Team 77

D.C. No. 155-CV-2013, 165-CV-2013

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, Cross-Appellee
Defendant-Appellant, Cross-Appellee

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JURISDICTIONAL STATEMENT

Plaintiff/Defendant-Appellant, and Cross-Appellee, Jacques Bonhomme filed a complaint in the United States District Court for the District of Progress under the jurisdiction of the citizen suit provision of the Clean Water Act § 505(a)(1), 33 U.S.C. § 1365(a)(1) (2006). Under the citizen suit provision, "district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties." 33 U.S.C. § 1365(a). On July 23, 2012, in Order No. 155-CV-2013 and 165-CV-2013, the district court granted Shifty Maleau's and the State of Progress' motion to dismiss all of Bonhomme's asserted claims. Bonhomme filed a timely notice of appeal pursuant to Federal Rules of Appellant Procedure, Rules 3 and 4. FED. R. APP.. P. 3, 4, 28 U.S.C. (1998). The district court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

The district court granted Maleau's motion to dismiss for each issue now before this Court. An appellate court reviews a motion to dismiss for failure to state a claim and lack of subject matter *de novo. Tri-Corp Mgmt. Co. v. Praznik*, 33 F. App'x 742, 745 (6th Cir. 2002); *Brown v. Budget Rent-A-Car Sys., Inc.*, 119 F.3d 922, 923 (11th Cir. 1997). Additionally, the court must "accept all of the factual allegations in petitioners' complaint as true and ask whether, in these circumstances, dismissal of the complaint was appropriate." *Berkovitz by Berkovitz v. U.S.*, 486 U.S. 531, 540 (1988).

STATEMENT OF THE ISSUES

1. Whether Bonhomme's relationship with Precious Metals International deprived him of his substantive right under the citizen suit provision of the Clean Water Act, and therefore , his status as the real party in interest as required by Federal Rule of Civil Procedure Rule 17.

2. Whether Bonhomme's status as a French national who resides, conducts business, and owns property in the United States prevents him from suing Maleau under the citizen suit provision of the CWA.

3. Whether Maleau's mining waste piles were not point sources as defined by CWA § 505(12) and (14), even though the piles were discrete, discernible, and created channels in which arsenic was discharged.

4. Whether Ditch C-1 is a "water of the United States" subject to regulation under CWA § 502(7), (12), because it is a relatively permanent body of water with a shared surface connection, or significant nexus with Reedy Creek.

5. Whether Reedy Creek is a "navigable water" under the definition in section 502(7), (12) of the CWA due to its interstate geography and ties to interstate commerce.

6. Whether Bonhomme should be liable for discharges of arsenic from the culvert, even though Maleau's mining waste piles are the but-for cause of the pollutant and Bonhomme is not responsible for any additional pollutants.

STATEMENT OF THE CASE

This is an appeal of the order issued by District Court for the District of Progress to dismiss Jacques Bonhomme's (Bonhomme) suit against Shifty Maleau (Maleau) and its denial of Bonhomme's motion to dismiss against the State of Progress (State). Record (hereinafter R.) 10. Bonhomme filed a civil action against Maleau for violating the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387. Bonhomme brought the action under the jurisdiction of the citizen suit provision in section 505 of the CWA, 33 U.S.C. § 1365. Maleau filed a motion to dismiss. R. 5.

The State also filed a citizen suit against Bonhomme for violating the CWA. Maleau intervened as a matter of right in the State's action under section 505(b)(1)(B) of the CWA. *Id.* Bonhomme filed a motion to dismiss the case against him. R. 5. The State and Maleau entered a motion to consolidate the two cases. *Id.* Bonhomme did not object and the district court granted

the motion. *Id*.

The district court granted Maleau's motion to dismiss and denied Bonhomme's motion to dismiss. The court held that: (1) Bonhomme is not a proper plaintiff because he is not the real party in interest under Rule 17 of Federal Rules of Civil Procedure (FRCP); (2) Bonhomme is not a citizen of the United States and, therefore, is not entitled to file a citizen suit; (3) the overburden piles on Maleau's property were not "point sources" under the CWA; (4) Reedy Creek is a "navigable water" under the CWA; (5) Ditch C-1 is not a navigable water; and (6) Bonhomme violated the CWA by allowing pollutants to be discharged from a point source on his property. R. 1-2, 10.

Bonhomme filed a Notice of Appeal challenging the district court's holding on all the issues except that Reedy Creek (Creek) is a navigable water. R. 1-2. Maleau filed a Notice of Appeal disputing the court's holding on the Creek. R. 2. The State also filed a Notice of Appeal taking issue with the court's holding that Ditch C-1 (Ditch) was not a navigable water.

STATEMENT OF FACTS

Bonhomme is a citizen of France who owns property in the State of Progress that borders part of the Creek and Wildman Marsh (Marsh). R. 6, 7. The Ditch also runs through Bonhomme's property. R. 5. Bonhomme also owns a hunting lodge on the property that he uses for duck hunting with personal acquaintances and for entertaining business clients and associates of Precious Metals International, Inc. (PMI). R. 6. Duck hunters from around the United States, and even the world, come to the Marsh to hunt. *Id.* However, Bonhomme has significantly decreased the amount of hunting parties because he is afraid to continue using the Marsh as a result of Maleau's arsenic pollution. *Id.* This fear was recently confirmed when the U.S. Fish and Wildlife Service detected arsenic in three Blue-winged Teal in the Marsh. *Id*.

Bonhomme has a business and professional relationship with PMI. He is the largest shareholder and a member of the Board of Directors of PMI. PMI paid for the water testing and Bonhomme's attorney and expert witness fees. *Id.*

Maleau owns a gold mining operation in Lincoln County in Progress. He trucks the overburden and slag materials from that operation to property he owns in Jefferson County. R. 5. Maleau dumps his overburden and slag into piles adjacent to the Ditch. The piles are configured in such a way that rainstorms have eroded channels between the piles which collect rainwater run-off. R. 4-5. When it rains the water flows off the piles or percolates through them. The rainwater then collects and channels the arsenic pollution present in the overburden and slag into the Ditch. R. 5.

