TEAM BRIEF

IN THE 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.

On Appeal from the Order of the United States District Court for the District of Progress

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BRIEF FOR SHIFTY MALEAU

Defendant-Appellant, Cross-Appellee and Intervenor-Plaintiff-Appellant, Cross-Appellee

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STATEMENT OF JURISDICTION

The parties seek review of the Order of the United States District Court for the District of Progress issued on July 23, 2012. The district court had proper subject matter jurisdiction to hear the case pursuant to 28 U.S.C. § 1331 (2012), as the underlying issues arose under the Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387 (2012), which are laws of the United States.

The district court's order is final, and was timely appealed by Jacques Bonhomme (Bonhomme), the State of Progress (Progress), and Shifty Maleau (Maleau). This Court granted appeal on September 14, 2013, and retains proper jurisdiction under 28 U.S.C. § 1291 (2012), which provides for jurisdiction over a final judgment from a United States District Court.

STATEMENT OF THE ISSUES

I. Whether Bonhomme is barred from bringing an action against Maleau under the CWA citizen suit provision because he not the real party in interest.

II. Whether Bonhomme, a foreign national, is precluded from bringing an action against Maleau under the CWA citizen suit provision because he fails to satisfy the statutory requirement that a plaintiff be a "citizen."

III. Whether overburden piles on Maleau's property are regulated under the CWA.

IV. Whether Ditch C-1 is a "navigable water" under the CWA.

V. Whether Reedy Creek is a "navigable water" under the CWA.

VI. Whether Bonhomme is in violation of the CWA because he is the owner and operator of a culvert that discharges pollutants into a navigable body of water.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of Progress granting Progress' and Maleau's motion to dismiss and denying Bonhomme's motion to dismiss. (R. at 10). Bonhomme provided notice and brought a civil action against Maleau under the CWA's citizen suit provision, 33 U.S.C. § 1365 (2012), alleging that Maleau violated provisions of the CWA and seeking full statutory relief. (R. at 4). Progress subsequently provided notice

and brought a citizen suit against Bonhomme, alleging that Bonhomme violated the CWA. (R. at 5). Maleau intervened as a matter of right in Progress' action against Bonhomme pursuant to 33 U.S.C. § 1365(b)(1)(B). *Id.* The district court granted Progress' and Maleau's motion to consolidate the two cases. *Id.* Maleau and Bonhomme both filed motions to dismiss. *Id.* On July 23, 2012, the district court issued an order holding that: (1) Bonhomme's citizen suit against Maleau was dismissed because he was not a proper plaintiff; and (2) Progress' citizen suit against Bonhomme properly remained before the court because it properly stated a cause of action. (R. at 10). On the substantive issues the court held that if the case had proceeded to trial, the court would have found that: (1) Maleau's mining waste piles are not "point sources" under the CWA; (2) Ditch C-1 is not a navigable water; (3) Bonhomme violated the CWA; and (4) Reedy Creek is a navigable water. (R. at 1–2). Each of the parties filed a Notice of Appeal. (R. at 1).

STATEMENT OF THE FACTS

Maleau owns a gold mining and extraction operation in Lincoln County Progress. (R. at 5). Bonhomme is president of a competing mining business, Precious Metals International (PMI). (R. at 6). Maleau's operation and PMI are direct competitors in this industry. *Id.* Lately, Bonhomme and PMI have noticed declining profits in their business. *Id.*

Maleau and Bonhomme are not only connected through their business pursuits, but they also own property within a close proximity to one another. (R. at 5). From Maleau's property line, a drainage ditch, Ditch C-1, runs three miles through agricultural property before it discharges through a culvert into Reedy Creek. *Id.* The culvert runs underneath a farm road, located on Bonhomme's property. *Id.* From Bonhomme's property, Reedy Creek flows for a few miles before ending in Wildman Marsh. *Id.* These wetlands attract duck hunters from a multi-state area, including PMI, which holds business-related hunting parties there. (R. at 6).

