Team No. 78

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 13-01234

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.

BRIEF ON BEHALF OF SHIFTY MALEAU

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JURISDICTIONAL STATEMENT

United States District Court for the District of Progress issued a final order granting Shifty Maleau's motion to dismiss all claims of Jacques Bonhomme. R. at 10. The district court also issued a final order denying Bonhomme's motion to dismiss consolidated claims against him by both Progress and Maleau. R. at 10. All three parties timely appealed. R. at 1. Federal district courts have original subject matter jurisdiction over claims arising under the Clean Water Act, 33 U.S.C. §§ 1251–1387; 28 U.S.C. § 1331. The United States Court of Appeals for the Twelfth Circuit has appellate jurisdiction to hear appeals of final orders by the United States District Court for the District of Progress. 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. Whether the district court erred in finding that Bonhomme is not the real party in interest under Fed. R. Civ. P. 17 because he is a front for Precious Metals International and lacks standing.

II. Whether the district court erred in finding that Bonhomme, as a foreign national, is not a "citizen" who may bring a citizen suit under the Clean Water Act.

III. Whether the district court erred finding that mining waste piles are not "point sources" under the Clean Water Act because the run-off from the rain was not channeled in any way.

IV. Whether the district court erred finding that Ditch C-1 is not a "navigable water/water of the United States" under the Clean Water Act because it is a point source that is not adjacent to a traditional navigable water.

V. Whether Reedy Creek is a "navigable water/water of the United States" under the Clean Water Act.

VI. Whether Bonhomme violates the Clean Water Act by adding arsenic to Reedy Creek through a culvert on his property.

STATEMENT OF THE CASE

Jacques Bonhomme initiated a citizen suit against Shifty Maleau for violation of the Clean Water Act (the Act). R. at 4. Bonhomme alleges that the erosion of mining overburden piles on Maleau's property is polluting the water of Ditch C-1 with arsenic. *Id.* He alleges that Maleau arranged these piles to direct runoff from the rain down the piles and into Ditch C-1. *Id.* Waters of Ditch C-1 then run into Reedy Creek through a culvert on Bonhomme's property. R. at 5. He alleges that the overburden piles are point sources and that Ditch C-1 and Reedy Creek are navigable waters under the Act. *Id.*

Later, the State of Progress filed suit against Bonhomme for violation of the Act. *Id.* It alleged that the pollution occurred at Bonhomme's culvert. *Id.* Culverts are established point sources. *Dagg v. Burlington*, 935 F.2d 1343, 1354–55 (2d. Cir. 1991) (rev'd on other grounds). Maleau intervened and the two cases were consolidated. *Id.* Defendants in each suit filed motions to dismiss. *Id.*

STATEMENT OF FACTS

Bonhomme is a shrewd businessman with a conveniently located vacation property. R. at 6. He is President and the largest shareholder of Precious Metals International (PMI), a corporation that competes directly with Maleau's gold mining operations. *Id.* Since PMI began struggling financially during the recent economic downturn, Bonhomme has been accusing Maleau of unfair and illegal business practices—the latest being that he is saving money by ignoring environmental regulation. R. at 7.

Maleau owns property in Jefferson County, Progress adjacent to Ditch C-1. R. at 5. He owns a mining operation that produces slag and overburden. *Id.* He piles that slag and

overburden on his property adjacent to Ditch C-1. *Id.* Bonhomme alleges that rainwater erodes the piles and carries arsenic into Ditch C-1. *Id.*

Ditch C-1 is used solely for agricultural use. *Id.* It was created as a drainage ditch in 1913, dug into saturated soils to allow them to drain. *Id.* On average, it is only three feet wide and one foot deep. *Id.* Each property owner along its banks is obligated to maintain it because of restrictive covenants in their deeds. *Id.* Both Maleau and Bonhomme, and every farmer in the three miles between their properties, have this restrictive covenant in their deeds. *Id.* Because the water in Ditch C-1 comes primarily from soil drainage, it is sometimes dry. *Id.* Its droughts can last weeks or months. *Id.* When Ditch C-1 isn't dry, it discharges into Reedy Creek from a culvert on Bonhomme's property. *Id.* Ditch C-1 is entirely within the state of Progress. R. at 5.

Reedy Creek is about fifty miles long. *Id.* Farmers use its waters for their crops. *Id.* It is also used as a water supply for a travel plaza on Interstate 250. *Id.* It terminates in Wildman Marsh, a protected wetland and duck-hunting destination. R. at 6. Bonhomme has a hunting lodge on his property, which abuts the marsh near Reedy Creek's terminus. *Id.* He uses it primarily for hunting parties in furtherance of PMI's business. *Id.*

It is assumed at the motion to dismiss stage that Bonhomme's allegation that arsenic originating in Maleau's mining waste piles has lead to the barely detectable levels of arsenic in Wildman Marsh. *Id.* However, there have been no notable changes in the flora and fauna surrounding the hunting lodge. *Id.* Arsenic has been detected in one three ducks. *Id.* Bonhomme alleges that this causes him to hunt less often. R. at 6. There is no evidence of other hunters hunting less.

STANDARD OF REVIEW

This court reviews a district court's dismissal of a complaint pursuant to Rule 12(b)(6) de novo. *Jackson v. City of Columbus*, 194 F.3d 737, 745 (6th Cir.1999). A complaint must state sufficient facts establishing a plausible claim or be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). A claim is not facially plausible where it does not "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Although the plausibility standard is not a "probability requirement," it does ask for more than a sheer possibility that a defendant has acted unlawfully. A complaint pleading facts that are "merely consistent with" liability "stops short of the line between possibility and plausibility of entitlement to relief." *Id*. (internal citations omitted). More than bare assertions of legal conclusions are required to satisfy federal notice pleading requirements. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436–37 (6th Cir. 1988).

SUMMARY OF ARGUMENT

The district court correctly found that Bonhomme is not a real party in interest as intended by Fed. R. Civ. P. 17. R. at 7. Despite Congress broadening the real party in interest standard for citizen suits to that of basic constitutional standing, Bonhomme still cannot satisfy its requirements. He lacks genuine injury as an individual, instead waging a proxy battle to further the interests of his mining corporation by attacking one of its competitors.

The district court was correct when it reasoned that a non-citizen cannot pursue a citizen suit. R. at 8. Use of reason, statutory interpretation, or a dictionary cannot lead to an alternative conclusion.

The district court was again correct when it found that Maleau's mining waste piles are not point sources. Under no meaning of the words can these piles be considered "discrete conveyances." Any runoff from the piles is the consequence of natural erosion and represents no affirmative channeling action by Maleau.

The district court was also correct in finding that Ditch C-1 is a point source and not a navigable water. First, ditches are listed as point sources under the Act. Secondly, Ditch C-1 has not, nor could it ever, float a boat, and therefore it is not susceptible to becoming a navigable water. Finally, it is not adjacent to a traditional navigable water putting it under the Act's jurisdiction.