Predecessors in interest of Maleau, Bonhomme, and neighboring landowners constructed the Ditch in 1913. All the properties adjacent to the Ditch have restrictive covenants on their deeds which legally obligates them to maintain the Ditch. *Id.* The Ditch contains running water fed primarily by groundwater, although it inevitably contains rainwater. It flows continually, except during annual periods of drought. It runs three miles from Maleau's property through several agricultural properties before reaching the Creek. The Ditch flows directly into the Creek from a culvert on Bonhomme's property. The Ditch is wholly within Progress. *Id.*

The Creek flows from New Union into Progress before it flows into the Marsh. It is approximately fifty miles long and serves as a water supply for an interstate highway service station and irrigation for several farms. *Id.* The Creek flows year-round, uninterrupted. *Id.*

Arsenic is a well-known poison and is a pollutant regulated by the CWA. R. 6. Gold mining operations, like Maleau's, commonly use arsenic. *Id.* Bonhomme tested the water in the Ditch both upstream and downstream of Maleau's property. He also tested the water in the

Creek upstream and downstream of where the culvert discharges water from the Ditch. Before the Ditch reaches Maleau's property arsenic is undetectable, but downstream there are large concentrations of arsenic in the water. In the Creek there was no arsenic detected downstream of the culvert, but after the Ditch's waters discharge into the Creek there is a significant amount of arsenic present. *Id.* These results, along with the known use of arsenic in mining gold, make Maleau's overburden piles the likeliest source of the arsenic pollution in the Ditch, the Creek, and the Marsh. *Id.*

SUMMARY OF THE ARGUMENT

The district court incorrectly held that Bonhomme was not the real party in interest under the FRCP Rule 17 to bring suit against Maleau for violating section 301(a) of the Clean Water Act. The lower court erred by focusing on Bonhomme's business relationship with PMI instead of on the substantive right granted under the citizen suit provision of the CWA. The purpose of Rule 17 is to ensure that the party suing has a right to sue under the relevant substantive law. Therefore, the lower court's disregard of the underlying substantive law and its emphasis on Bonhomme's position as director, status as a stockholder, and use of lodge for business-related hunting trips, was misplaced.

The district court should not have dismissed the suit because Bonhomme is a French national. The CWA allows "any person" to bring a citizen suit. The only requirement is that the person's interests have been adversely affected. Bonhomme's recreational interests are adversely affected because he has decreased his duck hunting activities as a direct result of the arsenic contamination from Maleau's overburden piles. His legal interests have also been affected because Maleau and the State have alleged that Bonhomme is liable for the discharges of arsenic from the culvert.

Furthermore, by limiting the definition of 'citizen' the district court has frustrated the purpose of the citizen suit provision of the CWA. Congress intended a high level of public participation in the enforcement of the CWA. Bonhomme is a French citizen, but he also owns property in the United States. The language in the statute is expansive and any attempt to limit the broad group of potential plaintiffs based on national origin would be contrary to the purpose of the citizen suit provision.

The district court erred in holding that Maleau's overburden and slag piles were not point sources under CWA section 502(12), (14). The court relied on the narrow definition of section 502(14), defining "point source" and did not integrate the broader intent of the CWA and the more expansive interpretation that courts have applied in order to further the purpose of the Act. The lower court also failed to consider the totality of the circumstances regarding the waste piles. Maleau trucks the waste from his operation and places them in discrete piles adjacent to the Ditch. Rainwater run-off and percolated water discharge through channels eroded by gravity as a result of Maleau's configuration of the piles. This discharge is carried into the Ditch and eventually the Creek and the Marsh. Under these circumstances, the piles are clearly discernible, confined, and discrete conveyances that create channels through which arsenic is discharged.

The district court should have used the decision of the Supreme Court in *Rapanos* to determine that the Ditch is within the scope of the CWA. The Ditch is not a traditionally navigable water, but jurisdiction may extend to non-navigable waters when either of the two tests set forth in *Rapanos* is met. The plurality's test extends the definition of navigable waters when the non-navigable water is relatively permanent and shares a surface connection with an adjacent navigable-in-fact water. The significant nexus test requires that the non-navigable water have a significant effect on the chemical, physical, and biological integrity of the nearby navigable

water.

The district court's holding that the Creek is a navigable water under the CWA should be upheld. The Creek satisfies the definition of "waters of the United States" under the CWA and EPA regulations. These authorities define navigable waters as interstate waters that are linked to Congress' Commerce Power.

The district court erred in holding Bonhomme liable for violation of the CWA. The court should have considered the EPA's Water Transfer Rule, which considers the transfer of water from one body to another to create a unified body of water. The transfer is not a discharge, unless there is an intervening use of the water. The Rule takes into account long-standing public policy and congressional intent behind the CWA. The enforcement scheme of the statute would be undermined if the owner of a conduit that merely transfers water and does not add any pollutant is liable for violating the CWA.

ARGUMENT

I. BONHOMME IS THE RIGHTFUL PARTY TO THIS ACTION BECAUSE HE HAS SATISFIED ALL STANDING REQUIREMENTS AND IS THE REAL PARTY IN INTEREST BASED ON THE SUBSTANTIVE RIGHT GRANTED UNDER THE CITIZEN SUIT PROVISION OF THE CWA.

Article III standing, prudential standing, and FRCP Rule 17 ensure that the rightful parties are before the court. Article III of the U.S. Constitution only grants judicial review of cases and controversies, U.S. CONST. art. III, § 2, in which the parties have a "direct stake in the outcome." *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Additionally, courts impose a "prudential" limitation on standing, (*see, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)), assessing "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970). Here,

the relevant statute is the CWA. Finally, FRCP Rule 17(a) requires an action to be prosecuted in the name of the real party in interest. FED. R. CIV. P. 17(a)(1). A real party in interest is the party with a right to sue under the relevant substantive law. *U-Haul Int'l, Inc. v. Jartran, Inc.,* 793 F.2d 1034, 1038 (9th Cir. 1986).

The lower court erred by denying Bonhomme standing based on nationality and ruling he was not the real party in interest based on his relationship with PMI. The lower court's order should be overturned because Bonhomme satisfies all the necessary requirements to bring this controversy to court. He also has a substantive right to sue under the citizen suit provision of the CWA.

A. Bonhomme Satisfies the Elements of Constitutional Standing Because He has Suffered a Recreational Injury Within the Zone of Interests of the CWA, Caused by Maleau's Arsenic Pollution, Which is Redressable by Holding Maleau Liable for the Discharges of Arsenic.

The Supreme Court identified a three-part test for constitutional standing: a plaintiff is required to allege: (1) injury in fact; (2) that the injury is fairly traceable to the defendant; and (3) that the injury would likely be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

To establish injury in fact, a plaintiff must show that the injury is concrete, particularized, and actual or imminent. *Bennett v. Spear*, 520 U.S. 154, 167 (1997). The Supreme Court has broadly interpreted the loss of recreational use and aesthetic enjoyment to be sufficient to establish injury in fact. *See, e.g., Lujan*, 497 U.S. at 886. Here, Bonhomme uses the marsh abutting his property for hunting parties, but has decreased the frequency of these parties because he afraid that Maleau's arsenic discharges have fouled the water and wildlife of the Creek and the Marsh. Tests by the Fish and Wildlife Service show that this is a legitimate fear. R. 6. Bonhomme's loss of the recreational use of the Marsh satisfies the first prong of the standing

requirements.