This cause of action arises from Bonhomme's allegations that overburden piles found on Maleau's property are a point source of effluent, which necessitates permits under the CWA. (R. at 8). Maleau trucks overburden and slag from his mining operation in Lincoln County to his personal property in Jefferson County where he piles it on his land. (R. at 5). When it rains, storm water runoff percolates the piles. (R. at 5). Maleau has not channeled or collected the storm water on his property, but allows it to flow with gravity. *Id.* Bonhomme alleges that the overburden piles are contributing to arsenic found in Reedy Creek and therefore should be subject to the federal point source regulation scheme instead of the nonpoint source regulations established by Progress. (R. at 9). Underlying these allegations remains the inextricable link between Bonhomme and PMI in this litigation and their competitive business interests against Maleau. (R. at 6–8).

STANDARD OF REVIEW

The district court granted Progress' and Maleau's motion to dismiss and denied Bonhomme's motion to dismiss. Appellate courts review motions to dismiss *de novo*. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)); *see also Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003).

SUMMARY OF THE ARGUMENT

The district court properly dismissed Bonhomme's citizen suit because he is not the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure. Principles of finality require that a suit be brought by the real party in interest, and the real party in interest in this action is PMI. Bonhomme's alleged injury is a front for PMI's effort to compete against Maleau, rather than a legitimate injury to a recreational interest. Even if a party has been adversely affected, the injured party is PMI, not Bonhomme. Additionally, Bonhomme may not bring a

citizen suit under the CWA because he is a foreign national, not a "citizen," and statutory interpretation of the CWA necessitates the conclusion that Congress only intended to extend citizen suit authorization to the class of plaintiffs who are citizens of the United States.

The district court also correctly dismissed Bonhomme's claim that Maleau was in violation of section 502 of the CWA because the overburden piles on Maleau's property are not point sources of pollution. The piles do not fall under Congress' definition of a "point source." The storm water that acts as the conveyance is exempted from the National Pollution Discharge Elimination System (NPDES) because it is neither from an industrial site nor is the storm water channeled and collected by Maleau. Therefore, the storm water constitutes a nonpoint source, and is regulated through the efforts of Progress.

The district court correctly found that Ditch C-1 is not a "navigable water" under the CWA, as it is properly classified as a "point source," and additionally, Ditch C-1 has no connection to navigable-in-fact waters.

The district court incorrectly held that Reedy Creek was a "navigable water" under the CWA. Jurisdiction based on its interstate nature would be unconstitutional unless that power were linked to Congress' commerce power over navigation, which is not co-extensive with Congress' complete commerce power. Because Reedy Creek has no connection to a navigable-in-fact water, jurisdiction does not exist. A connection to federal land is irrelevant in light of Supreme Court precedent that explains that a wetland cannot be the "navigable water" from which other tributaries obtain their status as "navigable."

The district court correctly found that Bonhomme need not be the but-for cause of pollution in Reedy Creek and properly denied his motion to dismiss. If this court finds that Reedy Creek is a navigable body of water, then it is Bonhomme who violates the CWA. The

issue to consider under the NPDES permit is not a but-for analysis, but an examination of who discharges pollutants through a discrete conveyance. Bonhomme is adding a pollutant through a culvert, which is a congressionally defined point source.

ARGUMENT

I. BONHOMME IS NOT A PROPER PLAINTIFF TO MAINTAIN A CITIZEN SUIT AGAINST MALEAU BECAUSE HE IS NOT THE REAL PARTY IN INTEREST UNDER RULE 17(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 17(a) of the Federal Rules of Civil Procedure (Rule 17(a)) requires that a suit filed in federal court be brought by the "real party in interest." Fed. R. Civ. P. 17(a)(1). The real party in interest is the party in possession of a right or interest under the substantive law. *Va. Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973); *Wieburg v. GTE Sw., Inc.*, 272 F.3d 302, 306 (5th Cir. 2001) (quoting *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990)); *In re Signal Intern., LLC*, 579 F.3d 478, 487 (5th Cir. 2009). The substantive law for the claims asserted by Bonhomme in his action against Maleau is the citizen suit provision of the federal CWA under section 505(a). 33 U.S.C. § 1365(a). The right under this provision is the right to bring a citizen suit against someone "alleged to be in violation of" either "an effluent standard or limitation" under the CWA or a government order regarding the standard or limitation, in order to have the standard, limitation, or order enforced by the court. 33 U.S.C. § 1365(a).