Reedy Creek is not a navigable water. Its use by the travel plaza strains the definition of interstate commerce. The mere use of its waters for plumbing or for irrigation does not transform it into an interstate highway used for travel and transportation.

If there is any violation of the Clean Water Act, it is by Bonhomme. The addition of aresenic to Reedy Creek occurs at his culvert—a point source. Not only are culverts point sources, but intent is not necessary for liability under the statute. Consequently, Bonhomme is guilty of adding a pollutant to Reedy Creek.

ARGUMENT

The District Court of Progress correctly found that Bonhomme is not a proper plaintiff. He is not the real party in interest, nor is he a citizen capable of filing a citizen suit. Furthermore, Maleau's waste piles are not point sources under the Clean Water Act, nor are Ditch C-1 or Reedy Creek "navigable waters" for purposes of federal jurisdiction. If Bonhomme fails on any of the first five issues his action must be dismissed. Lastly, should the Court finds that Reedy Creek is a "navigable water" it is Bonhomme who is in violation of the act, not Maleau.

Therefore, this Court should affirm the lower court's decision to dismiss Bonhomme's citizen suit.

I. BONHOMME IS NOT A REAL PARTY IN INTEREST BECAUSE HE LACKS STANDING AND ANY POTENTIAL HARM DONE TO HIM IS MERELY DERIVATIVE HARM

Bonhomme does not have a significant personal interest in the action and resolution of the claim would not provide Maleau with the preclusive effect intended by the real party in interest standard.

The real party in interest owns the right to sue under the substantive law and Bonhomme is not the real party. *Curtis Lumber Co., Inc. v. Louisiana Pacific Corp.*, 618 F.3d 762 (8th Cir. 2010). An action must be brought in the name of a real party in interest. Once reasonable time has been allowed to join a real party in interest an action may be dismissed for failure to do so. Fed. R. Civ. P. 17. The real party need not be the sole beneficiary of any recovery. *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609, 611 (5th Cir. 1957); *Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763, 764 (7th Cir. 1986). However, the plaintiff's injury cannot be merely derivative of the real party in interest. *Weissman v. Weener*, 12 F.3d 84, 86–87 (7th Cir. 1993).

There are two primary purposes behind the real party in interest analysis—the positive purpose and the negative purpose. The positive purpose "directs attention to whether plaintiff has a significant interest in the particular action plaintiff has instituted, and Rule 17(a) is limited to plaintiffs." Miller at al., *Real Party in Interest, Capacity, and Standing Compared*, 6A Fed. Prac. & Proc. Civ. § 1542 (3d ed.); *see also Frommert v. Conkright*, 535 F.3d 111, 120 (2d Cir. 2008) (reversed on other grounds) and *Prevor-Mayorsohn Caribbean, Inc. v. P. R. Marine Mgmt, Inc.*, 620 F.2d 1, 4 (1st Cir. 1980). The negative purpose ensures that a defendant enjoys the

preclusive affect of a final judgment to "protect it from having to twice defend an action, once against an ultimate beneficiary of a right and then against the actual holder of the substantive right." *Farrell Const. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 142 (5th Cir. 1990).

Bonhomme's suit does not fulfill the positive purpose of the real party interest requirement, the right to sue, because he lacks standing. Bonhomme's suit does not fulfill the negative purpose of the real party in interest requirement because any injury he has suffered is merely derivative of PMI's.

A. THIS CASE MUST BE DISMISSED BECAUSE BONHOMME DOES NOT HAVE THE LEGAL RIGHT TO SUE UNDER THE CITIZEN SUIT STATUTE BECAUSE HE LACKS STANDING

Bonhomme has no injury-in-fact, nor is the actual injury fairly traceable to the violation alleged. Without these his injury is not redressable in this action. Thus, he lacks standing.

To possess the legal right to commence a citizen suit one must first possess constitutional standing. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

Under the Clean Water Act the legal right to sue arises out of the citizen suit statute. Under that statute any "citizen" may sue on her own behalf for a violation of the Act. 33 U.S.C. § 1365. A violation of effluent limitations means a violation of § 301 of the Act: without permission under the Act, "the discharge of any pollutant by any person shall be unlawful." CWA § 301; 33 U.S.C. § 1311.

The real party in interest requirement is a "prudential," not constitutional, rule designed to ensure that the plaintiff, rather than some third party, is entitled to make the claim. *Ensley v. Cody Resources, Inc.*, 171 F.3d 315, 319 (5th Cir. 1999). Ordinarily, prudential standing requires that (1) a litigant assert her own legal interests rather than those of third parties; (2) the court avoids ruling on abstract generalized grievances; and (3) the litigants' interests are within the

zone of interests Congress intended to protect with the statute. *Freeman v. Corzine*, 629 F.3d 146, 153 (3d Cir. 2010) (internal citation omitted). However, prudential limits are judicially self-imposed and discretionary restrictions, which can be modified or abrogated by Congress because they are not rooted in the Constitution. *Id.* at 154.

With respect to the Act, the congressional intent behind the citizen suit provision is in the Senate Conference Report:

> It is the understanding of the conferees that the conference substitute relating to the definition of the term 'citizen' reflects the decision of the U.S. Supreme Court in the case of *Sierra Club v. Morton* (No. 70–34, April 19, 1972).

1972 U.S.C.C.A.N. 3776, 3823// S.Conf.Rep. No. 92–1236, p. 146 (1972) (*Sierra Club v. Morton* articulates the rule for constitutional standing). The Supreme Court found this clear legislative history to say that citizen suits under the Act must be brought by those possessing Article III standing. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

Bonhomme lacks Article III standing and is therefore not a real party in interest. The Article III standing inquiry, as distinct from judicially imposed prudential standing, "requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Specifically, it requires (1) a judicially cognizable injury-in-fact; (2) traceability of that injury to actions of the defendant that is not too attenuated; and (3) a more than speculative prospect of relief from a favorable ruling. *Id.*

1. BONHOMME LACKS STANDING BECAUSE HE HAS NO INJURY-IN-FACT

The injury-in-fact standing prong requires that the plaintiff assert a legally protected interest that is both "(a) concrete and particularized and (b) actual or imminent, not conjectural or

hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The burden of standing is on the party invoking federal jurisdiction. *Id.* at 561.