The second prong of constitutional standing requires "that there be a causal connection between the injury and the conduct complained of—the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Spear*, 520 U.S. at 167. Bonhomme's water quality tests demonstrate that Maleau is the likely cause of the arsenic in the Ditch and the Creek. The test results show that arsenic is undetectable above Maleau's property, but present below his property and the concentrations of arsenic decrease in proportion to the increasing flow of the Ditch. R. 6. In the Creek, arsenic is only present below the discharge from the Ditch. R. 6. Alternate sources of arsenic in the two water bodies are irrelevant at this stage of the proceeding. R. 6. Based on these findings, the arsenic in the Ditch and the Creek are fairly traceable to Maleau's conduct.

In order for an injury to be redressable, it must "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Spear*, 520 U.S. at 167. A finding that Maleau is liable under the CWA would require him to obtain a permit[1] or to stop polluting, which would then result in reduced or no allowable amounts of arsenic being released into the Ditch, the Creek, and, eventually, the Marsh. The reduction or elimination of arsenic in the Marsh would alleviate Bonhomme's fear of arsenic pollution and therefore redress Bonhomme's recreational injury because he could return to hunting in the Marsh.

In addition to satisfying the requirements of constitutional standing, a plaintiff must also establish prudential standing—that the injury falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis of the complaint. *Id*. at

[1] The EPA and the Corps issue permits under the CWA in accordance to the National Pollution Discharge Elimination System (NPDES), 40 C.F.R. § 122.

175-76. Here, Bonhomme seeks to be protected under the citizen suit provision of the CWA. The Supreme Court has held that this "test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). The only limitation is that the person bringing the action must have an interest which is adversely affected. Bonhomme fits the test because his recreational interests are adversely affected and his injuries are within the zone of interests that environmental statutes, like the CWA, are intended to protect. *See, e.g., Lujan*, 497 U.S. at 886 (stating that "[we] have no doubt that recreational use and aesthetic enjoyment are among the sorts of interests [the National Environmental Policy Act and the Federal Land Policy and Management Act] were specifically designed to protect").

Therefore, Bonhomme has constitutional standing because he asserts an injury, caused by Maleau, and a favorable resolution would likely cure his injury. Bonhomme also has prudential standing because his recreational injury is a recognized injury within the zone of interests the CWA aims to protect.

B. Bonhomme's Status as a French National is Immaterial to Whether He has Standing to Sue; and to Focus on National Identity Upsets Precedent and is Against Public Policy.

The Supreme Court has never relied solely on nationality to determine citizen suit standing in a case involving domestic pollution that adversely affects the interests of a resident of the United States. Neither is there reference to nationality in the CWA's definition of citizen. 33 U.S.C. § 1365(g). While the lower court's reasoning by analogy appears at first glance convincing, applying "navigable waters" jurisprudence to the standing issue upsets precedent and is contrary to the public policy underlying citizen suit provisions.

1. The Lower Court's Application of "Navigable Waters" Jurisprudence to the Issue of Citizen Suit Provision Standing has No Basis in Precedent.

The lower court erred by granting the State's and Maleau's motions to dismiss on the issue of Bonhomme's status as a French national. The court's analysis reasoned that because the CWA's citizen suit provision "does not expressly authorize foreign nationals to commence citizen-suits," it was appropriate to follow the Supreme Court's interpretation in *SWANCC* of the CWA's definition of "navigable waters," in order to determine congressional intent underlying the citizen suit provision. R. 8; *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001).

Section 505 of the CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected," and authorizes "any citizen [to] commence a civil action on his own behalf." 33 U.S.C. § 1365(a), (g). Therefore, under the CWA, any *person* with an interest that could potentially be adversely affected has standing to sue in civil court on his own behalf.

The question of standing is addressed in Article III of the U.S. Constitution, which states that "[t]he judicial Power shall extend to all . . . [c]ontroversies . . . between a State, or the Citizens thereof, and *foreign* States, Citizens or Subjects." U.S. CONST. art. III, § 2, cl. 1 (emphasis added). The Supreme Court's three-part test for standing is coupled with a determination of whether a plaintiff's injury "is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Camp,* 397 U.S. at 153. It does not make a determination of the plaintiff's national identity. In fact, Bonhomme is a citizen for the purposes of applying the CWA and Supreme Court precedent because he resides in the United States, owns property in the United States, and engages in recreational and business

activity in the United States. R. 5, 6. *See e.g., U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (holding that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country). Bonhomme satisfies both constitutional standing and the zone of interests test, and the lower court erred by allowing his status as a French national to affect its decision.

2. The Lower Court's Misplaced Focus on National Identity is Against the CWA's Policy of Encouraging a High Degree of Public Participation in the Enforcement Process.

In addition to ignoring the tenets of constitutional and prudential standing in favor of a nationality standard, the lower court also failed to recognize the public policy goals underlying the CWA's citizen suit provision. Had there been ambiguity as to the definition of citizen, the lower court should have referred to the words of the Act and the legislative intent underlying its enactment, not the Court's interpretation of a completely separate section ("navigable waters") of the CWA.[2]

The Senate Public Works Committee, in its report on the CWA, declared that "a high degree of informed public participation in the control process is essential to the accomplishment of . . . a restored and protected natural environment" and recognized that "the manner in which [restorative] measures are implemented will depend, to a great extent, upon the pressures and persistence which an interested public can exert upon the governmental process." S. REP. NO. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3679. The Committee recommended that "[t]he [EPA] and the state should actively seek, encourage and assist the involvement and participation of the public in the process of . . . enforcement." *Id.* In order to achieve its goal of encouraging public participation, Congress included the citizen suit provision. 33 U.S.C. § 1365.

[2] *See, e.g.*, Yule Kim, "Statutory Interpretation: General Principles and Recent Trends," CRS REPORT FOR CONGRESS (Aug. 31, 2008).

The lower court reasoned that Bonhomme lacked standing because section 502 did not explicitly permit foreign nationals to litigate. R. 8. This reasoning fails, because at the very least, the term "citizen" refers to "a person," which is ambiguous as to nationality. *See* CWA § 502(5), 33 U.S.C. § 1362(5) (defining person as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body."). If anything, the language in section 502(5) should have instructed the lower court that 'person' was to be defined expansively, but even if the lower court can be excused this error, it should have sought guidance from congressional intent. If it had, the court would have recognized that "[t]he term person, for purpose of the [Clean Water] Act, means all entitles [sic] which are capable of suing or being sued." 1972 U.S.C.C.A.N. 3668, 3742. Bonhomme has the capacity to sue under the CWA because he meets all the requirements for constitutional and prudential standing.

C. Bonhomme is the Real Party in Interest Because the Clean Water Act Affords Him a Substantive Right to Sue Under Rule 17 and His Relationship with PMI Does Not Deprive Him of This Right.

