C.A. No. 13-01234

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

D.C. No. 155-CV-2012

JACQUES BONHOMME
Plaintiff- Appellant, Cross-Appellee,

v.

SHIFTY MALEAU
Defendant-Appellant, Cross-Appellee.

D.C. No. 165-CV-2012

STATE OF PROGRESS
Plaintiff-Appellant, Cross-Appellee,

and

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

v.

JACQUES BONHOMME
Defendant-Appellant, Cross-Appellee.

ON APPEAL FROM JUDGMENT OF
THE UNITED DISTRICT COURT FOR
THE DISTRICT OF PROGRESS

BRIEF FOR APPELLANT/CROSS-APPELLEE

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JURISDICTIONAL STATEMENT

Original jurisdiction in the District Court was based upon the Clean Water Act's [hereinafter 'the CWA'] citizen suit provision. 33 U.S.C. § 1365(a) (2013). Appellate jurisdiction is based on 28 U.S.C. § 1291, which is applicable to final decisions of district courts. 28 U.S.C. § 1291 (2013). The July 23, 2012 opinion and order of District Judge Remus, is a final decision within the meaning of the section. See 28 U.S.C. § 1291. Bonhomme, and the other two parties, each have filed a timely Notice of Appeal as of Right from the above opinion and order, as allowed by Federal Rule of Appellate Procedure 4. FED. R. APP. P. 4.

STATEMENT OF THE ISSUES

1. Whether the plaintiff is the real party in interest under FED. R. CIV. P. 17, where he has a substantive right to bring suit under §505 of the CWA, but a third-party corporation may also derive an economic benefit from a successful suit against the defendant.

2. Whether a foreign national qualifies as a "citizen" under § 505 of the CWA, where the CWA does not explicitly bar 'citizen suits' by foreign nationals and the plaintiff has properly alleged a violation of the CWA and a personal interest "adversely affected" by that particular ongoing violation.

3. Whether gold mining waste piles can be termed "point sources" under §§ 502 (12), (14) of the CWA, when a gold mining company stacks the exposed waste piles next to a ditch, allowing rainwater runoff from the pile to leak debris and pollutants into the water.

4. Whether Reedy Creek, an interstate water, can be termed "navigable waters of the United States" under §§ 502(7), (12) of the CWA, where the EPA interprets the term to be inclusive of interstate waters in its regulations, it is a tributary of waters on federal property, and a group comprising of interstate farmers, interstate duck hunters, and travelers all utilize Reedy Creek as an instrument on their economic activity.

5. Whether a ditch can be termed a "navigable water of the United States" under § 502(7), (12) of the CWA, where the ditch is not 'navigable in-fact' but is a tributary for a 'navigable water' and ditches are examples of 'point sources' under §§ 502(7), (12) of the CWA.

6. Whether a third-party homeowner is in violation of the CWA where pollutants, which leak into a legally-required ditch three miles upstream, later pass unknowingly through a culvert on the third-party's property and into navigable waters.

STATEMENT OF THE CASE

Jacques Bonhomme originally filed this action in 2012 to seek all available relief under § 505 of the CWA, 33 U.S.C. § 1365 against Shifty Maleau for his alleged ongoing violation of § 301(a) of the CWA. R. at 4. In his suit, Bonhomme asserted that Maleau violated federal law by piling "gold mining overburden, waste rock, and dirt adjacent to" a draining ditch near their properties, and arranging those mining waste piles in such manner that rainwater runoff from the piles, which included high levels of arsenic, entered the drainage ditch, and carried "through a culvert under [Bonhomme's] farm road" to Reedy Creek, a "fifty mile long" interstate body of water and eventually settled at National Wildlife Refuge. R. at 4-7. In turn, the State of Progress filed a separate suit against Bonhomme alleging that he violated the CWA by allowing that arsenic to pass from his culvert – a point source – into Reedy Creek. R. at 6.

Both Clean Water Act claims proceeded as citizen suits brought under § 505(a)(1) of the CWA. Maleau intervened as a matter of right in Progress's action against Bonhomme under § 505(b)(1)(B) of the CWA. R. at 4-5. Then, Progress and Maleau filed a motion to consolidate their case with Bonhomme v. Maleau, which the district court granted. Id.

The defendant in each suit of the consolidated action filed motions to dismiss. On July 23, 2012, the District Court granted Maleau's motion to dismiss against Bonhomme, without prejudice, but denied Bonhomme's concurrent motion to dismiss against Progress and Maleau. Each of the parties has subsequently filed a Notice of Appeal to this Court. R. at 10.

STATEMENT OF THE FACTS

Shifty Maleau operates an open pit gold mining and extraction operation adjacent to the traditionally navigable Buena Vista River in Lincoln County, Progress. R. at 5. This mining operation produces great volumes of overburden and slag debris. Id. The debris contains arsenic,

a common environmental pollutant associated with gold mining and extraction, that is also a toxic poison. R. at 6. The mining operation in Lincoln County is adjacent to the traditionally navigable Buena Vista River in Progress, and if the piles were maintained there, would require additional CWA permits. R. at 5. In practice, Maleau trucks this overburden fifty miles from the mining operation in Lincoln County to Jefferson County and places it in piles adjacent to Ditch C-1, which does not presently require a CWA permit. Id.

Ditch C-1 is a draining ditch dug into saturated soils to drain them sufficiently for agricultural use. Id. The ditch was originally constructed in 1913 and a restrictive covenant in deeded property along the route of the ditch requires homeowners to maintain the ditch on their properties. Id. Such homeowners include Maleau and Jacques Bonhomme. Id. Bonhomme, a French national, is President and the largest shareholder of Precious Metals International, Inc. ("PMI"). R. at 7-8. PMI owns five gold mines around the world, including two in the United States, neither of which are in Progress or New Union. R. at 7.

Maleau is upstream of Bonhomme, and from his property line, Ditch C-1 runs three miles through several agricultural properties before reaching Bonhomme's property. R. at 6. From there, the ditch discharges through a culvert underneath a farm road on Bonhomme's property directly into Reedy Creek. R. at 5.

Reedy Creek is an interstate body of water that extends about fifty miles and maintains water flow throughout the year. Id. Reedy Creek begins in the State of New Union, and just before reaching Bonhomme's property, from which it continues to flow. Id. In both states, farmers with land adjoining the Creek, divert the water for agricultural purposes, primarily irrigation. Id. These farmers then proceed to sell their agricultural products in interstate

commerce. Id. Reedy Creek is also used as the water supply for Bounty Plaza, a service area on Interstate 250, a federally-funded, east-west interstate highway. Id.

Reedy Creek eventually ends it flow at Wildman Marsh. Id. Much of the wetlands in Wildman Marsh are located within Wildman National Wildlife Refuge, which is federal property owned and maintained by the United States Fish and Wildlife Service. R. at 6. The area is a major destination for duck hunters from Progress, New Union, five neighboring states from around the nation, and even a few foreign countries. Id. Hunting in Wildman is acknowledged to add over $25 million to the local economy from interstate hunters. Id.