The statutory standing requirement to bring a suit under the CWA citizen suit provision requires a citizen suit plaintiff to have "an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Congress intended this provision to extend statutory standing under section 505(a) to the limits of standing under Article III of the United States Constitution. *Middlesex*

Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 16 (1981)). This extension by Congress reflects the Supreme Court's holding in *Sierra Club v. Morton*, 405 U.S. 727 (1972). *Middlesex Cnty. Sewerage Auth.*, 453 U.S. at 16 (citing S. Rep. No. 92-1236, at 146 (1972) (Conf. Rep.)). Thus, where a citizen suit plaintiff can satisfy Article III standing in order to be authorized to bring a suit under section 505(a), that plaintiff can be said to hold the substantive right, and therefore, can be a real party in interest under Rule 17(a). However, Bonhomme has not alleged sufficient facts to show that his own interests are "adversely affected" or that he satisfies the requirements of Article III standing. On the contrary, the facts show that the corporation, Precious Metals International, Inc. (PMI), of which Bonhomme is the president, is the real party adversely affected by Bonhomme's allegations. (R. at 7–8). Therefore, this Court should affirm the district court's dismissal of Bonhomme's citizen suit against Maleau because Bonhomme is not a proper plaintiff under Rule 17(a).

A. PMI is the real party in interest under Rule 17(a) because any alleged harm has been suffered by PMI, and Bonhomme has failed to show that he has been personally "adversely affected."

Bonhomme is not the real party in interest because he has not alleged adequate facts to show that he has been personally "adversely affected" by Maleau's actions, and he fails to meet the first requirement of Article III standing.

1. If an injury in fact exists, the facts alleged by Bonhomme show an injury to PMI, not Bonhomme.

The first prong of standing under Article III of the Constitution requires a plaintiff to show that "it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (*Laidlaw*) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Courts have held that it is sufficient for a party to allege injury to recreational interests in order to

demonstrate an injury in fact. *Laidlaw*, 528 U.S. at 183–84; *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972). However, the "party seeking review must himself have suffered the injury." *Morton*, 405 U.S. at 738. Bonhomme alleges that he uses his property along the edge of Reedy Creek and Wildman Marsh to host hunting parties, and that he has reduced the number of annual hunting parties due to his concern over the arsenic levels he detected in the water. (R. at 6). However, Bonhomme has only alleged a reduction in the frequency of hunting parties held, which are conducted primarily as entertainment for business colleagues associated with PMI; he has not actually stopped using the resources completely. *Compare Laidlaw*, 528 U.S. at 183–84 (discussing plaintiffs' statements that the reason they did not use a river for recreational purposes was because it was polluted). Although Bonhomme claims that his decreased use of his hunting lodge is due to his fear of high arsenic concentrations in the water and wildlife, this claim is disingenuous. (R. at 6). Bonhomme does not live on his property along Wildman Marsh, and his recreational activity there was not for his own personal enjoyment and benefit, but instead was to benefit the business interests of PMI. (R. at 6–8). Furthermore, the mere decline rather than cessation of hunting parties suggests that his claim of injury is not due to any pollution of the environment, but rather is a front for the real reason his hunting parties have declined—a likely decrease in PMI's available funds for business-related recreational expenditures due to a decline in the economy. (R. at 6).

2. Bonhomme's citizen suit is merely a front, or sham, for PMI's competitive gain.

In other contexts, courts have recognized that "if an association were no more than a 'front' or 'sham' through which ineligible entities pursued litigation . . . it would be appropriate to pierce the associational veil and look to the real parties in interest." *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 603 (D.C. Cir. 1998) (citing *Unification Church v. INS*, 762 F.2d