Rule 17(a) of the FRCP requires an action to "be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a)(1). A real party in interest is the party with a right to sue under the relevant substantive law. *U-Haul Int'l*, 793 F.2d at 1038. The original purpose of the rule was permissive, to allow assignees to file suit in their own names. *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1197 (3d Cir. 1996). The rule now serves to protect defendants against subsequent action by the party actually entitled to recover. *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 532 (6th Cir. 2002). A single claim may have several real parties in interest and Rule 17(a) does not require the joinder of the other real parties in interest in order to proceed. *HB Gen. Corp.*, 95 F.3d at 1196. Therefore, the correct determination of whether Bonhomme is a real party in interest is whether the substantive law he is suing under grants him

a cause of action, not whether PMI is potentially *another* real party in interest.

Bonhomme is a real party in interest under the CWA's citizen suit provision, the relevant substantive law. The CWA permits "any citizen" to commence a civil action on his own behalf against any person who is alleged to be in violation of an effluent standard or limitation. 33 U.S.C.A. § 1365(a). The CWA defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §1365(g). Here, Bonhomme's interests are adversely affected because he is the owner of the culvert and also uses the Marsh for duck hunting. R. 5, 6. More pressing is that Bonhomme's ownership of the culvert (R. 9), alleged by Maleau and the State to be the originating point source of the arsenic (R. 5), could expose him to liability under the CWA for the arsenic discharges from the Ditch. *See Sierra Club v. El Paso Gold Mines, Inc*., 421 F.3d 1133, 1144 (10th Cir. 2005) (holding ownership of the point source triggers liability under the CWA).

Additionally, the broad language of 'any citizen' negates the claim that Bonhomme, despite his relationship with PMI, is not the real party in interest. For example, in *Burka v. U.S. Department of Health & Human Services*, the court held that any arrangements between the plaintiff and a third party are legally irrelevant for the purposes of plaintiff's Freedom of Information Act request because a request can be made by "any person." 142 F.3d 1286, 1290-91 (D.C. Cir. 1998). The court concluded that the plaintiff, not his undisclosed client, was the real party in interest because it was irrelevant that the plaintiff could have brought this suit on behalf of another third party. *Id.* at 1291. Similarly, the fact that Bonhomme has a relationship with PMI is legally irrelevant under the broad substantive right granted to 'any citizen' to bring suit against an alleged violator of the CWA.

Furthermore, PMI's financial contributions to the lawsuit and its relationship to

Bonhomme are irrelevant to Bonhomme's substantive rights under section 505 of the CWA. For example, in a Federal District Court case, the court held that the plaintiff was the real party in interest because it was irrelevant whether the NAACP was paying plaintiff's legal fees or whether plaintiff was a member of the association. *Rackley v. Bd. of Trustees of Orangeburg Reg'l Hosp.*, 35 F.R.D. 516, 517-18 (E.D.S.C. 1964). The court based the holding on the fact that the plaintiff's substantive rights stemmed from a racial discrimination claim, which could not be impaired by the relationship with the NAACP. *Id.* at 517-18; *compare with Love v. Reilly*, 924 F.2d 1492, 1494 (9th Cir. 1991) (holding that plaintiffs would only be the real party in interest in fee litigation if they were liable for the attorney's fees). The purpose of the CWA citizen suit provision would be greatly undermined if an individual's co-mingling of funds or services with an organization barred the individual's right to bring a citizen suit because violations could go unpunished if the organization chose not to take action.

Lastly, Bonhomme is the real party in interest because he satisfies the requirements of Article III and prudential standing. Although some courts distinguish the real party in interest inquiry from standing, *see e.g., Live Entm't, Inc. v. Digex, Inc.*, 300 F. Supp. 2d 1273, 1278 (S.D. Fla. 2003), other courts hold that if a party has "standing to raise a constitutional point, that ruling disposes of any real party in interest objections." *Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975); *Smith v. Bd. of Educ.*, 365 F.2d 770, 777-78 (8th Cir. 1966). As discussed previously, Bonhomme has standing which would also make him a real party in interest. Even in a jurisdiction where standing and real party in interest are separate inquiries, Bonhomme is still a real party in interest because his property and legal interests are adversely affected by Maleau's arsenic pollution. In either analysis, his affiliation with PMI is legally irrelevant.

II. MALEAU'S OVERBURDEN PILES ARE POINT SOURCES BECAUSE THEY ARE DISCRETE AND DISCERNIBLE SOURCES THAT HAVE CREATED CHANNELS THROUGH WHICH ARSENIC IS DISCHARGED.

The CWA prohibits the discharge of any pollutant without a permit. 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). 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, [or] rolling stock . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Point sources also include "surface runoff which is collected or channeled by man." 40 C.F.R. § 122.2(b).

The United States Courts of Appeals have broadly interpreted the definition of "point source" to further the scheme of the CWA. *See e.g. U.S. v. Earth Sci., Inc.,* 599 F.2d 368, 373-374 (10th Cir.1979), *cert. denied,* 522 U.S. 1052 (1998); *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 118 (2d Cir. 1994); *Wa. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994) (quoting the EPA's statement that the EPA "intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA."). The Fifth, Tenth, and Eleventh Circuits agree that this broad interpretation of a point source includes overburden piles, *Sierra Club v. Abston Const. Co.,* 620 F.2d 41, 45 (5th Cir. 1980); *Friends of Santa Fe Cnty. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1353 and 1359 (D.N.M. 1995) (citing *U.S. v. Earth Sci., Inc.*, 599 F.2d 368 (10th Cir. 1979)), especially when these piles are eroded by rainwater, which causes them to discharge pollutants into ditches, gullies, and similar conveyances that eventually join navigable waters. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004).

Under this broad interpretation, point sources are not limited to intentional discharges of pollutants. Congress intended the CWA to have a strong regulatory enforcement function and

proscribing only intentional acts would severely weaken the effectiveness of the CWA. *Earth Sci., Inc.*, 599 F.2d at 374. Accordingly, the polluter does not have to create the gullies, ditches, or similar conveyance and there is no requirement "beyond the mere collection of rock and other materials." *Abston Const. Co.*, 620 F.2d at 44-45.

Therefore, Maleau's overburden piles are point sources because rainwater run-off flows down Maleau's overburden and slag piles, percolates through them, and discharges the water out of the piles. R. 5; *Wa. Wilderness Coal.*, 870 F. Supp. at 988 (holding that "even though runoff may be caused by rainfall or snow melt percolating through a . . . refuse pile, the discharge is from a point source because the . . . pile acts to collect and channel contaminated water."). Then, due to Maleau's configuration of the piles, the discharge creates channels via erosion and carries the arsenic into the Ditch. R. 5; 40 C.F.R § 122.2(b).