A right of action is not created for any user of "waters of the United States" "not perceptibly affected by the unlawful action in question." *Id.* at 566. In *Lujan*, a case under the Endangered Species Act, the plaintiff asserted that the defendant's failure to consult with them resulted in an increase in the rate of extinction of endangered species. *Id.* at 562. The Court agreed that this was cognizable injury, but recognized that cognizable injury alone does not satisfy the injury-in-fact requirement. *Id.* Instead, the plaintiff must aver that she is among the injured, being directly affected, and not pursuing some "special interest" in the cause of action. *Id.* at 563 (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)) (stating that the special interest might be a generalized interest in protecting the environment or an ulterior business motive). The plaintiff cited several deleterious affects on animal populations, but failed to allege any "imminent" injury to herself. *Lujan*, 504 U.S. at 564. Having visited the affected areas and generally planning to visit them again is insufficient. *Id.*

Bonhomme fails to adequately allege injury–in–fact. The only apparent change in the life of Bonhomme is that he is taking two hunting trips to Wildman Marsh each year rather than eight. R. at 6. He alleges that arsenic is detected at lower levels in Wildman Marsh. *Id*. He states that he is afraid the arsenic has fouled the water and wildlife. *Id*.

There are two problems with these assertions. First, there is no evidence that the allegedly low levels of arsenic in the marsh are toxic or have caused any actual harm to the wildlife. The modest amount of arsenic found in one duck is not a "deleterious" affect on the animal population. Bonhomme does not state that he has been sick from eating hunted game or that there is less to hunt. Moreover, just as in *Lujan* there is no imminent injury looming for

Bonhomme. He cannot state that he is unable to hunt ducks because he continues to do so. R. at 6.

Second, if Bonhomme were genuinely afraid of the arsenic levels he would not have merely decreased the number of his hunting trips, he would have stopped them altogether. The more reasonable conclusion is that, due to the recent economic downturn, he simply has fewer business clients to take on trips, an injury to PMI and not to Bonhomme.

2. BONHOMME'S INJURY IS NOT FAIRLY TRACEABLE TO THE ALLEGED ILLEGAL ACT

The traceability standing prong requires a causal connection that is "fairly traceable" to conduct by the defendant. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This is not present in the current case. A plaintiff seeking to challenge an illegal act must assert specific, concrete facts demonstrating that the challenged practices caused him harm and Bonhomme has not done this. *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

In *Warth*, plaintiffs challenged zoning laws alleging they excluded low-income persons from a specific neighborhood. *Id.* at 507. Similar plaintiffs had proven standing where there were planned projects and they were already intended tenants. *Id.* However, in *Warth* the plaintiffs' ability to move into the specified neighborhood was dependent upon the willingness of a speculative third party to build housing they could afford. *Id.* at 505. The Court concluded that their inability to reside in that neighborhood was a result of the prevailing economics of the time and area, and not the alleged illegal acts of the defendants. *Id.* at 506. A plaintiff's injury must be caused by and not merely correlate with the defendant's acts. *Id.* at 508.

The economy, not arsenic, has caused PMI's business to wane. The causal relationship between any alleged arsenic addition and Bonhomme's hunting frequency is spurious and

speculative as in both *Lujan* and *Warth*. Thus, the Bonhomme's alleged injury is not fairly traceable to the allegedly illegal act.

3. BONHOMME DOES NOT SATISFY THE REDRESSABILITY PRONG BECAUSE THERE IS LITTLE LIKELIHOOD THAT HIS ALLEGED INJURY CAN BE REMEDIED

The redressability standing prong requires that there must be a likelihood—beyond speculation—that a favorable decision will remedy the alleged injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Relief sought must redress the plaintiff's injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105 (1998). In *Steel Co.*, the plaintiff asserted that defendant's failure to provide timely information required under the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) injured its right to know about the release of chemical substances. *Id.* There were no allegations that the chemical releases themselves or the amount thereof were illegal. *Id.* Plaintiffs sought redress in the form of declaratory relief stating there was a violation and providing for inspection of records and reports, civil penalties, and attorneys' fees. *Id*. Assuming injury-in-fact, the Court ruled that the requested relief was not likely to redress the complained of injury. *Id.*

Even if future harm is deterred, a plaintiff whose only interest is in seeing the defendant punished does not satisfy the redressability prong. *Id.* at 106–07. The Court found a declaration of violation to be worthless to the plaintiff. *Id.* at 106. Injunctions were deemed useless to remedy a past harm. *Id.* at 108. Civil penalties not payable to the plaintiff also provided no redress. *Id.* at 106. Plaintiff's requested injunctive relief would have sufficed to cure continuing or imminent future injury, but not past harms. *Id* at 108. Finally, litigation costs, though available in citizen suits, cannot themselves create standing. *Id.* at 107.

Bonhomme requests all relief available and no relief in particular. Indeed, it would be difficult to divine what relief this Court could offer to cure the ails of the economy. As in *Steel Co.*, Bonhomme wishes to see Maleau punished for his alleged past bad acts. However, also like in *Steel Co.* there is no benefit to Bonhomme for a declaration of violation, no civil penalty that could make him whole, and no reason to implement an injunction in response to past crimes. Here there is not even the benevolent motivation of generalized environmental protection, merely a proxy battle against a PMI competitor.

B. BONHOMME'S INJURY IS ONLY DERIVATIVE OF PMI'S AND THEREFORE HE DOES NOT HAVE STANDING

When a shareholder is harmed due to injury to the corporation, the company is the real party in interest and the shareholder's injury is merely derivative. *Weissman v. Weener*, 12 F.3d 84, 86–87 (7th Cir. 1993). In *Weissman*, a corporation, A.H.L. acquired a loan from the defendant and was injured through defendant's misrepresentations and malpractice. *Id.* at 86. The plaintiff alleged in his complaint that when A.H.L. went bankrupt, as a shareholder he lost the entirety of his investment. *Id.* The court found all of the plaintiff's claims to be derivative of the corporation's injury. *Id.* (internal citation omitted) ("When the injury is derivative, recovery by the indirectly injured person is a form of double counting. 'Corporation' is but a collective noun for real people—investors, employees, suppliers with rights and others."). Thus, the proper recovery is through the firm alone, by which its shareholder will receive their proper proportion and double recovery is avoided. *Id*. S*ee also Labovitz v. Washington Times Corp.*, 172 F.3d 897, 902–04 (D.C. Cir. 1999).

Any real injury suffered by Bonhomme is as a shareholder of PMI and not as a real party in interest. Maleau does not dispute that PMI's business has suffered, most likely thanks to the struggling economy. R. at 6. But whether or not PMI's injury is caused by pollution is irrelevant

because it is not a party. It may only recover in a suit brought on its own behalf. Only then may Bonhomme see the value of his three percent interest in the company improve accordingly. To rule otherwise and allow Bonhomme to bring suit for a derivative injury exposes Maleau to double liability and must be precluded.

II. BONHOMME IS NOT A "CITIZEN" UNDER THE CITIZEN SUIT STATUTE OF THE ACT

The district court correctly found that Bonhomme is not a proper party to bring a citizen suit because he is not a citizen—not by ordinary parlance, statutory interpretation, or Supreme Court definition.