The gold mining waste piles are arranged in an exposed manner next to Ditch C-1, in a way that allows rainwater to percolate down through the piles and eventually leak into the ditch. R. at 5. Arsenic within the piles also seeps into the channeled water runoff and is carried from the piles into the ditch. R. at 5-6. The natural flow of the water carries the water through the culvert under Bonhomme's property into Reedy Creek. R. at 5. Arsenic has been detected in measurable levels in both Ditch C-1 and Reedy Creek. R. at 6. Arsenic is also detectable at lower levels throughout Wildman Marsh, and the U.S. Fish and Wildlife Service in three Blue-winged Teal that habitat at Wildman Marsh. R. at 6.Water sampling and analysis of Ditch C-1 and Reedy Creek revealed a pattern of arsenic concentration that strongly suggests that arsenic in Reedy Creek and Wildman Marsh originate from Maleau's mining waste piles. Id.

SUMMARY OF THE ARGUMENT

In the consolidated action below, the District Court's granting of Defendants-Appellees' motion for dismissal and the concurrent denial of Plaintiff-Appellant's motion for dismissal was improper and should be reversed for the following reasons.

First, the district court erred in holding that Precious Minerals International (PMI) was the 'real party in interest' under FED. R. CIV. P. 17 (a). By giving undue weight to the peripheral economic benefit to PMI of the suit, rather than making findings about the "substantive right sought to be enforced" by Bonhomme, the district court misapplied the relevant law. Bonhomme properly alleged facts entitling him to substantive relief under the CWA. The district court's decision also reach beyond the modern "res judicata" function of the 'real party in interest' rule.

Second, the district court erred in holding that Bonhomme, as a French national, was not a proper 'citizen' entitled to file a 'citizen suit' under the CWA. Bonhomme constitutes a proper plaintiff because he has alleged a particularized and "actual or imminent injury" that is traceable to Maleau's continuing violation of the CWA. Under existing Circuit precedence, standing under the CWA only requires a showing of standing under Article III of the Constitution. The district court decision both contradicts such case law and Congress's legislative intent in utilizing citizens suits, as a means of maximizing enforcement of the CWA.

Third, the district court erred in holding that Maleau's exposed gold mining waste piles stacked next to Ditch C-1 were not 'point sources' of environmental pollutants under the CWA. The district court's narrow interpretation of "discernible, confined and discrete conveyances" is at odds with the judicial requirements that the term be interpreted broadly. In addition, the gold mining waste piles were 'point source' consistent with other Circuit Court decisions, finding that exposed mining piles that allow water runoff to carry debris and pollutants from the piles into navigable water, are 'point sources'.

Fourth, the District Court properly ruled that Reedy Creek, an interstate water, is a "navigable water of the United States" because it is a tributary of a "water of the United States" within the plain meaning and intent of the CWA. Even though the district court held in favor of

Bonhomme on other grounds on this issue, it should have also deferred to the EPA's interpretation of the CWA, finding that 'navigable waters' are inclusive of interstate waters. The EPA's interpretation of the CWA should be deferred to as Congress has not spoken about the issue and the regulation constitutes a reasonable and practical application of Congress's intent. Even though the district court held in favor of Bonhomme on other grounds on this issue, the district court should have held that Reedy Creek is a 'navigable water' within Congress's Commerce Clause powers to regulate.

Fifth, the district court erred in stating that Ditch C-1 was not a "navigable water of the United States" under the CWA. The Supreme Court has rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense. In addition, Ditch C-1 is a tributary of a navigable water and should qualify as a 'navigable water' in itself under existing law.

Finally, the district court erred in denying Bonhomme's motion to dismiss the allegation that he violated the CWA by allowing polluted upstream water to pass through a culvert on his property into Reedy Creek. It would be inequitable hold a homeowner liable for a commercial party's discharge of pollutants, of which the homeowner had no knowledge of or ability to seek a permit for. This Court should overrule the district court and dismiss the allegation that Bonhomme violated the CWA. In the absence of binding law stating otherwise, Bonhomme should not be held liable for violations of the CWA from a 'point source' culvert when he is not legally authorized to divert or remove the culvert.

STANDARD OF REVIEW

The Court of Appeals should apply a de novo standard of review to all of the trial court's legal conclusions below to determine if the lower court correctly applied the relevant substantive

law. Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). Moreover, the Court of Appeals should "accept the plaintiff's factual allegations [in the complaint] as true and construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged". Id. (internal quotation omitted).

ARGUMENT

I. BY ALLEGING A "CONTINUOUS OR INTERMITTENT" VIOLATION OF THE CWA, BONHOMME HAS A SUBSTANTIVE STATUTORY RIGHT TO FILE HIS SUIT AND CONSTITUTES A PROPER "PARTY IN INTEREST".

The district court erred in holding that Precious Minerals International (PMI) was the 'real party in interest' under FED. R. CIV. P. 17 (a). In its 'real party of interest' determination, the district court misapplied the relevant law by focusing exclusively on "the person who [may] ultimately benefit from the recovery". See Farrell Const. Co. v. Jefferson Parish, La., 896 F.2d 136, 140 (5th Cir. 1990). Under the existing rule, applied by a number of federal circuits, the court should have instead made findings as to which party "is the person holding the substantive right sought to be enforced". See 896 F.2d at 140. Because the district court disregarded the existing rule of the law, this Court should overrule their decision and hold that Bonhomme is a proper plaintiff based on his statutory right to file his citizen suit under § 505 of the CWA, or in the alternative, remand the issue to the district court for further findings. 33 U.S.C. § 1365

A. By not making findings about the "substantive right sought to be enforced" in its 'real party in interest' analysis, the district court misapplied the relevant law

The district court misinterpreted the relevant law to apply when determining who whether was the "real party in interest" to the litigation. The district court improperly took the position that it could limit its FED. R. CIV. P. 17 (a) analysis to findings about the economic benefit to PMI that would result from the suit. The court's reading of the law is surprising given that in

contrast, other district courts in this circuit have stated that "[I]t is not necessary [ ] that an action be brought in the name of the person who ultimately will benefit from any recovery". Honey v. George Hyman Const. Co., 63 F.R.D. 443, 447 (D.D.C. 1974) (quoting Notes of Advisory Committee on Rules, FED. R. CIV. P. 17 (a) (1966 Amendment).

Other federal courts have consistently followed the same general rule, with the Fifth Circuit, as a representative example, holding that "[t]he 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". See Farrell Const. Co. v. Jefferson Parish, La., 896 F.2d 136, 140 (5th Cir. 1990)(internal citation omitted); see also Virginia Elec. & Power Co. v. Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973) ("Whether a plaintiff is entitled to enforce the asserted right is determined according to the substantive law").

In contrast, however, the district court made no findings about the substantive right sought to be enforced. Instead, it focused its entire findings on the potential economic benefit to PMI that may result. For example, it made extensive findings that "Bonhomme is a 3% shareholder in PMI and is also on the Board of Directors of PMI", which were immaterial facts. Even if accepted the claim that "Bonhomme . . . filed suit against Maleau to injure his ability to compete with PMI", the district court still was required to make findings about the substantive statute and therefore its holding was in error. R. at 7.