An examination of non-point sources further emphasizes that Maleau's overburden and slag piles are point sources. Non-point sources are not defined in the CWA, but they are "widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source." *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1184 (9th Cir. 2002). Congress classified non-point sources as run-off caused primarily by rainfall which could not be traced to any identifiable point of discharge. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 220 (2d Cir. 2009). This is consistent with the EPA's guidance on non-point source pollution: "In practical terms, nonpoint source pollution does not result from a discharge at a specific, single location." *Id.* Examples of non-point sources include salt and oil from roads and parking lots, agricultural chemicals from farmlands, and "other substances washed by rain, in diffuse patterns, over the land and into navigable waters." *Id.*

Conversely, discharges from a refuse pile are easily traced to their source. *Wa. Wilderness Coal.*, 870 F. Supp. at 988. Here, Maleau has trucked his overburden and slag containing arsenic from his gold mining operation and dumped it adjacent to the Ditch. R. 5. The arsenic from Maleau's piles can be traced to a single, discrete source, not from many dispersed activities over large areas. Therefore, the piles are point sources subject to the CWA.

Furthermore, the Fourth Circuit's holdings in *Appalachian Power* and *Consolidated Coal* does not directly refute the broad interpretation of point sources used by other courts because it does not address the question of whether run-off, which then creates a channel or collects the discharge, constitutes a point source.[3] *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1372-74 (4th Cir. 1976); *Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) *rev'd on other grounds sub nom*; *E.P.A. v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). In fact, in *Appalachian Power*, the EPA urged the court to *assume* the run-off had been channeled into a collection system based on the policy that "to exempt uncollected runoff from regulation would be to permit pollution by indirection which would otherwise be barred." 545 F.2d at 1373. Although the court did "not dismiss [EPA's position] lightly," it nevertheless held that the definition of a point source "does not include unchanneled and uncollected surface waters." *Id*.

Unlike in *Appalachian Power*, here the overburden piles are also point sources because the run-off created channels that collected rainwater and discharged pollutants into the Ditch. Furthermore, it was Maleau's configuration of the piles that caused the creation of the channels. R. 5; 40 C.F.R § 122.2(b). Therefore, Maleau's overburden and slag piles are point sources

[3] Even the most negative treatment of *Abston Const. Co.* in *Cordiano* does not directly address whether a point source exists when run-off creates channels, such as ditches, gullies and similar conveyances which is then discharged. In *Cordiano*, the court only generally held that there was "no evidence that the surface water runoff from the berm containing lead is in anyway channeled or collected." 575 F.3d at 224.

because they are discrete and discernible sources that have created channels in which arsenic is discharged.

III. THE CREEK IS A NAVIGABLE WATER BECAUSE IT IS LINKED TO INTERSTATE COMMERCE AND THE DITCH IS A WATER OF THE UNITED STATES DUE TO THE CONNECTION BETWEEN THE TWO BODIES OF WATER.

The CWA was passed for the express purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA claims jurisdiction over all navigable waters, which are defined as "the waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). Waters of the United States are further defined by the EPA as interstate waters and waters that are in some way used in interstate commerce, including as a travel destination and a source of products for commerce. 40 C.F.R. § 122.2. This definition also includes tributaries and adjacent wetlands of interstate waters. *Id.* Initially, the Supreme Court extended jurisdiction under the CWA only to traditionally navigable, or navigable-in-fact, waters that had significant links to Congress's Commerce Power. *SWANCC*, 531 U.S. at 171. More recently, the Court has expanded the definition to include some waters that are not traditionally considered navigable. *Rapanos v. U.S.*, 547 U.S. 715, 731 (2006).

In *Rapanos*, the Supreme Court unanimously held that the scope of the CWA should extend beyond navigable-in-fact waters. 547 U.S. at 731, 767. However, *Rapanos* was a plurality opinion. While the full Court came to the ultimate conclusion that the wetlands at issue were waters under the CWA, it was divided on which standard should be used to interpret the definition and when a non-navigable water falls under the jurisdiction of the CWA. The four justices of the plurality concluded that a non-navigable water must have a "continuous surface connection" with a water of the United States to fall under the jurisdiction of the CWA. *Id.* at 742. The adjacent water can be either a navigable, interstate water or a relatively permanent

body of water connected to a traditionally navigable water. *Id.* Justice Kennedy's concurrence used a broader test that includes wetlands as navigable waters if they "significantly affect the chemical, physical, and biological integrity of other covered waters." *Id.* at 780 (Kennedy, J., concurring).

The Federal Appellate Courts have been left with split precedent and no clear standard for applying the CWA definition. In this type of situation the lower courts have been instructed to use the *Marks* rule which states, "[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 on the narrowest grounds." *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (internal quotation omitted). The "narrowest grounds" generally means "the concurring opinion that offers the least change to the law." *U.S. v. Cundiff*, 555 F.3d 200, 209 (6th Cir. 2009) (synthesizing several Supreme Court decisions). Some of the lower courts have attempted to apply the *Marks* rule to *Rapanos* and have found that Justice Kennedy's significant nexus test constitutes the narrowest opinion. *U.S. v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009); *see also U.S. v. Robison*, 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); *U.S. v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006). Even among those courts agreeing that the significant nexus test is the narrowest; there are some that will consider the facts of case before choosing a test. *Bailey*, 571 F.3d at 791 (8th Cir.); *see also N. Cal. River Watch*, 496 F.3d at 999-1000 (9th Cir.); *Gerke Excavating*, 464 F.3d at 724-25 (7th Cir.). The First Circuit felt that *Marks* was not workable in applying *Rapanos*. *U.S. v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). The rest of the Circuits have followed the guidance offered by Justice Stevens; where if either of the tests are met then the water at issue falls under CWA jurisdiction. *Rapanos*, 547

U.S. at 810 (Stevens, J., dissenting); *see also Cundiff*, 555 F.3d at 210 (6th Cir.); *Bailey*, 571 F.3d at 799 (8th Cir.); *U.S. v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008).

A. The Creek is a Navigable-in-Fact Water Subject to CWA Jurisdiction Because it is an Interstate Waterway that is Linked to Interstate Commerce.

The Creek is a traditional navigable water under the definition of a water of the United States and its connection to interstate commerce is within the EPA's definition as well. 40 C.F.R. § 122.2. The characteristics of the Creek are also consistent with the plurality's opinion in *Rapanos*; where Justice Scalia recites the dictionary definition of waters as features containing water such as streams, oceans, rivers, and lakes. *Rapanos*, 547 U.S. at 732-33. The plurality also notes that the connation of the definition is a continuously flowing body of water in a permanent channel. *Id*. at 733.

