lower concentrations than, in the water of the marsh. The chemical arsenic is not alleged to be naturally occurring, therefore, the creek has a substantial bearing on the chemical integrity of the federally owned wetland. Finally, at least three Blue-winged Teal have tested positive for arsenic – in addition to the arsenic already polluting the water in the marsh. Because arsenic is a toxic substance, it is logical to conclude that exposure has had a significant negative impact on the health of the animals. Arsenic has clearly had a biological impact on the wildlife found in the refuge. The tests reveal a substantial impact on the integrity of the

wetlands and establish Reedy Creek as tributary to Wildman Marsh, and thus, to Wildman National Wildlife Refuge.

b. Reedy Creek has an impact on interstate commerce. The District Court misapplied the *Rapanos* plurality opinion as restricting covered waters to be only within the first category of *Lopez* commerce power.

Reedy Creek is, admittedly, not navigable-in-fact. It is not used as a highway of interstate commerce. Rather, farmers whose property is adjacent to the creek take water out of it to irrigate their crops which are then sold on interstate markets, thus the trial court correctly concluded that it does not fit the traditional definition of a channel of interstate commerce. *See United States v. Lopez*, 514 U.S. 549 (1995) (noting three categories of interstate commerce which Congress can control: channels of interstate commerce, protection of instrumentalities, and activities substantially related). Reedy Creek clearly falls outside the definition of "navigable-in-fact" waters of the *Rapanos* plurality decision as drawn from the first category of *Lopez*. No justice, outside the plurality, in *Rapanos* supported the idea that the first category of *Lopez* was the only one in which a tributary could fall under the jurisdiction of the CWA. *See Rapanos*, 547 U.S. at 782-83 (Kennedy, J., concurring) (citing cases suggesting commerce power to control tributaries under the second and third categories of *Lopez*); *id.* at 803-04 (Stevens, J., dissenting) (Congress has a legitimate interest in the function wetlands often provide of flood control for waters of the United States); *id.* at 811 (Breyer, J., dissenting) (finding Congress' intent to extend CWA to the fullest extent of commerce power). Taken

together, it is plain to see that these justices would see control of waters that are not navigable-in-fact as essential to the function of protecting interstate commerce interests. *See Marks* 430 U.S. at 193 (when no opinion of the court holds a majority of justices, the law will be those narrowest of grounds on which a majority do agree).

Agriculture is a major sector of the economy of the United States. In 2007, farmers in the United States sold $297 billion worth of agricultural products. USDA, Nat'l Agric. Statistics Serv., *2007 Census of Agriculture* 9, tbl. 2 (2007). The farmers of the states of New Union and Progress are a part of this impact. When they irrigate their crops with water from Reedy Creek, they are using Reedy Creek and, therefore, the Ditch C-1 as instruments which directly impact the quality of the crop they can sell. The addition of pollutants, especially a toxin like arsenic, will be devastating to the marketability of these famers' crops. The impact that agriculture plays on the United States economy is a primary concern of Congress and makes Reedy Creek and the Ditch C-1 directly connected to the flow of interstate agricultural products. Therefore, they must be protected to ensure the viability of these crops on the interstate market.

In 2011, the United States Fish and Wildlife Service conducted a survey of the national economic impact of hunting and found that 2.6 million people participated in migratory bird hunting that year. U.S. Fish and Wildlife Serv. & U.S. Census Bureau, *2011 National Survey of Fishing, Hunting and Wildlife-Associated Recreation* 25 (2011). Those hunters spent about $1.8 billion for hunting expenses and about $942 million on travel expenses. *See id.* at 25. Of those who traveled anywhere to hunt, in or out of their

resident state, each migratory bird hunter spent an average of $40 per day to participate. *See id.* at 25-6. Eleven percent of migratory bird hunters traveled out of state to hunt. *See id.* at 25. Because arsenic is a known toxic substance, it is dangerous to living creatures. Migratory birds would be just as susceptible to its impact as any other animal. If the marsh is poisoned by arsenic, the population of migratory birds, both locally, nationally, and internationally would be impacted. The effect would be fewer birds to hunt, therefore fewer hunters adding money to the interstate economy, and a destruction of important ecosystems.