1077, 1081–82 (D.C. Cir. 1985) (discussing application of the "real party in interest" principle to an ineligible party's payment of an eligible party's fees in the context of Equal Access to Justice Act claims)). Even if Bonhomme can maintain a suit by showing that he has been adversely affected to satisfy section 505(a), his suit is nothing more than a front for an action that PMI could not have reasonably brought before the court. Under Rule 11 of the Federal Rules of Civil Procedure, a complaint cannot be "presented for any improper purpose." Fed. R. Civ. P. 11. Although PMI may have a claim to an injury sufficient to authorize suit under section 505(a), the corporation is also a direct competitor of Maleau's business. (R. at 6–7). According to Bonhomme's own statements, Maleau is viewed as having an unfair business advantage, and as the district court judicially noticed, the Attorney General claims that Bonhomme filed suit in an effort to reduce competition for PMI. (R. at 6–7). A court takes judicial notice of a fact when that fact "is not subject to reasonable dispute." Fed. R. Evid. 201(b). As further evidence of the sham, PMI has been paying the attorney and expert witness fees for Bonhomme in the citizen suit against Maleau. (R. at 7). Even beyond this financial contribution, PMI has evidenced its hand in the litigation by conducting arsenic testing and analyses. (R. at 7). *See Nat'l Ass'n of Mfrs.*, 159 F.3d at 603 (discussing involvement in litigation by ineligible entity). Accordingly, this Court should hold that Bonhomme's sham action against Maleau cannot be properly maintained before a court.

B. Principles of res judicata prohibit Bonhomme from maintaining a suit where he is not the real party in interest.

In the alternative, even if this Court finds the decline in hunting parties to be a result of higher levels of arsenic, and not general economic reasons, and that the suit was not brought for competitive purposes, the real party in interest is still PMI, the party on whose behalf the hunting parties are held. (R. at 6).

Courts have held that the purpose of Rule 17(a) is to provide a defendant with a guarantee that "'a judgment will be final and that res judicata will protect it'" from being forced to defend multiple lawsuits when one party has the substantive right and another party receives the benefit from the right. *Wieburg*, 272 F.3d at 306 (quoting *Farrell Const. Co.*, 896 F.2d at 142). Allowing Bonhomme's suit to go forward because he may benefit by the possibility of attending more company-sponsored hunting trips would deprive Maleau from the protection he is entitled to under Rule 17(a). (R. at 6). Bonhomme would benefit from CWA enforcement against an alleged violation to the same extent as any other beneficiary of PMI's hunting trips, including PMI's clients and associates, but the substantive right to sue would remain with PMI, the party suffering any direct harm resulting from the alleged environmental pollution. (R. at 6–8). Because PMI is the adversely affected party, and has the claim under section 505(a), PMI remains the real party in interest with "exclusive standing to assert" the right. *Wieburg*, 272 F.3d at 306. Thus, only a suit by the real party in interest, PMI, would afford Maleau the Rule 17(a) protection from defending multiple suits by any number of beneficiaries of PMI's hunting trips.

C. Bonhomme failed to add PMI as a party.

An action cannot be dismissed "for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a)(3). Courts have recognized that this provision is only appropriately applied "when the plaintiff brought the action in her own name as the result of an understandable mistake, because the determination of the correct party to bring the action is difficult." *Wieburg*, 272 F.3d at 308 (citations omitted). This reasoning follows from guidance provided by the FRCP Advisory Committee. *Id.* (citing Fed. R. Civ. Pro. 17(a) advisory committee's note (1966)). As stated by the Attorney General, and noted

by the district court, Bonhomme filed his citizen suit against Maleau with the intention of competing with Maleau on behalf of PMI. (R. at 6). Under these facts, Bonhomme cannot show that he made a genuine mistake in bringing the action himself in the place of PMI. Furthermore, even if Bonhomme made a good faith mistake in filing the action in his own name, he was afforded an opportunity to join or substitute PMI as the real party in interest after Maleau provided notice of the mistake in his answer. (R. at 7). However, Bonhomme has failed to correct any such mistake by amending his complaint to add PMI as a party. (R. at 7). Therefore, Bonhomme's citizen suit against Maleau cannot be maintained because Bonhomme is not the real party in interest, and the real party in interest, PMI, has not been joined to the action.