There are no facts here that suggest the Creek is anything less than a permanent body of water that consistently flows. The Creek is approximately 50 miles long and runs through two states. The Creek begins in New Union before flowing into Progress and ending at the Marsh. R. 5. It is used as a water supply for a service stop on a federally funded interstate highway and it is also a source of irrigation for several farms whose product is sold in interstate commerce. *Id*. These characteristics clearly qualify the Creek as a navigable-in-fact water under the CWA.

B. The Ditch is a Water of the United States Because of its Connection to the Creek Both Physically and Through Their Shared Ecology.

Even if the Ditch is not navigable-in-fact, it is under the jurisdiction of the CWA based on the two tests the Supreme Court set out in *Rapanos*. First, the Ditch is a "water" as defined by the plurality because it shares a surface connection to an adjacent water of the United States. Second, the Ditch also satisfies the significant nexus test due to the link between the water quality of the Ditch and the Creek, as well as the direct hydrological link between the two.

1. The Ditch is a Relatively Permanent Body of Water that Shares a Surface Connection with a Navigable Water.

The lower court erroneously held that the Ditch was not a protected water under the CWA because *Rapanos* explicitly precludes ditches from the definition of "waters of the United States." R. 9. In *Rapanos*, Justice Scalia uses the term "man-made drainage ditches" in conjunction with other forms of "intermittent or ephemeral flow." 547 U.S. at 733-34. Further, he discusses at length about the semantics of naming bodies of water based on their characteristics; particularly that "[a] permanently flooded ditch around a castle is technically a 'ditch,' but . . . we normally describe it as a 'moat.' And a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but as a 'canal.'" *Id*. at 736, n.7. The "relatively continuous flow" is the controlling detail. *Id*.

The Ditch "contains running water" all year round, except when there is a period of drought. R. 5. Seasonal rivers that experience "dry months" are still included by the plurality as relatively permanent waters. *Rapanos*, 547 U.S. at 732, n.5. The Ditch also has a self-sustaining flow from groundwater and rainwater run-off. R. 5. From the limited facts available, it can be concluded that the Ditch is a relatively permanent, flowing body of water.

The plurality's test also requires a surface connection between the Ditch and an adjacent navigable-in-fact water. The Court disfavors isolated and remote adjacency to a traditionally navigable water and prefers a continuous connection "so that there is no clear demarcation between 'waters' and wetlands." *Rapanos*, 547 U.S. at 742. For example, in *SWANCC*, the Court held that isolated ponds were not waters for the purposes of the CWA because there was only a remote hydrological connection between the ponds and a traditional water. *Rapanos*, 547 U.S. at 741-42. Unlike in *SWANCC*, the Ditch flows directly into the Creek and there is no issue of the Corps having to decide where "water ends and land begins." *Rapanos*, 547 U.S. at 740

(quoting *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985)). Therefore, the Ditch meets both the relatively permanent and surface connection elements of the plurality's test for navigable waters.

2. The Ditch is a Water of the United States Because the Presence of Arsenic in the Creek Downstream of the Ditch Shows There is a Significant Nexus Between the Two Bodies of Water.

Justice Kennedy based his standard on the practical application of the CWA by the Corps. *Rapanos*, 547 U.S. at 767 (Kennedy, J., concurring). The significant nexus test allows wetlands, and other bodies of water, to come within the definition of navigable waters if they "significantly affect the chemical, physical, and biological integrity of other covered waters." *Id*. at 779-80. Justice Kennedy notes that waters not considered traditionally navigable are still of interest to the EPA and the Corps. Wetlands, for example, serve important functions like pollution trapping, flood control, and storage for run-off. *Id*. However, the water at issue does not have to be a wetland, as Justice Kennedy explains, "the connection between a nonnavigable water *or* wetland and a navigable water may be so close, or potentially so close, the Corps may deem the water *or* wetland a 'navigable water' under the [CWA]." *Id*. at 767 (emphasis added). In *Rapanos*, Justice Kennedy determines that there is probably a nexus, but further fact finding would be necessary to use his test. *Id.* at 784-85.

Justice Kennedy also discusses at length the Corps use of tributaries in establishing jurisdiction over wetlands. Although he considers the current Corps definition of a tributary to be overbroad,[4] his concern is that these 'tributaries' might allow the Corps to regulate "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor volumes

[4] The Corps regulations consider a water a tributary if "it feeds into a traditional navigable water . . . and possesses an ordinary high water mark." *Rapanos*, 547 U.S. at 781; *see also* 33 C.F.R. § 328.3(e) (2005).

of water." *Id*. at 781. The concern is not whether tributaries should be subject to the CWA, but whether wetlands adjacent to tributaries are still important to the biological, chemical, and ecological integrity of the navigable-in-fact water. *Id*. When the water in question, non-navigable or wetland, is directly adjacent to a navigable-in-fact water, then there is "a reasonable inference of ecological interconnection." *Id.* at 780.

In similar factual situations the other circuits have concluded that a significant nexus exists. A case in the Ninth Circuit found that a pond was subject to the CWA through the significant nexus test because there was conclusive evidence of chloride leaching from the pond into a nearby navigable-in-fact water. *N. Cal. River Watch*, 496 F.3d at 995. A district court decision in Idaho applied the significant nexus test to rule that a man-made canal was a water of the United States because the canal was adjacent to a feeding operation and waste dumped into the canal ended up in a navigable-in-fact water. *U.S. v. Vierstra*, 803 F. Supp. 2d 1166, 1167 (D. Idaho 2011).

Here, Bonhomme provided evidence that arsenic from Maleau's property was carried to the Creek by the Ditch. R. 6. There is no dispute that arsenic is a pollutant covered by the CWA. R. 6. The presence of arsenic in the Creek shows a significant nexus where the Ditch affects the chemical integrity of a navigable water. Furthermore, the presence of arsenic in waterfowl in the Marsh shows a significant nexus between the Ditch and the Creek that affects the biological and ecological integrity of all three waters. R. 6. The nexus between the Creek and the Ditch subjects both to regulation under the CWA as navigable waters.

By using the standards put forth in *Rapanos*, the Creek and the Ditch are both subject to jurisdiction under the CWA. The Creek meets the definition of a navigable-in-fact water. Although the Ditch is not a traditionally navigable water, it qualifies as a water of the United

States. The Ditch meets the plurality's test because it is relatively permanent and has a surface connection to an adjacent navigable water and there is a significant nexus between the Ditch and the Creek.

IV. BONHOMME IS NOT LIABLE UNDER THE CWA BECAUSE MALEAU'S PILES ARE THE BUT-FOR CAUSE OF THE ARSENIC IN THE WATER, WHICH IS MERELY TRANSFERRED TO THE CREEK.