A. STATUTORY INTERPRETATION PRECLUDES BONHOMME FROM FILING SUIT BECAUSE HE IS A FOREIGN NATIONAL

The statutory language does not explicitly address foreign nationals. The citizen suit provision in the Act defines "citizen" as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Bonhomme argues that "citizens" are the same as persons under the Act and should be controlled by the Act's definition of "person." R. at 8. Under the Act, "person" means an "individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5).

To permit Bonhomme, a foreign national, to file as a "citizen" obviates the ordinary understanding of the term "citizen". It also ignores the intentional distinction Congress made between the terms "citizen" and "person." Consequently, Bonhomme cannot bring a citizen suit under the Act.

1. THE PLAIN MEANING OF "CITIZEN" EXCLUDES FOREIGN NATIONALS

By the plain and ordinary understanding of the word "citizen" a geopolitical association is implied: "a person who legally belongs to a country and has the rights and protection of that country." Merriam Webster Dictionary, http://www.merriam–webster.com/dictionary/citizen (last visited Dec. 2, 2013). *See also* CITIZEN, Black's Law Dictionary (9th ed. 2009), citizen ("A person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections; a member of the civil state, entitled to all its privileges."). "Citizen" is narrower than "person." A "citizen" is a person *with* geopolitical affiliation and Bonhomme has no such affiliation to the United States.

2. TO CONCLUDE A FOREIGN NATIONAL IS A "CITIZEN" REMOVES THE EFFECT OF DISTINCT TERMS

A proper textual analysis must give effect to all the language of a citizen suit section. *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 618–19 (1992). Equating the term "citizen" to the term "person" in the Act ignores the express use of distinct terms. *Bonhomme v. Maleau*, 155–CV–2012, 165–CV–2012, *8 (Dist. Ct. of Progress 2012).

As the Supreme Court stated in *U.S. Dep't of Energy*, the term "citizen" must take on a meaning distinct from that of a "person" in order to give it proper effect and for this reason Bonhomme cannot be a "citizen" within the citizen suit statute. *U.S. Dep't of Energy*, 503 U.S. at 618. A "citizen" is a person with a geopolitical allegiances, protections, and rights.

Quite simply Bonhomme lacks any geopolitical allegiance or affiliation with the State of Progress or the United States, aside from his ownership of property there. Bonhomme presumably is a citizen, just not a "citizen" of the United States. It is true that "persons" under

the act is broader than humans, clearly intended to include corporate persons, but even that definition does not explicitly include foreign nationals. 33 U.S.C. § 1362(5). Concededly, "persons," by ordinary parlance would likely include foreign nationals. But it strains logic to say that when Congress chose to use the word "citizen" instead of "person" it intended to include foreign nationals in this group.

B. BONHOMME IS NOT A "CITIZEN" BECAUSE HE HAS NO STANDING

The definition of "citizen" can, at most, be no broader than the constitutional requirement of standing. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981). Bonhomme fails to adequately allege injury-in-fact. Section I.B.1., *supra*. The injury, actually suffered by PMI, is not fairly traceable to the alleged violation. Section I.B.2., *supra*. This Court cannot cure the economy to redress the economic woes of a non–party. Section I.B.3., *supra*. Consequently, Bonhomme lacks standing and therefore is not a proper "citizen" for the sake of a citizen suit.

III. MALEAU'S MINING WASTE PILES ARE NON-POINT SOURCES AND THEREFORE ARE NOT REGULATED UNDER THE CLEAN WATER ACT

Erosion caused by surface rainwater carried pollutants into Ditch C-1, not Maleau. Maleau did nothing to channel or collect this runoff and discharge it into Ditch C-1. Therefore, the runoff percolating through his waste piles was not discharged from a point source. It was the erosion of his waste piles by surface rainwater that carried pollutants into Ditch C-1 and consequently, Maleau's actions are lawful under the Clean Water Act.

Maleau's waste piles are not point sources under the Act because they are not discernible, confined or discrete conveyances created by Maleau to channel polluted water in the course of his mining activities. Under the Act, a point source is defined as "any discernable, confined and discrete conveyance." 33 U.S.C. § 1362(14). This includes, but is 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." *Id.*

Although the definition of point source has been interpreted broadly, both statutory construction principles and court decisions require that the term not be interpreted so broadly that it is read out of the statute. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d. Cir. 2009); *see also Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d. Cir. 1993) (stating that if Congress wanted to punish any person who polluted navigable waters it could have said "any person who places pollutants in navigable waters without a permit is guilty of a crime").

A pollutant must be channeled in order for it to be a "discrete" or "confined" conveyance. In *Cordiano*, the plaintiffs alleged that a berm designed to catch discharged bullets at a firing range was a point source, conveying lead into navigable waters. 575 F.3d at 218. The court rejected this argument. *Id.* at 223. It ruled that the lead was not channeled into navigable waters, and therefore did not originate from a point source. *Id.* at 202, 224. Although it conceded that the berm may have been a "container" or a "conduit," there was no evidence to suggest that it served as a "confined and discrete conveyance." *Id.* at 223. It noted that the only evidence of how the deposits made it into navigable waters was by "surface water runoff." *Id.* at 224.

The court recognized the importance of channeling in determining whether something is a point source. *Id.* It noted that in general, the EPA expects discharges to be "channelized" in order to fall under the Act and its regulatory jurisdiction. *Id.* In the end, although the court acknowledged that a berm is not always precluded from being a point source, it determined that the rain runoff from it alone was not enough to make it so. *Id.* To rule that the rain runoff from

the berm transformed it into a point source would have "eviscerate[d] the point source requirement" in the statute. *Id.*

The Fifth Circuit has recognized the transformation of non-point sources into unintended point sources under the statute but only after some affirmative act by a defendant. *See Sierra Club v. Abston Construction Co. Inc.*, 620 F.2d 41 (5th Cir. 1980). Some affirmative effort is needed to change the surface of the ground in order to direct the water flow or in some way impede its progress. *Id.* at 45. If surface runoff is collected or channeled in connection with mining activities, it constitutes a point source. *Id.* at 47.