B. Bonhomme qualifies as a 'real party of interest' under FRCP 17 because he has properly alleged facts entitling him to substantive relief under section 505.

Under a proper FED. R. CIV. P. 17(a) analysis, Bonhomme would certainly constitute a proper plaintiff and "the real party in interest". As stated previously, a proper "real party in interest" determination requires an analysis of the substantive law being asserted and an analysis

of whether the named plaintiff possesses the right sought to be enforced under that governing substantive law. See Farrell Const. Co., 896 F.2d at 140.

In the present matter, both of those considerations weigh in favor of Bonhomme. First, Bonhomme is alleging that Maleau is in violation of § 301(a) of the CWA, which prohibits the "discharge of a pollutant" by any person except in compliance with certain enumerated provisions. 33 U.S.C. § 1311 (a) (2013). The Act defines "discharge of a pollutant" to mean the "addition of any pollutant to navigable waters from any point source. 33 U.S.C. §§1311 (a), 1362 (12). No element of a § 301(a) violation is lacking. 33 U.S.C. § 1311 (a). Applying the substantive law of § 301(a), Bonhomme made a sufficient claim under that specific provision, by alleging that Maleau "arranged [his gold mining] waste piles in such a configuration that stormwater runoff from the piles . . . carries [ ] arsenic through a culvert under his farm road to discharge into Reedy Creek, [an interstate, navigable water]". Id.

Moreover, an examination of § 505 of the CWA shows that Bonhomme also possesses the statutory substantive right to seek to remedy a violation of § 301(a) of the CWA. 33 U.S.C. § 1365; 33 U.S.C. § 1311 (a). The interplay between § 505 and § 301(a) is key. Under Section 505(a)(1), "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of [ ] an effluent standard or limitation" established under the CWA. 33 U.S.C. § 1365(a)(1) (2013). The Act further defines "citizen" to mean "a person or persons having an interest which is or may be adversely affected" by the ongoing violation. § 505(g). 33 U.S.C. § 1365(g) (2013). There can be little argument that the § 301(a) here is not an ongoing right that a plaintiff has a substantive right to enforce through a § 505 citizen suit. 33 U.S.C. §§ 1311 (a) , 1365. As previously argued in Issue I, under the relevant

law, Bonhomme's apprehension at visiting an arsenic-polluted Wildman Marsh and his decreasing visits constitutes a significant "adversely affected" interest.

Furthermore, assuming that PMI also constitutes a "real party in interest" under this doctrinal rule, the Third Circuit has held that although "[t]here may be multiple real parties in interest for a given claim, [ ] if the [existing] plaintiffs are real parties in interest, Rule 17(a) does not require the addition of other parties also fitting that description". HB Gen. Corp. v. Manchester Partners, L.P., 95 F.3d 1185, 1196-97 (3d Cir. 1996); FED. R. CIV. P. 17 (a).

In short, because Bonhomme has a statutory substantive right enforceable under the CWA and a significant interest in the litigation, the Court should hold him to be the sole "real party in interest" under the relevant rule of law.

C. The district court's decision is in error because it goes beyond the modern "res judicata" function of the 'real party in interest' rule.

Left undisturbed, the district court's finding of law would also be contrary to the modern purpose of FED. R. CIV. P. 17 (a). Many federal courts, and the district courts in this circuit, have held that "the modern function of Rule 17 is to prevent the defendant from being subjected to subsequent suits". Virginia Elec. & Power Co., 485 F.2d at 85; see also Celanese Corp. of Am. v. John Clark Indus., 214 F.2d 551, 556-57 (5th Cir. 1954); Wieburg v. GTE Sw. Inc., 272 F.3d 302, 305-06 (5th Cir. 2001). More expressively, the Fourth Circuit has held that that the purpose of FED. R. CIV. P. 17 (a) is:

> [T]o enable a defendant to present defenses he has against the real party in interest, to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper res judicata effect".

Virginia Elec. & Power Co., 485 F.2d at 83-84.

As a result, where there is no concern that a defendant is not capable of putting forth all of its affirmative defenses against a party or concern with the preclusive effects of a potential judgment, a court will not bar a proper plaintiff under FED. R. CIV. P. 17. See Celanese Corp. of Am., 214 F.2d at 556-57.

Because neither of these policy concerns are implicated here, the district court's reading of FED. R. CIV. P. 17 is overly expansive and unnecessary. To illustrate, there is no finding that the State of Progress or Maleau needs to enjoin PMI before it can introduce all of its claims and defenses. In fact, the chief claim and defense is that Bonhomme is in fact in violation of the CWA because he "owns the culvert from which Ditch C-1 discharges the arsenic into Reedy Creek". This claim and defense exists independent of PMI. In addition, there is no finding that the doctrine of *res judicata* would not apply to a judgment in favor of Bonhomme. Courts have held that res judicata applies to bar a second suit "involving identical parties or their privies based on the same cause of action" and that "[w]hether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts'". Apotex, Inc. v. Food & Drug Admin., 393 F.3d 210, 217 (D.C. Cir. 2004). Similarly, in the present case, *res judicata* would certainly bar PMI or another party from filing suit under section 301 based on the same "nucleus of facts".

In short, the district court both misapplied the relevant rule of law, and dramatically expanded the guiding intent of FED. R. CIV. P. 17. The district court decision on this issue should be overruled.

II. THE "U.S. CITIZENSHIP" STANDING REQUIREMENT CREATED BY THE DISTRICT COURT IN ITS READING OF § 505 WAS IN ERROR.

The district court made an error in holding that Bonhomme, as a French national, was not a proper 'citizen' entitled to file a 'citizen suit' under the CWA. The district court gave undue

weight to a finding that "sections 505(g) and 502(5), does not expressly authorize foreign nationals to commence citizen suits". R. at 8 (referencing 33 U.S.C. §§ 1362 (5), 1365(g)). Although this may be true, the district court's finding is a novel interpretation of the law and a comparatively severe, judicial reading of the standing requirement of §§ 505(g) and 502(5). In addition, the district court decision will directly work against three decades of congressional intent to use 'citizen suits' as a means of maximizing enforcement of the CWA.

A. **The district court's decision is inconsistent with the plain meaning of the CWA and is at odds with the standing requirement of all other federal circuits**.

To begin, the district court's construction of a heightened 'citizenship' standing requirement within §505 is contrary to the plain language of the CWA. 33 U.S.C. § 1365. Section 505 of the CWA does not speak at all about nationality, simply authorizing "any citizen" to "commence a civil action on his own behalf . . . against any person" allegedly in violation of any section of the CWA. 33 U.S.C. § 1365(a)(1)-(2). Section 505(g), which discusses the statutory meaning of "citizen" under § 505, defines the term as "a person or persons having an interest which is or may be adversely affected". Within that subdefinition, §`502(5) further defines "person" as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body". 33 U.S.C.A. § 1362(5). Nowhere within the CWA is nationality referenced as a mandatory, or even discretionary, requirement for standing under § 505.