Bonhomme is not liable under the CWA. His culvert, while technically considered a point source, was not the but-for cause of the arsenic that fouled the Marsh. R. 9; *Dague v. Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). It merely transfers waters and does not add pollutants to a navigable water, because the Ditch and the Creek are unitary waters as implicitly recognized by the EPA in its Water Transfers Rule (WTR). 40 C.F.R. § 122.3(i).

Bonhomme is not required to obtain a permit under the CWA's NPDES permitting program. 33 U.S.C. § 1342(a)(1); *see also* 40 C.F.R. 122. The EPA has clarified that merely moving an existing pollutant from one navigable water to another does not constitute an *addition* of a pollutant. *Friends of Everglades v. S. Florida Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009) (internal quotations omitted). Bonhomme cannot be liable under the CWA because the Ditch that he was legally obligated to maintain did nothing more than transfer polluted water from a single, discrete point source, through a navigable water, to another navigable water.

The EPA's issuance of the WTR occurred after the Supreme Court declined to address the Unitary Waters Theory in *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004). The lower court's reliance on *Miccosukee* and its focus on the word 'conveyance' was therefore flawed. R. 9. Consequently, this Court must take all of Bonhomme's factual allegations as true and, applying them per the guidance set forth in the

WTR, reverse the lower court's holding on this issue.

A. The Lower Court Erred Because it Followed *Miccosukee*, But Failed to Recognize More Recent EPA and Circuit Court Guidance.

The Unitary Waters Theory (UWT) "holds that it is not an addition ... to navigable waters to move existing pollutants from one navigable water to another. . . [but that] addition occurs . . . only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Friends of the Everglades*, 570 F.3d at 1217 (internal quotations omitted). In *Miccosukee*, the Supreme Court in 2004 declined to rule on the UWT and only ruled that point sources do not have to initially add pollutants to water to be liable under the CWA. 541 U.S. at 105, 109. However, since *Miccosukee*, the EPA has promulgated the WTR and thus, the ruling in *Miccosukee* does not offer authoritative guidance on this issue.

The Courts of Appeals have addressed the UWT several times, both before and after *Miccosukee*. *See e.g., Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York (Catskills I)*, 273 F.3d 481, 491 (2d Cir. 2001) (holding that the "transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition" demanding an NPDES permit.); *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York (Catskills II)*, 451 F.3d 77, 83 (2d Cir. 2006) (concluding that its rejection of the UWT in Catskills I "[was] ... not undermined" by *Miccosukee*, 541 U.S. 95); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) ("[T]here is no basis in law or fact for the district court's 'singular entity' [unitary waters] theory."). Each time, the appellate court in question rejected the theory. However, when the Eleventh Circuit adjudicated *Friends of the Everglades* in 2009, the EPA had provided further guidance in the form of the WTR, a regulation that accepted the UWT and enabled the Eleventh Circuit to re-evaluate the "addition . . . to navigable waters" issue. *Friends of the Everglades*, 570 F.3d at 1218-1227.

The *Friends* Court's ultimate issue to decide was "whether the [WTR], which accepts the unitary waters theory that transferring pollutants between navigable waters is not an addition . . . to navigable waters, is a permissible construction of that language." *Id*. at 1227. Using a *Chevron* analysis, that court held that the WTR was a reasonable, and therefore permissible, construction of the language, to be given effect unless rescinded by the EPA or overruled by Congress. *Id*. at 1228; *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

In addition to the Eleventh Circuit, the D.C. and Fourth Circuits agree with the EPA that the term 'addition' may reasonably be limited to situations in which "the point source itself physically introduces a pollutant into a water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982); *W. Va. Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 167 (4th Cir. 2010). Other lower courts have also accepted the binding effect of the WTR. *See ONRC Action v. U.S. Bureau of Reclamation*, CIV. NO. 97-3090-CL, 2012 WL 3526833 (D. Or. Jan. 17, 2012) (report and recommendation adopted *sub nom*); *ONRC Action v. Bureau of Reclamation*, No. 1:97-CV-03090-CL, 2012 WL 3526828 (D. Or. Aug. 14, 2012) (accepting the Eleventh Circuit's interpretation of the binding effect of the EPA's Water Transfer Rule, but also acknowledging that the Ninth Circuit has rejected the unitary waters theory).[5]

Here, the issue is whether, even though it is accepted that Maleau is the source of pollutants added to the Ditch, Bonhomme can be held liable for conveying Maleau's pollution from the banks of the Ditch to the Marsh. R. 6-7. The issue of 'conveyance' was central to both

[5] The Unified Waters Theory, also known as the Unitary Waters Theory, "proposes that the waters of the United States constitute a single entity." Michael Kettler, *Friends-and-Enemies-of the Everglades: Unitary Waters in the Federal Courts*, 36 COLUM. J. ENVTL. L. FIELD REPORTS 29 (2011) (internal quotations omitted).

Miccosukee and the EPA's WTR, and this court can only decide the issue properly by interpreting the evolution of 'conveyance' from the former, to the latter.

1. *Miccosukee* Relied on 'Conveyance' to Show that Structures that Merely Transport Pollutants Can Still Be Considered Point Sources.

In *Miccosukee*, the Supreme Court faced a factually similar scenario to the case here. In the early 1900s, the state of Florida built conveyances to drain wetlands for agricultural purposes, and in 1948, expanded its efforts in order to provide flood protection and water conservation. *Miccosukee*, 541 U.S. at 99. The main conveyance at issue was a pump station called "S-9", which emptied the contents of a canal, including accumulated phosphorous, into a wetland area. *Id*. at 100. The Court identified that the relevant provision of the CWA was section 1342, establishing the NPDES permitting requirements related to "any addition of any pollutant to navigable waters from any point source." *Id.* at 101-02; 33 U.S.C. § 1362(12). The Court then referred again to the CWA in defining 'point source' as "any discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14).

The Court relied heavily on its interpretation of the word 'conveyance' in holding "untenable" the petitioners' initial argument, "that the NPDES program applies to a point source only when a pollutant originates from the point source." *Miccosukee*, 541 U.S. at 104-05. "A point source is," by definition, a "discernible, confined, and discrete *conveyance*. 33 U.S.C. § 1362(14) (emphasis added)." *Id*., 541 U.S. at 105. After it added emphasis to the CWA's definition of point source, the Court identified "pipes, ditches, tunnels, and conduits, [as] objects that do not themselves generate pollutants but merely transport them." *Miccosukee*, 541 U.S. at 105. Ultimately, the Court rejected the petitioners' proposed reading of the definition of 'discharge' based on its own reading of the word 'conveyance.' *Id*.

Here, because the conveyance at issue is the Ditch, *Miccosukee* would appear to control.

However, after that case, the EPA issued its WTR to provide clarity.