II. AS A FRENCH NATIONAL, BONHOMME IS NOT A PROPER PLAINTIFF TO BRING A CITIZEN SUIT AGAINST MALEAU UNDER THE CWA BECAUSE HE IS NOT A CITIZEN AS REQUIRED BY THE STATUTE

The CWA provides that "any *citizen*" is authorized to bring a civil action under its citizen suit provision. 33 U.S.C. § 1365(a) (emphasis added). The CWA defines a "citizen" as "a *person* or *persons* having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g) (emphasis added). Congress has specifically defined the term "person" in the general definitions section of the CWA as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a state, or any interstate body." 33 U.S.C. § 1362(5) (2012). Bonhomme is not a United States citizen, but rather is a foreign national. (R. at 8). As such, Bonhomme is not entitled to bring a citizen suit against Maleau because he does not satisfy the fundamental requirement of a citizen suit plaintiff—a plaintiff with the legal status of a "citizen" of the United States. To allow Bonhomme to maintain a citizen suit against Maleau would defy the Congressional intent to limit authorized citizen suits to those suits

brought by U.S. citizens. Therefore, this Court should affirm the district court's decision to grant Progress' and Maleau's motion to dismiss Bonhomme's citizen suit against Bonhomme.

"Statutory interpretation begins with the plain language of the statute." *United States v. Hanousek*, 176 F.3d 1116, 1120 (9th Cir. 1999) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The words of the statute should be interpreted as having "their natural, plain, ordinary and commonly understood meaning" unless Congress shows a different intent. *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (citing *Malat v. Riddell*, 383 U.S. 569, 571–72 (1966)). According to Black's Law Dictionary, the ordinary meaning of the word "citizen" is "[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 . . . ." *Black's Law Dictionary* 278 (9th ed. 2009). Applying this definition to the use of the term in a U.S. law implies the meaning of a person who is a born or naturalized member of the United States. Therefore, the plain language shows Congressional intent to limit the authority of the citizen suit provision to persons who are citizens of the United States. Bonhomme is not a citizen under the ordinary meaning of the word "citizen," and because Congress did not extend the meaning of "citizen" to include non-U.S. citizens in section 505, he is not entitled to maintain a citizen suit against Maleau.

A. Congress did not intend to deprive the term "citizen," as used in 33 U.S.C. § 1365, of its fundamental meaning by defining "citizen" with the broader term "person" as defined in 33 U.S.C. § 1362.

The term "citizen" is limited in that it would require the plaintiff to be a human person. Congress went on to include in the definition of "citizen," the separately defined term, "person." 33 U.S.C. §§ 1362(5), 1365(g). Congress intended to remedy the perceived limit on the term "citizen" by defining a citizen using the separately defined term "person" as that term is used

throughout the CWA. Under section 502 of the CWA, a "person" includes other legal entities beyond the natural person, such as corporations, states, and other enumerated governmental and associational bodies. 33 U.S.C. § 1362(5). Under this expanded definition of "citizen," states, such as Progress, are authorized to bring citizen suits. 33 U.S.C. § 1362(5). Despite its use of the term "person" to extend citizen suit authorization to these other entities, such as states, Congress did not intend to completely abrogate the purpose and meaning of the term "citizen" as Bonhomme suggests. (R. at 8). The United States Supreme Court addressed this issue with respect to Congress' use of the term "navigable waters" in section 404 of the CWA and its broad interpretation as including "waters of the United States" under the term's definition in section 502. 33 U.S.C. §§ 1344(a), 1362(7) (2012); *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (*SWANCC*). The Supreme Court reasoned that simply because a statutory term was written to have a "limited effect" did not mean that the term must have "no effect." *SWANCC*, 531 U.S. at 172. Bonhomme is asking this Court to interpret Congress' use of the term "person" to broaden the scope of the term "citizen" in such a way that "citizen" would lose its ordinary meaning. (R. at 8). The Supreme Court held that "Congress' separate definitional use of the phrase 'waters of the United States' [did not constitute] a basis for reading the term 'navigable waters' out of the statute." *Id.* Even though a term may have "limited import," Congress' decision to include the term indicates its intent to convey the limited meaning that it carries. *See id.* (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985)). Congress chose to use the words "any citizen," and even though the use of "person" in the "citizen" definition gives "citizen" a limited meaning, it still carries the essential meaning that Congress intended—the limit of the availability of citizen suits to plaintiffs who are domestic persons.