In the same fashion, the district court's construction of a heightened 'citizenship' standing requirement is above and beyond this Court's interpretation of standing requirements within § 505. In contrast to the district court, this Court and other federal courts have only required that a CWA citizen-plaintiff meet the minimum constitutional standing requirement under Article III of the Constitution. U.S. CONST. amend. III. For example, the Fourth Circuit

has stated that "[i]f a plaintiff asserting an interest under the Clean Water Act meets the constitutional standing requirements to satisfy Article III, then that plaintiff satisfies the statutory standing threshold as well". Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387 (4th Cir. 2011). This Court has also followed the same reasoning, holding that a CWA citizen-plaintiff must meet Article III standing, which only "requires that a plaintiff allege an actual or imminent injury that is both fairly traceable to the challenged action and likely redressable by the court proceeding". Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers, 663 F.3d 470, 473 (D.C. Cir. 2011). See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). As a result, this district court misapplied the relevant law.

B. Bonhomme's avoidance of Wildman Marsh due to fear of arsenic pollution constitutes a cognizable and particularized injury for purposes of Article III.

Bonhomme certainly constitutes a proper plaintiff if this Court applies the existing and proper rule that § 505 standing should be equivalent to Article III standing. 33 U.S.C. § 1365 Bonhomme has alleged that he has a suffered a particularized and "actual or imminent injury" that is traceable to Maleau's continuing violation of the CWA. In particular, Bonhomme has stated the arsenic concentrations from Maleau's gold mining have polluted Wildman Marsh, "a major destination for duck hunters". R. at 6. Bonhomme states that he has visited Wildman Marsh in the past "primarily for duck hunting activities" but that because the arsenic pollutes the waters and wildlife of the marsh, "he is afraid to continue to use the marsh for his hunting parties" and has "decreased his hunting parties from eight a year to two a year". R. at 6.

Even though the injury is based on Bonhomme's decreased visits to Wildman Marsh, other Circuit Courts have held that "[i]njury in fact, as required to establish standing, is alleged adequately by environmental plaintiffs 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". Friends of the Earth, Inc., 629 F.3d at 397. The sole limitation under this constitutional rule is that a plaintiff "claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it'". Ibid. (quoting Lujan, 504 U.S. at 565–66.) Because Bonhomme properly alleged that he visited Wildman Marsh, this limitation would not apply.

C. **The legislative history of the CWA shows Congress's understanding that 'citizen suits' were to promote enforcement of the CWA rather than benefit individual plaintiffs.**

In the section of the CWA entitled 'Congressional declaration of goals and policy', Congress stated that the legislative objective of the Clean Water Act was "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C. § 1251(a) (2013).

To meet this goal, Congress not only extended authority to enforce the statute to traditional federal agencies, but also broadly extended such enforcement authority to the public at large through § 505. Congress specifically authorized "any citizen" to "commence a civil action on his own behalf" for any alleged violation of the CWA. 33 U.S.C. § 1365. Furthermore, Congress also expressly extended the original jurisdiction of Article III courts, granting district courts the jurisdiction to review all such 'citizen suits' "without regard to the amount in controversy or the [diversity of] citizenship of the parties". 33 U.S.C. § 1365.

Courts have stated that there are two primary purposes of citizen suits. First, "to protect and advance public's interest in pollution-free waterways". Pennsylvania Envtl. Def. Found. v. Bellefonte Borough, 718 F. Supp. 431, 434 (M.D. Pa. 1989). As for the second goal, district courts have also explained citizen suits "enable private parties to assist in enforcement efforts

where federal and state authorities appear unwilling to act". Lockett v. E.P.A., 319 F.3d 678, 684 (5th Cir. 2003). That the primary jurisdictional restraint on filing a 'citizen suit' is a showing that a "Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States", further demonstrates this point. 33 U.S.C. § 1365(b)(1)(B).

Bonhomme's suit is capable of advancing the public interest by filing suit for an ongoing harm to public waters. In addition, Bonhomme has claimed that the State of Progress may have not acted previously against Maleau "in return for major contributions that Maleau gave to the Attorney General's election campaign". R. at6. The district court's narrow reading of § 505, as a result, does nothing to further the legitimate aims of Congress is allowing for 'citizen suits' by proper plaintiffs. The district court's decision only hurts the public interest.

In addition, the negative costs of the district court's decision are not justified by a judicial concern with overburdening the courts. The district court incorrectly stated that a finding for Bonhomme would under § 505 would deprive the term 'citizen' of its meaning or any limiting principle. This is simply not possible as a matter of law. The inclusion of Bonhomme, within the broader statutory meaning of 'person', does not remove the existing Article III standing requirement that already works to bar meritless suits and suits for generalizable injuries. The district court's holding, as applied in this case, would only work to bar meritorious suits, such as here, where a foreign national's cause of action also benefits the public good.

Separately, the district court's holding is not justified by an apprehension with encroaching on the effective enforcement of federal statutes concerning immigration. Most importantly, there is no finding that Bonhomme was in violation of immigration law. Even assuming for the sake of argument, that Bonhomme was, Congress' intent in allowing for 'citizen suits' was to create a means of assuring protection of the public in the absence of

governmental action, rather than benefitting private plaintiffs. In sum, if left undisturbed, the district court decision will have a far-reaching and unnecessarily disruptive impact on the effective enforcement of the CWA. The district court's reading of § 505 - that Congress clearly intended for the provision to apply to U.S. citizens alone – is inconsistent with the express terms of the CWA, the Article III standing test applied within the D.C. Circuit, and Congress' intent in implementing the 'citizen suit' as a means of achieving the objectives of the CWA. There are enough facts for the Court to overrule the district court, but if the Court were not to agree, at minimum it should remand the case for further findings. See Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982) (holding that "[w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings").

III. MALEAU'S GOLD MINING WASTE PILES THAT WERE STACKED NEXT TO DITCH C-1 AND LATER LEAKED INTO DITCH C-1 THROUGH RAINWATER RUNOFF ARE 'POINT SOURCES' UNDER THE CLEAN WATER ACT

The district court erred in holding that Maleau's gold mining waste piles stacked next to Ditch C-1 were not 'point sources' under the CWA. 33 U.S.C. § 1362 (12), (14). The district court primary error in applying the relevant law was in limiting the range of statutory 'point sources' to the dozen examples in the statutory definition and excluding the gold mining waste pile here, as a result. Both the CWA itself and a number of federal court cases, in contrast to the district court, allow for a broader range of potential "point sources". The district court misapplied the law and should be reversed.

A. The district court misapplied the rule of law by narrowly reading § 502 (14) to exclude all "discernible, confined and discrete conveyances" not within the illustrative statutory examples from the statutory definition of 'point source'.

In making its determination that overburden piles were not "point sources," the district court misapplied the law by focusing solely on the illustrative statutory examples within § 502 (14) of the CWA. 33 U.S.C. § 1362 (14). The district court's narrow interpretation of the statute is at odds with the plain meaning of § 502(12) and (14) of the CWA, which states that a 'point source' is "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)(emphasis added).