In *Abston*, the respondents erected "sediment basins" in an effort to collect rainwater runoff that drained from their mine pits and stop it from carrying materials into nearby streams. *Id.* at 43. However, occasional heavy rain would cause the basins to overflow, depositing acid materials and silt into the streams nonetheless. *Id.*

The court held the respondents responsible for the pollution despite their efforts to prevent any discharge. *Id.* It rejected the argument that to create a point source, respondents had to actively pump the polluted water into the waterway. *Id.* Instead, the court stated that when the mine operators have affirmatively acted to "at least initially" collect or channel *"water and other materials*," a point source is created. *Id.* at 45 (emphasis added). In *Abston*, this meant the creation of sediment basins. *Id.* Although the court did not rule out the idea that overburden piles could become point sources, it stated that they must be created as part of the mine's drainage system to fit the definition. *Id.* Therefore, surface water that is channeled or collected by an operator creates a point source, but "simple erosion" resulting in the discharge of materials into navigable waters does not. *Id.*

Intent therefore is not a factor in determining what is a point source. The Act does not say that only the "*intentional* discharge of pollutants" is unlawful. *Id.* at 46 (emphasis added). The miners were liable because they created the basins, despite the fact that they were created to prevent the discharge of pollutants. *Id.* When they created their spoil basins, it was reasonably likely that such materials would ultimately deposit pollutants into navigable waters, and therefore the court found the miners liable. *Id.*

The importance of "point source" in the statute is also illustrated by the fact that nonpoint sources are not subject to the National Pollutant Discharge Elimination System (NPDES) and are left to the states to regulate. *Cordiano*, 575 F.3d at 220; *see also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (stating that Congress "consciously distinguished" between point sources and nonpoint sources, giving the EPA authority only to regulate the former). Unlike point sources, nonpoint source pollution is typically caused by rain falling around activities that create pollutants. *Cordiano*, 575 F.3d at 220 (citing *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)); *see also Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1173 (D. Mont. 1995) (stating that nonpoint sources are limited to uncollected runoff of water). The statute itself also indicates that the regulation of nonpoint source pollution is left to the states. *See* 33 U.S.C. §§ 1251(a)(7), (b); *see also Cordiano*, 575 F.3d at 220 (internal quotations omitted) (stating "control of nonpoint sources continues to be primarily a state function, with indirect federal participation"). The policy objective of the Act itself echoes this sentiment, proclaiming that it is the "policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states." *Rapanos v. United States*, 547 U.S. 715, 722 (2006); *see also* 33 U.S.C. §1251(b).

The EPA's own guidance on nonpoint sources states that land runoff is typically categorized as nonpoint source pollution. Office of Water, *Nonpoint Source Guidance* 3 (1987). According to the guidance, nonpoint source pollution generally results from "land runoff, precipitation, atmospheric deposition, or percolation" and does not result from discharge at a "specific single location (such as a single pipe)." *Id.* The Ninth Circuit has mirrored the guidance, stating that it is not the type of pollution or the activity causing the pollution, but whether or not the pollution reaches the water through a "confined, discrete conveyance," that makes it a point source. *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984).

In the present case, Maleau took no affirmative steps to collect or channel the rainwater runoff in furtherance of his mining activities. The water came only from rain or flooding and not from a conveyance created by Maleau in connection with his mine drainage system. Consequently, the piles are not point sources.

Like the berm in *Cordiano*, Maleau's piles can only be described as containers or conduits, not confined and discrete conveyances. There is only evidence that rainwater carried pollutants into Ditch C-1, which is analogous to the berm in *Cordiano*. R. at 6. The discharge was never channelized, but instead was carried into Ditch C-1 via rainwater falling around activities that create pollutants—precisely the definition of non-point sources that is described in *Cordiano*, *Trustees for Alaska* and *Beartooth Alliance.*

Maleau's piles were also not created to direct water flow in any way as in *Abston*. Maleau made no affirmative effort to change the ground to direct or impede water flow—all he did was move his overburden away from a known navigable water source and onto land further away from such waters. R. at 5. Because Ditch C-1 is not a navigable water, it was not

reasonably likely for Maleau to believe the pollutants would eventually reach a navigable water. Unlike *Abston*, Maleau did not inadvertently create a point source.

IV. DITCH C-1 IS NOT A NAVIGABLE WATER BECAUSE IT IS A POINT SOURCE AND IT IS NOT TRADITIONALLY NAVIGABLE OR ADJACENT TO A TRADITIONAL NAVIGABLE WATER

The Army Corps of Engineers does not have jurisdiction over Ditch C-1 because it is a nonnavigable, man-made ditch that is not adjacent to traditional navigable water. Instead, it is a point source. Under the statute, navigable waters are the "waters of the United States, including territorial seas." 33 U.S.C. § 1362(7). These waters include traditional waterways, and waters that are currently used, or were used in the past, or which may be susceptible to use in interstate or foreign commerce, and their tributaries. 40 C.F.R. § 230.3(s)(1), (5). Ditch C-1 does not fit this definition because it is merely a tributary to Reedy Creek which itself is a tributary; neither of these bodies of water are traditional waterways or are susceptible of becoming so. On the other hand, the definition of point source lists ditches explicitly in the statute. 33 U.S.C. § 1362(14). Because a ditch is a point source it cannot also be a navigable water under the statute.

A. DITCH C-1 IS NOT A NAVIGABLE WATER BECAUSE IT IS CLEARLY DEFINED AS A POINT SOURCE IN THE STATUTE

Ditch C-1 is not "waters of the United States" because the statute explicitly says it is a point source. Both the plain language of the statute and common sense dictate that it cannot be both.

A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any . . . ditch." 33 U.S.C. § 1362(14). The EPA Guidance, issued after the *Rapanos* decision, also states that federal jurisdiction will generally not extend to "ditches . . . excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water." EPA GUIDANCE, CLEAN WATER ACT JURISDICTION FOLLOWING THE

U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED SATES & CARABELL V. UNITED STATES* (2007).

However, the plurality in *Rapanos* stated that the Corps has stretched the term "waters of the United States 'beyond parody'" by applying it to culverts and man-made ditches. *Rapanos v. United States*, 547 U.S. 715, 734 (2006) (plurality opinion). Although the term "navigable water" is broader than the word "navigable" implies, the term still carries some of its original substance. *Id.* According to the Supreme Court, "it is one thing to give a word limited effect and quite another to give it no effect whatever." *Solid Waste Agency of N. Cook County v. U. S. Army Corps of Eng'Rs*, 532 U.S. 159, 172, (2001) [*hereinafter SWANCC*] (ruling that the Corps did not have jurisdiction over abandoned sand and gravel pits which had become permanent and seasonal ponds).

Lastly, because channels or conduits such as ditches are point sources and usually *carry* the intermittent flows of water, common sense dictates that these are separate and distinct categories. *Rapanos*, 547 U.S. at 735. Therefore ditches, through which waters typically flow, are not "waters of the United States." *Id.* at 736.

Ditch C-1 is clearly a point source under the statute. First, it is a ditch and 33 U.S.C. § 1362(14) unequivocally states that ditches are point sources and not "waters of the United States." Secondly, it was created solely for agricultural use and not for navigational purposes. R. at 5. It has never been nor is it susceptible of becoming a navigable water under the statute. R. at 9. To consider Ditch C-1 "waters of the United States" would only perpetuate the Corps' parody of the term and would render "navigable" meaningless under the statute.