When Congress has intended a term to extend beyond its ordinary meaning, it has defined the term separately. *See, e.g.*, 33 U.S.C. § 1362(3). Under the rules of statutory interpretation, Congress' lack of further definition must be read as Congress' intent for the term to carry only its ordinary meaning. *See Hanousek*, 176 F.3d at 1120–21 (holding that Congress' failure to define the term "negligently" in the CWA requires the presumption that Congress only intended the term to convey its ordinary meaning). Courts have recognized that action by Congress to include "'particular language in one section of a statute'" while leaving it out of "'another section of the same Act'" shows "'that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *Wong Kim Bo*, 472 F.2d at 722)). In this case, Congress expounded on the term "citizen" by incorporating the CWA's statutory definition of a "person." Congress stopped there, however, and this action presumably signifies Congress' intentional exclusion of any other variations from the ordinary meaning of "citizen." On the other hand, Congress went further in defining other terms under section 502 of the CWA. *See* 33 U.S.C. § 1362. For example, Congress defined "State" as including other territorial bodies that would not fall under the ordinary meaning of the fifty states of the United States, such as Puerto Rico and the Virgin Islands. 33 U.S.C. § 1362(3). Furthermore, Congress defined "municipality" as specifically those which have "jurisdiction over disposal of sewages, industrial wastes, or other wastes" and as including Indian tribes, where those inclusions would not otherwise have been clear from the ordinary meaning of the word "municipality." 33 U.S.C. § 1362(4). Congress' failure to specifically define "citizen" as a citizen of any community other than the United States shows Congress' intent that the term express its ordinary meaning.

B. When Congress has intended a particular statute to apply to foreign nationals, it has expressly provided for such applicability in the statute.

In other legislation, beyond the express inclusion or exclusion of defined terms in the CWA, Congress has shown its intent and ability to create provisions allowing non-U.S. citizens to file suit in federal court. *E.g.*, 28 U.S.C. §§ 1332, 1350 (2012). For example, Congress allows an "alien" to bring a federal suit for a tort "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. If Congress had intended to allow aliens, such as Bonhomme, to bring citizen suits, it could have included similar express language in the CWA statute, but it chose not to. Additionally, for purposes of filing a suit in federal court on the basis of diversity jurisdiction, Congress has allowed suits involving "citizens of a State" and "citizens or subjects of a foreign state" as opposing parties. 28 U.S.C. § 1332. Under the statute for diversity jurisdiction, where Congress intended "citizen" to carry a meaning other than a citizen of the United States, Congress employed language to convey this different meaning, by using modifying words such as "of a State" and "of a foreign state." 28 U.S.C. § 1332. Allowing an interpretation that would read the term "citizen" out of the citizen suit provision of the CWA, thereby allowing a suit by an "alien" where Congress did not so specifically provide, would violate Congressional intent. Therefore, this Court should affirm the dismissal of Bonhomme's citizen suit based on the plain language of the statute because Bonhomme is not a citizen of the United States, as required of a proper citizen suit plaintiff.

III. THE OVERBURDEN PILES ON MALEAU'S PERSONAL PROPERTY ARE NOT POINT SOURCES, AND THEREFORE ARE NOT REGULATED BY 33 U.S.C. § 1342 (NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM)

This Court should affirm the decision of the district court and find that the overburden piles on Maleau's property cannot constitute a point source under the CWA. 33 U.S.C. § 1362.

Bonhomme alleges that the mining waste piles found on Maleau's property are "point sources" as defined by the CWA. (R. at 8). The district court stated that it would "find for Maleau" on this issue because the overburden piles do not fall within the Congressional definition of a point source (R. at 10). For the reasons set forth below, this Court should affirm.

The CWA prohibits any discharge of any pollutant into a navigable water, and defines the "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1311, 1362(12) (2012). Congress has defined a point source to be "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft . . . ." 33 U.S.C. § 1362(14); 40 C.F.R. § 144 (2013). Where a pollutant is "discharged" into a "navigable water," the owner or operator must obtain a NPDES permit under the CWA. 33 U.S.C. § 1342 (2012). Because the piles in question fall outside of these statutory definitions of point source, Maleau did not violate the CWA when he did not apply for a NPDES permit.