2. The EPA's Water Transfer Rule Clarified that Conveyances Such as Ditches are Subject to the NPDES Exclusion.

In 2008, the EPA issued its new regulation, known as the Water Transfer Rule. The WTR is exclusionary, "clarify[ing] that water transfers are not subject to regulation under the . . . NPDES . . . permitting program," and defining "water transfers as an activity that *conveys* or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." NPDES Water Transfers Rule, 73 Fed.Reg. 33697–708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)) (emphasis added).

In its final rule on the implementation of the WTR, the EPA issued interpretive guidance as to eligibility for permit exclusion based on the type of point source in question and its owner's purpose in using it. First, the EPA provided a non-exhaustive table of potentially affected entities, identifying those conveyances that could fall under the Rule. 73 FR 33697-01 at 33697-98. Next, the EPA provided guidance on circumstances under which the WTR would be given effect, referring readers to the code of federal regulations. *Id*. at 33698 (directing readers to 40 C.F.R. 122.3 for guidance on applicability criteria).

B. <u>This Court Should Follow the WTR to Find that the Ditch is an Acceptable Conveyance Transferring Water for an Acceptable Purpose.</u>

The EPA is clear in its instruction as to how to apply the WTR. First, the court must determine whether there is a transfer. If the court finds that a transfer does exist, then provided the transferred water is not subjected to "intervening industrial, municipal, or commercial use," there is an exclusion to the NPDES permitting requirement. 73 FR 33697-01.

"Water transfers occur routinely and in many different contexts across the United States . . . rout[ing] water through tunnels, channels, and/or natural stream water features, and either pump[ing] or passively direct[ing] it for uses such as providing public water supply, irrigation,

power generation, flood control, and environmental restoration." FR 33697-01. Comments in the Federal Register indicate an agency intent toward inclusivity, rather than exclusivity, in terms of both the types of channels used, and the purpose for the transfer. *Id.* Projects that benefit from transfers include "flood control structure construction, drainage canal and *ditch* construction, flood control project construction, and spillway, floodwater, construction." 73 FR 33697-01 (emphasis added). Nothing in the rule's guidance dictates that a certain timeframe for construction must be met, nor that the WTR may not apply to ditches already constructed.

As in *Miccosukee*, the Ditch was constructed in the early 1900s in order to drain agricultural properties sufficiently for their intended use. R.5. However, unlike *Miccosukee*, this case is adjudicated after the EPA issued the WTR, which brought under the regulation's purview ditches of the exact type at issue. Therefore, under the plainest interpretation of the WTR, the Ditch constitutes an acceptable conveyance transferring water for an acceptable use. The next question for the court to consider is whether the transferred water is subjected to 'intervening industrial, municipal, or commercial use.'

The EPA "defines a water transfer as an activity that conveys or connects water of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 73 FR. 3367-01 at 33704; 40 C.F.R. 122.3(i). Only Maleau adds arsenic to the water that flows in the Ditch through Bonhomme's land, into the culvert, and into the Creek. R. 4-5. Maleau subjects the transferred water in the Ditch to commercial use. R. 5. He trucks the overburden and slag from his gold mining and extraction operation in Lincoln County to his property adjacent to the Ditch in Jefferson County, where he piles the slag. R. 5. When it rains, the run-off from the overburden and slag piles collect arsenic and, through channels "eroded by gravity from the configuration of the . . . piles," deposit it into the Ditch. R. 5. This means that

only Maleau can be liable for the discharges of arsenic because he is the only party that has added pollutants from the outside world into the Ditch while using it for his own commercial purposes. Because Maleau's overburden and slag piles constitute the only point source to which the CWA's permitting authority can be applied, he is the only party in this dispute who could possibly face liability under the CWA.

Bonhomme does not use the water in the Ditch for any purpose at all. He did not introduce a pollutant from outside the waters being transferred into the Creek. The arsenic originated on Maleau's land and was not subject to any 'intervening industrial, municipal, or commercial use' as it transferred across Bonhomme's land from Maleau's overburden and slag piles to the Creek. Therefore, Bonhomme's mere ownership of the culvert does not expose him to liability, as the WTR provides him with an exclusion from the NPDES permitting requirement. Maleau is the but-for source of the arsenic and he should be liable for the discharge of a pollutant from a point source into a navigable water under the CWA and EPA regulations. Bonhomme is not liable.

C. The Water Transfer Rule is Consistent with Congressional Intent of the CWA.

In discussions on the movement, flow, or circulation of navigable waters as sources of pollutants not subject to regulation, Congress clearly expressed a policy not to include mere transfers of navigable waters. 73 FR 33697-01 at 33701-02. Congress stated that "[w]hen a pollutant is . . . subsumed entirely within . . . water . . . not diverted for an intervening use, the water never loses its status as waters of the United States, and thus nothing is added to those waters from the outside world." *Id*. at 33701 (internal quotations omitted).

Congress pointed out that pollutants often enter waters of the United States through a variety of point and non-point sources unassociated with, and beyond the control of, the discharger, evincing the intent that "pollutants be controlled at the source whenever possible."

Id. at 33702; *see* S. REP. NO. 92-414, p. 77. Evidently, Congress conceived of the Catch-22 facing Bonhomme and his neighbors. Because, as deed holders with restrictive covenants, they are legally obliged to maintain the Ditch for its drainage purpose, none of them may disrupt the Ditch at any point. R. 5. Therefore, unless all deed holders are granted NPDES permitting exclusions, the restrictive covenants offend the Congressional intent to "restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. § 1251(a). Thus, Congress determined that because oversight was best left to state authorities, "pollution from transferred waters [should be] addressed through water resource planning and land use regulations, which attack the problem at its source." 73 FR 33697-01 at 33702-03.

CONCLUSION

This Court should hold that Bonhomme is a real party in interest and he has standing to sue under the CWA because he has a substantive right under the citizen suit provision and has suffered an injury which is traceable to Maleau and redressable with a favorable holding. Bonhomme is also a citizen for purposes of the citizen suit provision in the CWA because the correct inquiry is whether he has constitutional standing and not whether he is a U.S. citizen. Additionally, Maleau's overburden and slag piles are point sources because they are discrete and discernible conveyances whose eroded channels are responsible for the discharges of arsenic.

The Creek is a navigable-in-fact water because it flows through two states and is linked to interstate commerce. The Ditch falls under the jurisdiction of the CWA through its connection to the Creek, in accordance to the two tests in *Rapanos*. Moreover, Bonhomme's culvert only transfers, but does not add, arsenic to a navigable water because the Ditch and the Creek are one unified water of the United States. Therefore, Maleau's piles are the sole source of the arsenic. Accordingly, Maleau is the only party who should be liable for any discharges of arsenic into the Ditch, the Creek, and the Marsh. For the above stated reasons, this Court should reverse the

district court's order to grant the State's and Maleau's motions to dismiss.

Respectfully Submitted,

Counsel for Jacques Bonhomme

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