For the foregoing reasons, the trial court misapplied the plurality opinion of *Rapanos* as the controlling law. The other justices saw possibilities of extending CWA jurisdiction to include waterways that fall into the second and third categories of *Lopez.* Because Reedy Creek has a substantial relationship on interstate economic activity through its connection to Wildman Marsh and because harming Reedy Creek is harming an instrumentality of interstate commerce, it must is protected by the CWA.

This Court should uphold the ruling below because Reedy Creek maintains a constant flow, is a discrete body of water and has a substantial connection as a tributary of Wildman Marsh; thus, it meets either test under *Rapanos*. Because Wildman Marsh is located predominantly within the Wildman National Wildlife Refuge, Reedy Creek is a "navigable water/water of the United States." Therefore, the court did not err in finding that Reedy Creek is protected by the Clean Water Act.

VI. Bonhomme did not violate the CWA by adding arsenic to Reedy Creek through a culvert on his property because Maleau's spoils piles are the point source for the

arsenic in the Ditch C-1. Since Maleau's spoils piles are the point source of pollution conveyed to waters of the United States, and the Ditch C-1 is navigable water, Bonhomme cannot be in violation of the CWA for arsenic flowing into Reedy Creek by the culvert at the terminus of the Ditch C-1.

Water testing has shown that Maleau adds arsenic to The Ditch C-1 via his gold mining waste piles, which are the point source for pollutants added upstream of Bonhomme's property and the culvert. The establishment of Maleau's waste piles as the point sources of the pollutant was clearly established in III, *supra*. Since Maleau's mining waste is the point source for pollution, Maleau is in violation of the Clean Water Act, not Bonhomme. Therefore, the lower court erred in denying Bonhomme's motion to dismiss.

The first problem in regard to this issue is one of semantics. "Ditch" in common usage means "a long, narrow excavation dug in the earth." *Webster's Third New International Dictionary*, 661 (ed. Philip Babcock Grove, 1993). The Ditch C-1 was built in 1913. It originates before crossing Maleau's property and winds some three miles across several properties before entering Bonhomme's property on which it merges with Reedy Creek. Along its course The Ditch C-1 drains water from saturated soils and rainfall runoff. C-1 is a permanently flowing tributary of Reedy Creek except for annual periods of drought. The problem lies in the use of "ditch" as a noun in general usage, or as here, used with an implicit definite article, "the Ditch C-1." In this way, the word ditch connotes a specific body of water, and is the proper name for that body, as opposed to the common usage of the word with an implied indefinite article, as in "a ditch." The CWA definition of point source makes use of the word "ditch" in its common usage, to indicate a conveyance that could, among others, be determined a point source for pollution. The

usage of “ditch” in Ditch C-1, is as previously determined a name and not of common usage.

The Ditch C-1 is navigable water. As previously discussed in IV "navigable waters" are defined as “waters of the United States” under 33 U.S.C. § 1362 (7), (14). Further, "waters of the Untied States" have been found to include tributaries of waters covered by the CWA. 40 CFR 122.2. The Ditch C-1 directly and indirectly carries waters that have historically been used, and still are used in furtherance of interstate commerce. The Ditch C-1 directly drains saturated soils sufficient for agricultural use, all along its course (with the exception of Bonhomme and Maleau’s properties,) it is used directly in aiding the growth of crops, which are sold on the open market. The Ditch C-1 is also a tributary of Reedy Creek, which is an interstate waterway used along its course to water crops sold in interstate commerce, and as a water source for facilities along Interstate Highway 250. The Ditch C-1 and Reedy Creek feed Wildman Marsh, a wetland and home to migratory birds, the hunting of which adds $25 million dollars to the local economy from interstate and intrastate hunters. Use in interstate commerce is sufficient under EPA definition to qualify the Ditch C-1 (as well as Reedy Creek, and Wildman Marsh) as the waters of the United States and by definition, navigable. 40 CFR 122.2, 33 U.S.C. § 1362(7).