A. Piles alone do not qualify as a point source under the statutory definition of 33 U.S.C. § 1311.

The plain language of the statute supports Congress' intent to exclude overburden piles from regulation as a point source. 33 U.S.C. § 1311. First, a pile cannot be categorized as a conveyance as provided under the CWA. 33 U.S.C. § 1362. Second, canons of statutory construction suggest that even where a list is not exhaustive, items expressly excluded were excluded by choice; here, Congress detailed a conveyance to be man-made and designed to channel water, and thus, intentionally excluded overburden piles from the definition of a point source. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (articulating the canon of *expressio unius est exclusion alterius*, or the expression of one thing is the exclusion of another).

Finally, courts have interpreted point source as defined in section 502 to exclude the isolated piles like those found on Maleau's property. *See Consolidation Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979).

A conveyance is defined as the action or process of transporting something from one place to another. *Black's Law Dictionary* 148 (9th ed. 2009). Bonhomme contends that these piles are the conveyors of arsenic into the water in Ditch C-1. (R. at 5). Although a pile may be discernible and discrete, it cannot act as the conveyor because the pile alone cannot transport anything from one place to another. It is *rainwater* that flows over the piles and percolates through them. (R. at 5). The Environmental Protection Agency (EPA) has recognized that storm water can act as a conveyance, and has established particular guidelines associated with storm-water runoff. *See* 40 C.F.R. § 122.26 (2013) (generally exempting storm water discharge from NPDES permitting).

That an overburden pile is not a conveyance regulated under the NPDES provision is supported by the list of items included by Congress as "discernible, confined and discrete conveyances." 33 U.S.C. § 1362(14). Congress defined point source through a non-exhaustive list including any "pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated feeding operation or vessel." *Id.* While Congress stated that the list is not limited, the doctrine of *inclusion unius est exclusion alterius* (the inclusion of one is the exclusion of another) suggests that Congress intended a point source to be a man-made structure or system that intentionally manipulates the flow of water. *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) (holding Congress did not intend for human beings to be included in the definition of a point source).

This canon of *expression unius* depends upon the identification of "a series of two or more terms or things that should be understood to go hand in hand . . . [it] support[s] a sensible inference that the term left out must have been meant to be excluded." *Barnhart*, 537 U.S. at 168 (2003) (analyzing and applying the doctrine to the Retiree Health Benefits Act). "This statute only has force when the items expressed are members of an 'associated group or series.'" *Id.* (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (citations omitted). The "words used to define [point source] and the examples given ('pipe, ditch, channel, tunnel, conduit, well, discrete fissure,' etc.) evoke images of physical structures and instrumentalities that systematically act as a means to convey pollutants from an industrial source in navigable waterways." *Plaza Health Labs.*, 3 F.3d at 646. The series provided by Congress in the CWA was intended to include "water which is collected or channeled by man; discharges through pipes, sewers or other conveyances . . . [and] does not include an addition of pollutants by any 'indirect discharger.'" 40 C.F.R. § 122.2 (2013). This doctrine prescribes exclusion of overburden piles from the definition of a point source because Congress had not intended overburden piles to go "hand in hand" with "collected or channeled" water or "discharge through pipes, sewers or other conveyances." *Id.* Overburden piles cannot reasonably be read into the CWA's definition of a point source.

B. Storm water runoff is a nonpoint source as defined by the CWA and EPA regulations.

A NPDES permit is not required for surface water runoff that "does not fit within the statutory definition of a point source." *Consolidation Coal*, 604 F.2d at 249 (holding that the EPA cannot bring storm water runoff into the definition of point source because to do so would obviate Congress' distinction between point and nonpoint source). Storm water percolates through overburden piles found on Maleau's property and may act as a conveyance. (R. at 5).