In addition, the district court's narrow reading of the statute is at odds with other Circuit Courts that have held that "[t]he definition of a point source is to be broadly interpreted." Dague v. City of Burlington, 935 F.2d 1343, 1354-1355 (2d Cir. 1991) rev'd in part, 505 U.S. 557 (1992); see also United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir.1979) (holding that "the concept of a point source was designed to . . . embrac[e] the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States"). Courts have found a wide variety of conveyances to qualify as point sources, even though they were not listed within § 502 (14). Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983) (finding bulldozers and backhoes to be 'point sources' where they "collected into windrows and piles material that may ultimately have found its way back into the waters"); Peconic Baykeeper, Inc. v. Suffolk Cnty., 600 F.3d 180, 188 (2d Cir. 2010) (finding helicopters used by county to spray pesticides to be 'point sources' within meaning of CWA).

Consistent with the plain meaning of § 502 (14) and numerous judicial opinions interpreting the statutory definition, the district court reading of the law was in error.

B. A finding that the gold mining waste piles stacked next to Ditch C-1 were 'point sources' of polluted rainwater runoff would be consistent with on-point Circuit Court decisions.

The Court should find that these gold mining waste piles constituted a 'point source' for purposes of the CWA because Maleau stacked the piles directly next to Ditch C-1 in a way that enabled rainwater runoff to mix with and easily carry arsenic from the piles to the water in Ditch C-1. Such a finding would be consistent with case law that finds such a factual situation to constitute a "discernible, confined and discrete" conveyance of a pollutant. Sierra Club v. Abston Const. Co., Inc., 620 F.2d 41, 44 (5th Cir. 1980).

In Sierra Club v. Abston Const. Co., the Fifth Circuit was presented with the question of "whether pollution carried in various ways into a creek from defendant coal miners' strip mines is "point source" pollution controlled by the Act". 620 F.2d at 43. Applying the broader definition of § 502(14), the Court focused on whether the coal mine pile was a "discernible, confined and discrete" conveyance of the pollutant and held that "[a] point source of pollution may also be present where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials". 620 F.2d at 45. The Eleventh Circuit has held similarly. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1009 (11th Cir. 2004)(finding that "piles of debris in this case collected water, which then flowed into the stream. They are, therefore, point sources within the meaning of the CWA"). In the present case,

similar to the miners in Abston Const. Co., Maleau was responsible for the creation of the gold mining waste piles and their placement immediately next to the ditch.

Even though the polluted rainwater runoff flowed into Ditch C-1 "through channels eroded by gravity from the configuration of the waste piles into Ditch C-1", rather than from an intentional action by Maleau, under the holding of Abston Const. Co., "[t]he ultimate question is whether pollutants were discharged from 'discernible, confined, and discrete conveyance(s)' either by gravitational or nongravitational means". 620 F.2d at 45. In addition, the Fifth Circuit explained that "[n]othing in the Act relieves miners from liability simply because the operators did not actually construct those conveyances, *so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water*". Ibid. (emphasis added).

Bonhomme has made enough factual allegations in his complaint to meet this "reasonably likely" test. For example, "[a]rsenic is commonly associated with gold mining and extraction" and Bonhomme has made findings that "[u]pstream of the Maleau property, arsenic is undetectable in Ditch C-1 [but] [j]ust below the Maleau property, arsenic is present in Ditch C-1 in high concentrations". R. at 6. Accepted as true for purposes of this appeal from a motion to dismiss, these facts "strongly suggest[ ] the arsenic in Reedy Creek and Wildman Marsh originates from Maleau's mining waste piles". R. at 6.

Even were the Court to not apply strict scrutiny here, Maleau is especially at fault for any discharges from the waste piles. First, Maleau "trucks the overburden and slag from Lincoln County [over fifty miles away] and places it in piles adjacent to Ditch C-1 in Jefferson County, Progress." R. at 7. He, as a result, had greater control over where to place the waste piles than the miners in Abston Const. Co. who simply pushed the waste piles aside from the mines in which

they were working. 620 F.2d at 43. In addition, it should also be noted that unlike the miners in Abston Const. Co, who "occasionally constructed 'sediment basins' . . . to catch the runoff" before it reached the body of water", there is no factual evidence that Maleau made even the slightest effort to prevent the environmental pollutant from entering Ditch C-1. 620 F.2d at 43.

Neither of the cases cited by Maleau conflict with the holding of the Fifth Circuit, as both stand for the main proposition that 'point sources' do not include "unchanneled and uncollected surface waters". Consolidation Coal Co. v. Costle, 604 F.2d 239, 249 (4th Cir. 1979) rev'd sub nom. E.P.A. v. Nat'l Crushed Stone Ass'n, 449 U.S. 64 (1980). In Sierra Club v. Abston Const. Co., the Fifth Circuit expressly took these cases into consideration in its holding. 620 F.2d at 47. (holding that "[a]lthough the point source definition 'excludes unchanneled and uncollected surface waters', surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution"). In any case, the dicta of the cases cited by Maleau agree with Abston Const. Co. holding. See Consolidation Coal Co. at 249 (noting that "[d]rainage of precipitation and surface water over coal waste rather than water actually used for coal mining causes the bulk of the water pollution from coal mines"); Appalachian Power Co. v. Train, 545 F.2d 1351, 1373 (4th Cir. 1976)(noting that "runoff from material storage sites, where channeled into a settling pond or other such collection system, is clearly subject to regulation" as a point source).

As a result, the Court should overrule the district court and find that Ditch C-1 is a proper 'point source' under § 502(14) of the CWA.

IV. THE DISTRICT COURT CORRECTLY HELD THAT REEDY CREEK WAS A "NAVIGABLE WATER OF THE UNITED STATES" UNDER THE CWA.

In 1972, Congress enacted the Clean Water Act with the express goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters". 33 U.S.C.

§ 1251. In interpreting that directive, courts have held that even though the Act only applies to 'navigable waters of the United States', "the CWA is entitled to a broad construction to implement its purpose". Shanty Town Associates Ltd. Partnership v. E.P.A., 843 F.2d 782, 792 (4th Cir.1988); United States v. Hamel, 551 F.2d 107, 112 (6th Cir.1977). See also United States v. Sellers, 926 F.2d 410, 416 n. 2 (5th Cir.1991). As such, the Supreme Court has previously held that the statutory meaning of 'navigable waters' in the CWA is broader than the traditional understanding of that term".

Because Reedy Creek qualifies as a 'navigable water' under the CWA, consistent with several different lines of cases and EPA guidance, the district court properly held that Reedy Creek was a 'navigable water of the United States'.

D. The district court properly applied existing case law and EPA guidance to find that Wildman Marsh was a "navigable water of the United States", and that Reedy Creek, as a tributary of such "navigable water," was in turn, also a "navigable water of the United States".