B. DITCH C-1 IS NOT WATERS OF THE UNITED STATES BECAUSE IT IS NOT ADJACENT TO A TRADITIONAL NAVIGABLE WATER

Because Ditch C-1 is a man-made ditch, next to a tributary, next to a wetland—none of which are traditional navigable bodies of water—it is not "waters of the United States." The Supreme Court has focused on proximity and reasonableness to determine what is "waters of the United States." Its case law demonstrates that only bodies of water that are themselves traditionally navigable, or are directly adjacent to a traditional navigable water, can be "waters of the United States" and fall under federal jurisdiction.

The Court included adjacent wetlands into the definition of "waters of the United States" only after determining that the close proximity of the wetlands to navigable waters and the ambiguity between where land ends and water begins required that such wetlands be included in the term. *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 135 (1985). In *Riverside*, the Court recognized the difficulty of distinguishing between 80 acres of low-lying, marshy land and Lake St. Clair in Michigan, a navigable water. *Id.* at 123–24, 131. Consequently, the Court deferred to the Corps' interpretation of the definition of "waters of the United States" and permitted adjacent wetlands that formed the border of other "waters of the United States" to fall under its jurisdiction. *Id.* at 134. According to the Court, an agency's construction of a statute is entitled to deference provided it is reasonable and not in conflict with Congress's expressed intent. *Id.* at 131; *see also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984).

In *Riverside*, the word "navigable" had "limited import," and the Court relied instead on the wetland's proximity to Lake St. Clair. 474 U.S. at 133. The fact that Congress wanted to use its power under the Commerce Clause to regulate "at least some" of the waters that were not

deemed navigable under the ordinary understanding of the word was also instructive. *Id.* at 132–33.

However, "waters of the United States" has not always been defined so broadly. *See Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the plurality voiced its antipathy for the Corps' expanding jurisdiction by stating that it had "asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Id.* at 722 (plurality opinion). The plurality resisted this expansion, opting instead for a narrower definition that would be consistent with the "policy of Congress to recognize, preserve, and protect the primary rights of the States to prevent, reduce and eliminate pollution." *Id.* at 737 (plurality opinion). To adopt the Corps' definition would have "brought virtually all planning of the development and use of land and water resources by the States under federal control. *Id.* (internal quotations omitted). Instead, it defined "waters of the United States" as only those waters that are "relatively permanent, standing or continuously flowing bodies of water," such as streams, oceans, rivers, lakes, and "bodies of water forming geographical features." *Id.* at 739 (plurality opinion) (internal quotations omitted). It does not include "channels that periodically provide drainage for rainfall." *Id.*

Rapanos reiterated that the *Riverside* holding was reached because of the inherent ambiguity between where land ends and water begins. *Id.* at 742 (plurality opinion). The wetlands' close proximity to the waters of the United States created this ambiguity. *Id.* Such ambiguity made it reasonable for the Corps to include adjacent wetlands in its jurisdiction. *Id.* Unlike the adjacent wetlands in *Riverside*, the wetlands in *Rapanos* were "sometimes saturated" and the nearest body of navigable water was 11 to 20 miles away. *Id.* at 720 (plurality opinion).

Ditch C-1 has nothing more than a tenuous connection to "waters of the United States." Therefore both reasonableness and proximity dictate that it not fall under the Act.

Unlike the wetlands in *Riverside*, Ditch C-1 is not physically adjacent to a traditional navigable water. Furthermore, there is no ambiguity between where Ditch C-1 ends and Reedy Creek begins as in *Riverside*; the two are clearly delineated by a culvert. R. at 5. Instead, the nearest body of water under federal jurisdiction is Wildman Marsh. However, because Ditch C-1 is only connected to Wildman Marsh via another tributary (Reedy Creek), it is unreasonable to conclude that it should also be "waters of the United States." As *Riverside* held, only *adjacent* bodies of water are "navigable waters" under the statute.

On the other hand, Ditch C-1 more closely resembles the extra-jurisdictional bodies of water that the plurality described in *Rapanos*, because it is a channel designed to provide drainage for rainfall and is not continuously flowing. R. at 5. Much like the *Rapanos* lands, which were "sometimes saturated," Ditch C-1 can go for months without draining water. *Id.* To put Ditch C-1 under the jurisdiction of the Corps would run counter to the Court's own aversion to the Corps' increasing jurisdictional claims.

Ditch C-1 is a remote, intermittently flowing channel that is beyond the Corps' jurisdiction. Although the Supreme Court has interpreted "waters of the United States" broadly, it has done so reasonably, keeping in mind the goals of the Act, and the physical proximity of the water to a traditional navigable water. Because Ditch C-1 is not adjacent to a traditional navigable water and putting it under the Act's jurisdiction would unconstitutionally abrogate the role of the States in land use, it is not "waters of the United States."

V. REEDY CREEK IS NOT A WATER OF THE UNITED STATES BECAUSE IT IS NOT NAVIGABLE IN FACT OR CONNECTED IN ANY WAY TO TRADTIONAL NAVIGABLE WATERS

Reedy Creek is not a navigable water under the Clean Water Act because it is not a "waters of the United States." Not only is it not navigable in fact, but it also has no significant nexus to a navigable water or "waters of the United States."

The Act broadly defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The EPA has issued regulations interpreting "waters of the United States" as traditional navigable waters and "[a]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . . including interstate 'wetlands,'" as well as all other waters "[w]hich are or could be used by interstate or foreign travelers for recreational or other purposes." 40 C.F.R. §§ 122.2, 230.3(s)(1), (5).

The scope of the EPA and Army Corps of Engineers' jurisdiction over navigable waters has been subject to extensive litigation both expanding and contracting the reach of the Act. First, in *United States v. Riverside Bayview Homes, Inc.*, a unanimous Court upheld the Corps' jurisdiction over a wetland directly abutting an open body of water. 474 U.S. 121, 135 (1985) (holding that wetlands directly abutting navigable in fact waterways received Clean Water Act protection). Next, the Court invalidated a Corps regulation that sought to extend the Act's jurisdiction to any intrastate waters "which are or would be used as habitat" by migratory birds. *Solid Waste Agency of Northern Cook Cnty v. U.S. Army Corps of Eng'Rs*, 531 U.S. 159, 172 (2001) (putting a municipal landfill under federal jurisdiction because it is used as a habitat by migratory birds "is a far cry," from Congress's intent and claiming such jurisdiction over ponds would result in a "significant impingement of the States' traditional and primary power over land and water use").