The CWA in section 502 categorizes the “channels and conduits” of water sources that typically carry intermittent and ephemeral flows as point sources, and as previously stated, the CWA defines “discharge of a pollutant” as any addition of any

pollutant *to* navigable waters *from* any point source. 33 U.S.C.S. § 1362(12)(A) [emphasis added]. In III, it was established that the point sources in the case at hand were the mining waste piles Maleau has placed in the vicinity of The Ditch C-1. According to Justice Scalia's plurality opinion in *Rapanos*, the definitions of navigable waters and point source are distinct and separate and would make little sense if they overlapped. *Rapanos*, 547 U.S. at 735-36. Note Justice Scalia's emphasis that one test of point source versus navigable flows is the continuity of flow in the streambed. It can be safely inferred that under this reasoning intermittent and ephemeral flows of water are more likely considered point sources than consistently flowing waters.

The USGS defines streams in three categories, perennial, intermittent and ephemeral. Perennial streams are those that hold water throughout the year, Hedman and Osterkamp (1982) defined perennial streams as those having measurable discharge 80% of the time, intermittent 10-80% of the time, and ephemeral less than 10% of the time.. E.R. Hedman & W.R. Osterkamp, *Streamflow Characteristics Related to Channel Geometry of Streams in Western United States*, *in* USGS Water-Supply Paper 2193, 17 (1982).

According to records, the Ditch C-1 continuously flows except for periods of drought lasting from a few weeks to a few months in any year. To meet the Hedman and Osterkamp criteria, the Ditch C-1 must continuously flow more than 80% of the year, or on average more than 9.6 months. If the periods of drought lasted a few months annually, Ditch C-1 would arguably be an ephemeral watercourse. But since the range is a few

weeks to months, the inference may be drawn that Ditch C-1 is a perennial waterway. Since the Ditch C-1 is a perennial waterway and a navigable water under CWA it cannot be a point source as Maleau alleges. *Rapanos*, 547 U.S. at 735-36.

Public policy would dictate a similar finding. The stated policy of Congress in the CWA is to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ." 33 U.S.C.§ 1251(b); *See also Rapanos*, 547 U.S. at 737. Since Maleau's spoil piles have been determined by water sample testing to be the source of pollution in Ditch C-1, Reedy Creek, and Wildman Marsh; Congressional policy of reducing pollution to its source would logically fix liability to Maleau.

Because the unfortunately named Ditch C-1 is navigable water it is not a point source under the CWA. Since it is not a point source, Bonhomme is not in violation of the CWA. Bonhomme does not add arsenic to Reedy Creek at the point where the culvert feeds Ditch C-1 into Reedy Creek on Bonhomme's property. Maleau's waste piles, however are point source for addition of arsenic to Ditch C-1. *See III, supra*. Since Maleau's waste piles are point source and Ditch C-1 is navigable water, Maleau is in violation of the CWA, not Bonhomme. Because Maleau is in violation of the CWA for point source pollution of a navigable water, the lower court erred in denying Bonhomme's motion to dismiss.

CONCLUSION

The Court should find in favor of Bonhomme and remand this case to the District Court for trial. The District Court erred when it granted Shifty Maleau's and Progress' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). Jacques Bonhomme is a real party in interest under Federal Rule of Civil Procedure 17 to bring suit against Maleau for violating 301(a) of the CWA, 33 U.S.C. § 1311(a); Bonhomme meets the definition of "citizen" under CWA 505, 33 U.S.C. § 1365; Maleau's mining waste piles are "point sources" under CWA 502(12),(14), 33 U.S.C. §1362(12),(14); Ditch C-1 is a navigable water/water of the United States under CWA 502(7),(12), 33 U.S.C. § 1362(7),(12); Reedy Creek is a navigable water/water of the United States under CWA 520(7),(12), 33 U.S.C. § 1362(7),(12); and Bonhomme is not, himself, in violation of the Clean Water Act by adding arsenic to Reedy Creek through a culvert on his property because Maleau's mining waste is the source of the arsenic. For the foregoing reasons the Court should find in favor of Bonhomme and remand this case for trial.