3. Wildman Marsh is a "water of the United States" within the plain meaning of the Clean Water Act.

It is an issue of first impression whether intrastate waters and wetlands on federal property are "waters of the United States" within the plain meaning of § 502(7) of the CWA. However, because such a finding would in no way intrude on state sovereignty, the district court's reading of § 502 (7) should stand.

To begin, Wildman Marsh National Wildlife Refuge, and the waters and wetlands within it, are clearly on federal property. Equally important, there was no allegation presented below that the State of Progress has any authority or control over Wildman Marsh. Concerns with intrusions on state sovereignty have primarily animated judicial objections to agency interpretations of the term "navigable waters". As the chief example, in Rapanos, the plurality

opinion objected to a federal agency's exercise of jurisdiction over purely intrastate waters because it constituted an "intrusion into such an area of traditional state authority as land-use regulation" and because such jurisdiction "stretches the limits of Congress's commerce power" to its other limits. Rapanos, 547 U.S. at 716.

In contrast, a construction of "navigable waters" which includes federal property such as Wildman Marsh would not logically constitute an intrusion on "quintessential state and local power". Primarily, this is because there is no factual basis to challenge the inference that the State of Progress was without existing authority to regulate federal lands and the water and wetlands on those lands. Even though Wildman Marsh is located wholly within the State of Progress, a construction of the Act that removed land owned and maintained solely by the federal government from federal jurisdiction would be disruptive and clearly conflict with the mandate that the CWA be given "a broad construction to implement its purpose". Shanty Town Associates Ltd. Partnership, 843 F.2d at 792. As such, the district court was correct to hold Wildman Marsh was a "water of the United States" within the plain meaning of the CWA.

4. Reedy Creek is a tributary of a 'navigable water of the United States,' and is, as a result, a "navigable water of the United States" in its own right as a matter of law and policy.

Wildman Marsh is "the terminus of Reedy Creek", which arguably makes Reedy Creek a tributary of Wildman Marsh. Courts and the EPA have previously held that tributaries of "navigable waters" are also "waters of the United States". R. at 9; Parker v. Scrap Metal Processors, Inc., 386 F.3d at1009 (holding that within term "navigable waters" includes tributaries of "navigable waters of the United States); see 40 C.F.R. § 122.2 (including under term "waters of the United States," tributaries of such waters). The reasoning for this, as expressed by the district court, is that "it would be difficult or impossible to prevent pollution of

a navigable stream without preventing pollution of its tributaries, which are the origins of most of the water in the stream". R. at 10. The district court did not make legal findings about whether Bonhomme properly alleged that Reedy Creek was a tributary of Wildman Marsh, a 'navigable water of the United States' as argued above in Issue IV.1. However, Bonhomme has presented enough factual allegations for the Court to find in his favor on this issue under existing law.

In making a determination of whether Reedy Creek can be termed a tributary, the Court should examine the issue under the two existing standards as set out in the Rapanos plurality and concurring opinion. Under either standard, Reedy Creek qualifies as a tributary for purposes of the CWA. In Rapanos, a plurality of four Justice joined in an opinion stating that a non-navigable water qualifies as a 'tributary' of "navigable waters" where it contains "a relatively permanent flow "and if so, whether the non-navigable waters are adjacent to navigable waters "in the sense of possessing a continuous surface connection". Rapanos, 547 U.S. at 757. Here, there is no question that Reedy Creek meets this standard as there is no factual allegation that it does not have a 'relatively permanent flow' or a 'continuous surface connection' with Wildman Marsh since the findings below show that it flows to an end at Wildman Marsh.

Reedy Creek also qualifies as a tributary under the test set out in Justice Kennedy's concurring Rapanos opinion. In the concurrence, Justice Kennedy held that tributaries that "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity" of 'navigable waters', fall within the Act's regulatory authority. Rapanos, 547 U.S. at 717. Reedy Creek certainly meets this test as the facts show that "arsenic is present in [Reedy Creek] in significant concentration", is subsequently "detectable at lower levels throughout Wildman Marsh", and has been detected in three Blue-winged Teal. R. at 6, Arsenic is a well-known poison and as such, would certainly 'significantly

affect the chemical integrity' of Wildman Marsh. This chain of events shows a nexus that qualifies Reedy Creek as a tributary of Wildman Marsh under the Rapanos concurrence test as well.

E. Even though not the basis of its decision, the district court should have given deference to the EPA's interpretation of "navigable waters" in 40 CFR 122.2, which included interstate waters, such as Reedy Creek.

In its regulations, the EPA has determined that interstate waters are 'navigable waters' under the CWA. See 40 CFR 122.2. This regulation is applicable to Reedy Creek as it flows fifty miles from the State of Union and into the State of Progress, making it an interstate water. The district did not apply the EPA's interpretation in the present case. Consistent with Chevron, however, the district court should have made findings to determine whether the EPA interpretation of the CWA was deserving of judicial deference. Because the district court did not consider the issue or apply the relevant law, even as it found for Bonhomme on other grounds, the Court should conduct a de novo review on the issue.

In Chevron, the Supreme Court stated that "[t]he power of an administrative agency to administer a congressionally created program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress". Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843, (1984) (internal citation omitted). The Court also stated that where "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" and that "[s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute". Chevron, 467 U.S. at 843.

The EPA's finding that interstate waters are "navigable waters of the United States" is similarly deserving of deference under Chevron. See 40 CFR 122.2. Under the two-part Chevron analysis, the Court must first determine whether there is evidence that Congress "has directly spoken to the precise question". Chevron, 467 U.S. at 842. In the present case, there is no evidence that Congress discussed whether interstate waters were 'navigable waters of the United States' under the CWA.

The EPA's finding is also permissible under the second part of the Chevron test as both "a permissible construction of the statute," and "reasonable and consistent with the statute's purpose". Independent Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 643 (D.C.Cir.2000); Chem. Mfrs. Ass'n v. E.P.A., 217 F.3d 861, 866 (D.C. Cir. 2000). In discussing the purpose of the CWA, the district court below held that "[t]he interstate nature of water pollution is the reason why Congress enacted water pollution control legislation in the first place". R. at 10. See, e.g., Act of Oct. 2, 1965, Pub. L. 89-234, 79 Stat. 903 (1965) (addressing water pollution only in interstate waters). In the same fashion, the regulation here is designed to address interstate water pollution by directly including interstate water within the enforcement authority of the EPA. Therefore, the EPA's regulation meets the two-part Chevron test and is constitutionally deserving of deference from the Court.

Where Congress is silent or ambiguous about an issue, the Supreme Court has said that a reviewing court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency". Chevron, 467 U.S. at 843-44. Because the district court failed to do so here, its finding of law should be overturned.

C. Even though not the basis of its decision, the district court should have held that Reedy Creek was a 'navigable water' within Congress's Commerce Clause power to regulate.

In United States v. Lopez, the Court "identified three broad categories of activity that Congress may regulate under its commerce power": (1) 'the use of the channels of interstate commerce'; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce". United States v. Lopez, 514 U.S. 549, 558-59 (1995).