Finally, the Court addressed whether the Corps could regulate wetlands that were linked to navigable waterways by miles of ditches, drains and creeks. *See Rapanos v. United States*, 547 U.S. 715 (2006). The Court issued a split decision with Justice Scalia writing the plurality opinion and Justice Kennedy authoring a concurring opinion. The plurality held that under the Act "waters of the United States" include only those "relatively permanent, standing or continuously flowing bodies of water connected to traditional interstate navigable waters." *Id.* at 742. It also held that "*only* those wetlands with a continuous surface connection to . . . 'waters of the United States' . . . so that there is no clear demarcation between 'waters' and wetlands are 'adjacent to' such waters and covered by the Act." *Id.* at 742. In his concurrence, Justice Kennedy found that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779 (stating that "wetlands possess a significant nexus if, either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'").

As a result of the split holdings of the court in *Rapanos*, jurisdiction over waters may be found by satisfying either the plurality's or Justice Kennedy's concurrence. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding that when the Supreme 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") (quoting *Gregg v. Georgia.*, 428 U.S. 153, 169 n. 15 (1976)).

The Act's jurisdiction does not extend to Reedy Creek because 1) it is not navigable in fact, 2) the interstate migration of birds is not valid grounds for the Act's jurisdiction, and 3)

Reedy Creek is not connected to any traditional navigable waters and there is no significant nexus between Reedy Creek and a traditional navigable water.

A. REEDY CREEK DOES NOT FALL UNDER THE ACT'S JURISDICTION BECAUSE IS NOT NAVIGABLE IN FACT AND CANNOT BE MADE SO WITH REASONABLE IMPROVEMENTS

Reedy Creek is not a traditional navigable water because it is not navigable in fact. In *Daniel Ball*, the Supreme Court defined "navigable waters" as waters that are "navigable in fact" and could be used as highways of commerce. 77 U.S. 557, 563 (1871) (defining the test as "those rivers . . . which are navigable in fact . . . when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water"); *See also United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 406 n.21 (1940) (reaffirming the navigable in fact test set forth in The Daniel Ball).

In *Appalachian*, the government sought to enjoin an electric power company from constructing and operating a hydroelectric dam on a river that flowed from West Virginia to Virginia. 311 U.S. at 398. The statutes in place at the time made it illegal to construct a dam on navigable waters of the United States without the consent of Congress. 30 Stat. 1151, 33 U.S.C. §§ 401, 403 (also known as the Rivers and Harbors Act). The Supreme Court held that under Commerce Clause authority the Federal Government had the power to regulate interstate waters that are "susceptible of being used . . . as highways for commerce." *Appalachian*, 311 U.S. at 406 n.21.

Reedy Creek is far from the "highway of commerce" that the *Daniel Ball* definition requires. The record in this case makes clear that Reedy Creek has never been used for transportation or trade, nor could it be so used with reasonable improvements. R. at 9. No boats

have been floated in the creek and no goods have been transported. *Id.* Consequently, Reedy Creek cannot be a traditional "navigable water" under the statute.

B. THE INTERSTATE MIGRATION OF BIRDS IS NOT VALID GROUNDS FOR CLEAN WATER ACT JURISDICTION OVER REEDY CREEK

Interstate migration of birds is not a valid basis for asserting federal jurisdiction over Reedy Creek because it has been rejected by the Supreme Court. The Corps promulgated regulations in 1986 asserting jurisdiction over non-navigable, isolated intrastate waters, which are or could be used as a habitat for migratory birds. 33 U.S.C. § 1344(a), CWA § 404(a). The Corps interpreted the statute to confer jurisdiction over an abandoned sand and gravel pit in Northern Illinois that provided a habitat for several species of migratory birds. *Solid Waste Agency of N. Cook Cnty. v. U. S. Army Corps of Eng'Rs*, 531 U.S. 159, 162 (2001) [*hereinafter SWANCC*]. SWANCC was a consortium of 23 cities and villages in the Chicago area that had purchased the land to dispose of baled non-hazardous solid waste. *Id.* at 163. The Corps refused to issue a permit under § 404(a) asserting that the abandoned gravel pit was a "waters of the United States" under the Act and that SWANCC had not shown that the site was the "least environmentally damaging" alternative for the waste disposal site. *Id*. at 174.

In a 5–4 decision, the Supreme Court held that the "migratory bird rule" exceeded the Corps' statutory authority and that § 404 does not extend to wetlands with no connection at all to navigable waters. *Id.* at 174. The Court found that the migratory bird rule, by conferring jurisdiction over isolated waters, failed to acknowledge Congress' express use of the term "navigable" in the Act and thus exceeded the scope of authority granted by the language of the statute. *Id.* at 173–74. To find that migratory birds transformed this abandoned landfill into "waters of the United States" would have been a "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173.

Bonhomme and Progress argue that Wildman Marsh, the terminus of Reedy Creek, is necessary for the interstate migration of birds and for supporting interstate commerce in duck hunting. R. at 9. As the Court plainly laid out in *SWANCC*, the "migratory bird rule" cannot be the basis for asserting federal jurisdiction over isolated intrastate waters because it would result in expanding the Corps' jurisdiction beyond what Congress intended in the Act. *Solid Waste,* 531 U.S. at 174. Furthermore, it is not even Reedy Creek that houses the birds, but Wildman Marsh, making this argument even more tenuous. As such, the interstate migration of birds cannot be the basis for asserting Clean Water Act jurisdiction over Reedy Creek.

C. REEDY CREEK IS NOT CONNECTED TO ANY TRADITIONAL NAVIGABLE WATER NOR IS THERE A SIGNIFICANT NEXUS BETWEEN IT AND A TRADITIONAL NAVIGABLE WATER

Federal jurisdiction cannot be asserted over Reedy Creek because it is not connected in any way to traditional navigable waters. The EPA and the Corps have issued guidance following the decision in *Rapanos* regarding which waters they will continue to assert jurisdiction. ENVTL. PROT. AGENCY, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* (2007). These waters include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.3(a)(1); 40 C.F.R. § 230.3s)(1) (includes all waters that are navigable-in-fact). The guidance makes clear that any water that a federal court has determined is navigable-in-fact or used for commercial navigation, or is susceptible to that use in the future, falls under the Act's jurisdiction. *Id*.

Following the Court's decision in *Rapanos*, jurisdiction will be asserted over adjacent wetlands or waters if one of the following criteria is satisfied: 1) there is an unbroken surface

connection or shallow sub-surface connection to jurisdictional waters; 2) the waters are only physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes and the like; or 3) their proximity to jurisdictional water is reasonably close, supporting the science-based inference that such wetlands or waters have an ecological interconnection with jurisdictional waters. EPA, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* (2007).

The EPA and Corps' guidance reflects both the plurality and concurring opinions of *Rapanos*. The plurality held that under the Act "waters of the United States" include only those "relatively permanent, standing or continuously flowing bodies of water connected to traditional interstate navigable waters." *Rapanos*, 547 U.S. at 742 (plurality opinion). The concurrence held that "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id*. at 779 (Kennedy J., concurring).