The Court improperly referenced the Rapanos plurality opinion as binding authority on the question of whether Congress only had authority under the CWA to regulate 'navigable waters' which must be "highways of interstate commerce to fall within the definition of 'navigable waters' under the CWA". The Supreme Court has previously held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds". Marks v. United States, 430 U.S. 188, 193 (1977) (internal citation omitted).

In Rapanos, Justice Kennedy only concurred in the judgment, and therefore the legal conclusions presented in dicta about the Lopez v. United States decision are not binding precedent. Because the district court, misapplied the law and improperly limited the definition of interstate commerce to only one prong of Lopez, the Court should conduct a de novo review under the two additional prongs.

1. **Reedy Creek serves as a water supply for interstate travelers on I-250, a federal highway, and as a water source for farmers who sell their goods in interstate commerce.**

Reedy Creek affects "the instrumentalities of interstate commerce" and "persons or things in interstate commerce" as required within Congress's Commerce Clause powers under

the second prong of Lopez. 514 U.S. at 558-59. Specifically, Reedy Creek serves as the water supply for a federal highway service area and as a water source for farmers who sell their agriculture products in interstate commerce. 514 U.S. at 558-59.

In Lopez, the Court stated that Congress is authorized to regulate "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities". Earlier in Heart of Atlanta Motel, Inc. v. U. S., the Court cited approvingly to the proposition that "[c]ommerce among the states . . . consists of intercourse and traffic between their citizens". Heart of Atlanta Motel, Inc. v. U. S., 379 U.S. 241, 256 (1964). Here, Reedy Creek "is used as the water supply for Bounty Plaza, a service area on Interstate 250 ("I-250"), a federally-funded, east-west interstate highway". R. at 5. It is, as a result, certainly an instrumentality of interstate commerce as traditionally understood.

Moreover, "farmers whose land adjoins the Creek divert the water for agricultural purposes, primarily irrigation . . . sell their agricultural products in interstate commerce". R. at 5. Such usage is analogous to the facts presented in United States v. Earth Sciences, Inc., where the Tenth Circuit held that interstate waters where are within Congress's Commerce Clause powers when "used for agricultural irrigation, and the resulting products are sold in interstate commerce". United States v. Earth Sciences, Inc., 599 F.2d 368, 375 (10th Cir. 1979). The Tenth Circuit reasoned that holding was consistent with the Act's purposes as "Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce". 599 F.2d at 375.

As such, the Court should find Reedy Creek to be a 'navigable water' capable of regulation under Congress's Commerce Clause powers under the second prong of Lopez.

2. Wildman Marsh, for which Reedy Creek is a tributary, is used as a major destination for duck hunters from Progress, New Union, and from around the nation, adding over $25 million to the local economy.

Wildman Marsh, of which Reedy Creek is a tributary, is a 'navigable water of the United States' because duck hunting at the wetland has "a substantial relation to interstate commerce" consistent with the third prong of Lopez. 514 U.S. at 558-59.

The Supreme Court has held that "those activities having a substantial relation to interstate commerce" are activities that Congress may regulate under its Commerce Clause power. The Court has further stated that "it is not necessary that each individual instance of the activity substantially affect commerce; it is enough that, taken in the aggregate, the *class of activities* in question has such an effect". Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 193 (2001).

Such 'substantially related' activities are present here. For example, Wildman Marsh is is a vast tract of land utilized for duck hunting. The district court below found that "[t]he area is a major destination for duck hunters from Progress, New Union and five neighboring states" and that hunting in Wildman "add[s] over $25 million to the local economy from interstate hunters". The economic benefit of $25 million shows that duck hunting at Wildman Marsh is an economic activity that substantially affects commerce as required by Lopez. But see Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 173 (2001). In addition, the $25 million of economic activity shows that duck hunting at Wildman Marsh does not have a simply "attenuated effect upon interstate commerce". United States v. Morrison, 529 U.S. 598, 599 (2000). As a result, Reedy Creek, a tributary of Wildman Marsh, should also constitute a 'navigable water' within Congress's authority to regulate.

V. THE COURT ERRED IN FINDING THAT DITCH C-1 WAS NOT A NAVIGABLE WATER

The district court erred in stating that Ditch C-1 was not a "navigable water of the United States" under § 502(7), (12) of the CWA. 33 U.S.C. §§ 1362 (7), (12). Furthermore, the district court misapplied the rule of law set out in Rapanos v. United States, and reached legal conclusions contrary to both the plurality opinion and the concurring opinion of Justice Kennedy. Consistent with the Rapanos Court, the district court should have held that a Ditch C-1 does not have to be 'navigable in-fact' to be a "navigable water of the United States. In addition, the district court should have held that Ditch C-1 can "be simultaneously two elements in the water pollution offense". Because the district court misapplied the law and held otherwise, the Court should overrule the district court.

A. Maleau's argument that Ditch C-1 cannot be a navigable water because it is not navigable in-fact has previously been rejected by the Supreme Court

Four justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense. Rapanos v. United States, 547 U.S. 715, 730-31 (2006). Similar to Maleau, the defendants in Rapanos contended that the terms "navigable waters" and "waters of the United States" must be limited to the tradition definition of "navigable waters" that required that the 'waters' be "navigable in fact, or susceptible of being rendered so". 547 U.S. at 730. The Court held otherwise stating, "[w]e have twice stated that the meaning of "navigable waters" in the Act is broader than the traditional understanding of that term". 547 U.S. at 731 (citing Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 167 (2001); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985)). The Court also noted that:

> [The CWA] provides, in certain circumstances, for the substitution of state for federal jurisdiction over "navigable waters ... *other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a

> means to transport interstate or foreign commerce ... including wetlands adjacent thereto." § 1344(g)(1) (emphasis added). This provision shows that the Act's term "navigable waters" includes something more than traditional navigable waters.

547 U.S. at 731.

Justice Kennedy did not join the plurality's opinion, but in his concurring opinion, agreed with the plurality that the prior decisions of the Court evidenced the fact that the statutory term "waters of the United States" extended beyond water bodies that are traditionally considered navigable. Rapanos, 547 U.S. at 765. In the same spirit, a pre-Rapanos decision in this district paralleled the same reasoning. Natural Res. Def. Council, Inc. v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975) (finding that Congress intended to assert "federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution" and that the terms "navigable waters" and waters of the United States" were not limited to the traditional tests of navigability).

In light of such these binding cases, the trial court was in error to hold that Ditch C-1 was not a "navigable water of the United States" due to it not being navigable in fact. In addition, because Bonhomme properly alleged in his complaint that Ditch C-1 was a tributary of Reedy Creek - an interstate, navigable water as argued in Issue Five – the district court should have held the ditch to be a "navigable water" on the basis of that factual allegation consistent with existing law. United States v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997) (noting that "courts repeatedly have recognized that tributaries to bodies of water that affect interstate commerce are 'waters of the United States' protected by the CWA).