In *Rapanos*, the Court addressed whether Clean Water Act jurisdiction covered four different wetlands: three having continuous surface-water connections to navigable waters and one separated from a tributary by a four-foot-wide man-made berm. *Id.* at 729 (plurality opinion). The first parcel, known as the Salzburg Site, contained 28 acres of wetlands whose waters flowed directly into the Hoppler Drain, which spilled into Hoppler Creek, which in turn flowed into the traditional navigable Kawkawlin River. *Id.* The second parcel, the Hines Road site, contained 64 acres of wetlands with a surface water connection to the Rose Drain, which flowed into the traditional navigable Tittabawassee River. *Id.* The third parcel, the Pine River site, contained 49 acres of wetlands with a surface water connection to the Pine River, which

flowed into the traditional navigable Lake Huron. *Id.* The fourth parcel, the Carabell wetlands, consisted of approximately 16 acres of wetlands separated from the continuously flowing Sutherland-Oemig Drain by a four-foot-wide man-made berm that blocked surface water flow between the wetlands and the drain. *Id.* at 790 (Stevens J., dissenting). The Sutherland-Oemig Drain emptied into Auvase Creek, which flowed one mile into the traditional navigable Lake St. Clair. *Id.* The Court vacated the decision of the lower court and remanded for further proceedings to determine whether the immediately surrounding waters to each of these locations were traditional navigable waters. *Id.* at 757 (plurality opinion).

The common thread among each of the waters in *Rapanos* was the existence of a nearby water that was either a traditional navigable water itself, or a tributary of such a water. Reedy Creek is not connected in any way to a traditional navigable water or "waters of the United States." It is a 50-mile long water that begins in the State of New Union and crosses into the State of Progress at the edge of Bonhomme's property. R. at 5. The Creek flows several miles through Progress before terminating at Wildman Marsh, a wetland that supports twice-annual migratory bird habitation. R. at 6. There is nothing in the record to indicate that Reedy Creek at any time connects to *any* other bodies of water—let alone one that is traditionally navigable. Unlike the four bodies of water in *Rapanos*, there is no question that Reedy Creek does not terminate into traditional navigable water.

Additionally, Reedy Creek fails to satisfy Justice Kennedy's significant nexus test in *Rapanos*. There is no significant nexus to a qualifying traditional navigable water so as to affect the chemical, physical, and biological integrity of that absent water. The only things navigating Wildman Marsh are the migratory birds, not interstate commerce. It is unlike any of the Supreme

Court's prior cases on the subject which all involved some nexus to a traditional navigable water, anchoring federal jurisdiction. Consequently, Clean Water Act jurisdiction cannot be asserted.

VI. IF REEDY CREEK IS A NAVIGABLE WATER UNDER THE STATUTE, IT IS BONHOMME WHO VIOLATES THE ACT BY ADDING ARSENIC TO THE CREEK FROM A POINT SOURCE ON HIS PROPERTY AND NOT MALEAU

Even if the court finds that Reedy Creek is water of the United States, Bonhomme is the party responsible for the discharge of arsenic into Reedy Creek. The Act prohibits the discharge of pollutants except in compliance with the Act. 33 U.S.C. § 1311(a). The "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). The term "pollutant" is defined as " . . . industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is a "discernible, confined and discrete conveyance" that includes "any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container." 33 U.S.C. § 1362(14). The Act does not "define 'discharge' or 'addition' in terms of causation, direct addition or indirect addition." *Bonhomme v. Maleau*, 155–CV–2012, 165–CV–2012, *9 (Dist Ct. of Progress, July 23, 2012); *see also* 33 U.S.C. § 1311. "[A] point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (citing *South Fla. Water Management Dist. v. Miccosukee Tribe,* 541 U.S. 95, 105 (2004)).

In *Miccosukee*, the plaintiffs brought suit against a Florida water-management agency contending that the agency needed a discharge permit under the Act to pump already polluted water from a canal into a reservoir. *Id*. at 98–9. The parties agreed that the water being pumped was a "pollutant" under the Act. *Id*. at 102. They also agreed that the canal and reservoir were "waters of the United States" under the Act. *Id.* The question addressed by the court was whether the pumping of *already polluted* water by the agency, which adds no pollutants itself, constitutes

an "addition" of a pollutant "from" a point source triggering the need for a NPDES permit under the Act. *Id*. at 102.

The Court found that the definition of point source "makes plain that [it] need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Id*. at 105; *see also* 33 U.S.C. § 1362(7). Examples of point sources listed in the Act were all "objects that do not themselves generate pollutants but merely transport them." *Id.*; *see also* § 1362(14). The Court held that the agency was required to obtain a NPDES permit even though they were not the but-for cause of the existence of pollutants in the water because they conveyed the pollutants into a navigable water of the United States. *Id.*

Even if the court finds that Reedy Creek is a navigable water under the Act, Bonhomme is responsible for conveying arsenic into Reedy Creek. Bonhomme argues that he does not violate the Act because Maleau is the but-for cause of the arsenic in Ditch C-1. R. at 2. However, as discussed in § III, *supra*, Maleau's waste piles are not point sources and he is not required to have a NPDES permit to cover the erosion of his piles by rainwater. Additionally, Ditch C-1 is not a navigable water of the United States because it is specifically listed as a point source in the Act. *See* § IV, *supra*. Consequently, Bonhomme's is the only discharge that may fall under the Act's jurisdiction for adding a pollutant to a navigable water.

Like the water-management agency in *Miccosukee,* Bonhomme is responsible for conveying *already polluted water* into a navigable water via a culvert on his property. R. at 5. Ditch C-1 runs three miles from Maleau's property before it crosses onto Bonhomme's property and discharges through a culvert directly into Reedy Creek. R. at 5. If the court finds that Reedy Creek is a navigable water under the Act, it is Bonhomme's culvert that "convey[s] the pollutant

to ‘navigable waters,’” in violation of the Act regardless of whether or not Maleau is the but-for cause of the pollutant. *Miccosukee,* 541 U.S. at 105.

Therefore the court below correctly found for Maleau. Even if Reedy Creek is a navigable water, Bonhomme is responsible for the addition of arsenic through the conveyance on his property. As such, the court should affirm the lower court’s holding on this issue.

CONCLUSION

The District Court of Progress correctly dismissed Bonhomme’s citizen suit. As a foreign national his is not capable of filing a citizen suit, nor is he a real party in interest. Even if he did have standing, Maleau’s waste piles are not point sources under the Clean Water Act, nor are Ditch C-1 or Reedy Creek “navigable waters” for purposes of federal jurisdiction. Regardless of whether Bonhomme fails on one or all of five of these issues his action must be dismissed. Finally, should this Court find that Reedy Creek is a “navigable water,” it is Bonhomme who is adding arsenic to Reedy Creek, not Maleau. Consequently, this Court should affirm the lower court’s decision to dismiss Bonhomme’s citizen suit.