B. Under existing law, Ditch C-1 can conceptually serve as both point source and a navigable water at the same time for purposes of remedying a violation of the CWA

The district court erred in finding that Ditch C-1 was both a 'point source' and a "navigable water" under the CWA. As argued in Issue Three, the gold waste mining piles were the 'point sources' of the arsenic pollution, rather than Ditch C-1. However, assuming for the sake of this argument that Ditch C-1 is the actual 'point source' of the arsenic pollution, the district court still misapplied the law in in stating that a ditch cannot be simultaneously two elements under the CWA.

In light of the fact that Rapanos v. United States was a plurality opinion, the district court improperly cited to the decision as binding precedent on the question of whether Ditch C-1 could simultaneously constitute two elements under the CWA. The Supreme Court has previously held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds". Marks v. United States, 430 U.S. 188, 193 (1977) (internal citation omitted). In the present case, Justice Kennedy only concurred in the judgment and expressly objected to the position taken by the four Justices in the plurality opinion that 'point sources' and 'navigable waters' could not conceptually constitute the same object since "the definition of 'discharge' would make little sense if the two categories were significantly overlapping". Rapanos, 547 U.S. at 735. As a result, the district court misapplied the law by not considering the persuasive Rapanos concurring opinion in its analysis. The district court's reading of law should be reversed

To illustrate, in the Raponos concurrence authored by Justice Kennedy, he states that the plurality was mistaken in describing point sources and navigable waters as "separate and distinct categories". In assessing the plurality's proposition that 'point sources' and 'navigable waters' are "separate and distinct categories", Justice Kennedy specifically objected to the

plurality's construction of the statute because it would logically "would likely exclude, among other things, effluent streams from sewage treatment plants," contrary to the purposes of the CWA. 547 U.S. at 772. As a result, Justice Kennedy reasoned that "certain water-bodies could conceivably constitute both a point source and a water". Ibid.

Justice Kennedy's concurring opinion has been applied by courts within this circuit. See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Engineers, 699 F. Supp. 2d 209, 216 (D.D.C. 2010) vacated, 663 F.3d 470 (D.C. Cir. 2011) (explaining that Rapanos plurality opinion "did not establish that the terms 'point source' and 'navigable waters' are always mutually exclusive" and that the plurality opinion "stopped just short of declaring that a point source, such as a ditch, can never be a navigable water under the CWA").

In any case, because the actual 'point source', as argued in Issue Three, is the gold waste mining piles, no substantial overlap between the categories exists.

VI. THE DISTRICT COURT ERRED IN CONCLUDING THAT MALEAU HAD A CAUSE OF ACTION WHERE BONHOMME UNKNOWINGLY ALLOWED POLLUTED WATER FROM THREE MILES UPSTREAM TO PASS THROUGH A LEGALLY-MANDATED CULVERT ON HIS PROPERTY INTO REEDY CREEK

The district court erred in denying Bonhomme's motion to dismiss the allegation that he violated the CWA by allowing polluted upstream water to pass through a culvert on his property into Reedy Creek. Even though a culvert is a 'point source', no court in any jurisdiction has yet to extend this reasoning and conclude that a homeowner can be liable under the CWA when an upstream, commercial polluter discharges pollutants through conveyances the property of that homeowner. Dicta in a number of federal court cases and significant policy considerations demonstrate that the district court's reading of the law was in error.

Courts have traditionally examined the liability of the original defendant-polluter alone when a conveyance of an innocent third-party property owner is implicated as a 'point

source'. For example, in Dague v. City of Burlington, a case cited by Maleau, the defendant-polluter was a municipality and the owner of the culvert was a separate railroad company. Even though the Court determined that the "railroad culvert was a point source for the discharge of pollutants and therefore that the city was violating 33 U.S.C. § 1311(a)", at no point in the opinion is the railroad company implicated as liable for a CWA violation. Dague, 935 F.2d at 1354. Similarly, in Velsicol Chem. Corp., the defendant-corporation discharged pollutants "into the city sewer system, which, in turn, empties into the Mississippi". United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976). The Court stated that the city sewer system constituted a 'point source' in that case and added that "the fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from the scope of this Act". 438 F. Supp. at 947. At no point in the opinion does the district court make reference to liability being imposed on the innocent third-party property owner.

In S. Florida Water Mgmt. Dist., another case cited by Maleau, the Court did find a defendant-pumping facility itself liable under the CWA for moving pollutant-laden water between covered waters even the "pollutants originat[ed] elsewhere merely pass[ing] through the point source". S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 104 (2004). However, in that case the Supreme Court did also explain that a relevant consideration was that "one of the [Clean Water Act's] primary goals was to impose NPDES permitting requirements on municipal wastewater treatment plants" and that a reading which exempted them from liability would not be consistent with Congress's intent. 541 U.S. at 105 (citing § 1311(b)(1)(B) (establishing a compliance schedule for publicly owned treatment works)). Such a concern with Congress's intent is not applicable here.

Moreover, the Court should not allow Bonhomme to be made liable under the CWA as a matter of equity. Bonhomme receives no benefit from and has no control over the 'point source' conveyance on his property, in contrast to the third-parties in Dague and Velsicol Chem. Corp. As described, Ditch C-1 is ""a drainage ditch dug into saturated soils to drain them sufficiently for agricultural use" and "[r]estrictive covenants in [homeowners'] deeds require them to maintain the Ditch on their properties". If Bonhomme blocked the water from Ditch C-1 from passing through his property, he would be in violation of that restrictive covenant.

The requirements to establish a violation under the CWA further support reason why liability should not apply to Bonhomme for his 'point source'. As stated by the Tenth Circuit, as one example, "[t]o establish a violation of Clean Water Act (CWA) provision prohibiting discharge of pollutants without a permit, a plaintiff must prove that defendant (1) discharged (2) a pollutant (3) into navigable waters (4) from a point source (5) *without a permit*". Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133 (10th Cir. 2005) (emphasis added). The material element of "without a permit" makes it clear that an innocent homeowner such as Bonhomme should not be made liable for another party's violation. Under the National Pollutant Discharge Elimination System, the only program through which required permits can be obtained, only a person "proposing a new discharge" and who engages in activities which "require it to obtain an NPDES permit," can make a request under 40 C.F.R. § 122.21. As a result, a homeowner such as Bonhomme, with no idea about the arsenic pollution that occurred three miles upstream, would have no ability to even apply for a permit. Assuming for purposes of this argument that the arsenic in Reedy Creek reasonably came from Maleau's mining operation, only Maleau would have had that opportunity. Under the district court's reasoning, however, it would be the

innocent downstream homeowner with a legally-required ‘point source’ on his property, rather than Maleau who discharged the pollutants without a permit, who is in violation of the law. The district court’s reasoning is not supportable as a matter of law or of policy, and would set an unsettling precedent. Because Maleau has no legal or factual basis for his cause of action, the Court should overrule the district court and grant Bonhomme his motion to dismiss, even assuming that Bonhomme’s culvert is a ‘point source’ for Maleau’s arsenic pollution to enter Reedy Creek.

CONCLUSION

For the foregoing reasons, Appellant Bonhomme asks this court to overrule the decision of the district court on Issues 1, 2, 3, 4, and 6 and to sustain their holding on Issue 5.

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