"[D]ischarges composed entirely of storm water" do not require a NPDES permit, unless the "discharge [is] associated with industrial activities" or the discharge is "collected and channeled by man." 33 U.S.C. § 1342(p)(2)(B) (2012) (Industrial Storm Water Rule); 40 C.F.R. § 122.2 (subjecting collected and channeled runoff to a NPDES permit). The storm water runoff from Maleau's overburden piles are neither collected nor channeled, and fall outside the Industrial Storm Water regulation scheme. Therefore, the piles are not a point source and are not subject to NPDES regulations.

Bonhomme incorrectly cites *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980), in support of his contention that the storm water from Maleau's overburden pile is point source; the facts of *Abston* are substantially distinguishable from the facts sub judice—Maleau's piles are not part of a man-made system used to collect or channel runoff. *Abston* is but one in a litany of cases that holds piles *alone* cannot be point sources of pollutants. *Id.* (discussing a situation where miners constructed sediment basins to collect storm water runoff). Additional judicial decisions can be read in furtherance of the EPA's conclusion that storm water runoff must be "*collected* or *channeled* by the operator" to constitute "a point source discharge." *Abston*, 620 F.2d at 45 (emphasis added) (holding that the gravity flow of surface runoff may be a point source discharge if the miner "at least initially collected or channeled the water); *see also Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009) (requiring storm water runoff to be collected or channeled per EPA regulation); *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (a NPDES permit is required for "surface runoff that is collected or channeled"); *United States v. Earth Scis.*, 599 F.2d 368, 374 (10th Cir. 1979) (finding a point source amidst the combination of sumps, ditches, hoses, and pumps used to serve a mining operation); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373

(4th Cir. 1976) (holding that Congress' definition of a point source "does not include unchanneled and uncollected surface waters"); *Reynolds v. Rick's Mushroom Serv., Inc.*, 246 F. Supp. 2d 449, 457 (E.D. Penn. 2003) (determining that the defendants designed a system to collect and channel the wastewater and would therefore be regulated as a point source).

The logic of the Court in *Abston* is consistent with the EPA's regulation of a point source. 620 F.2d at 45. To fall under the NPDES permitting scheme, a person must *discharge* a pollutant. 33 U.S.C. § 1311. In 1983, the EPA further clarified "discharge of a pollutant" includes surface runoff which is collected or channeled by man." 40 C.F.R. § 122.2. The EPA's regulations define the extent to which surface runoff can constitute a point source pollution—where storm water is collected or channeled. *Id.*

The EPA's regulations should be accorded *Chevron* deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (determining a court's review of an agency's construction of a statute consists of a two part test: whether Congress has directly spoken on the question at issue, and whether the statute is silent or ambiguous with respect to the specific issue). The Second Circuit evaluated the EPA's regulation of collected and channeled storm water, and determined that: (1) Congress has not directly addressed the circumstances in which storm water is to be regulated as a point source; and (2) the EPA's interpretation of the CWA was reasonable, and thus instructs the Court to grant deference. *Cordiano*, 575 F.3d at 221 (citing *Estate of Landers v. Leavitt*, 545 F.3d 98, 106 (2d Cir. 2008)). This Court should also defer to the EPA's conclusion that storm water runoff can only be regulated under the NPDES permit where it is channeled or collected. Maleau does not channel or collect the storm water on his property; therefore, he is not subject to NPDES permitting.

The second instance in which storm water can be regulated is through the Industrial Storm Water Rule. *See* 33 U.S.C. § 1342(p). The EPA has interpreted the Industrial Storm Water Rule to include discharge from "any conveyance that is used for collecting and conveying storm water" and is directly related to "manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. 122.26(14). The EPA listed industries that would be required to obtain a NPDES permit for their storm water runoff, including "active or inactive mining operations." *Id.* The Supreme Court considered the extent of the Industrial Storm Water Rule as it applies to silviculture. *See Decker v. Nw. Envtl. Defense Ctr.*, 133 S. Ct. 1326 (2013). Here the Court agreed with the EPA that the "inclusion of logging [as an industrial activity] need not be read to extend to all discharges from logging sites," and that the Industrial Storm Water Rule's "reach may be limited by the requirement that the discharge be 'directly related to manufacturing, processing, or raw materials storage areas at an industrial plant.'" *Decker*, 133 S. Ct. at 1337. The EPA argued, and the Court agreed, that the logging operation in question was not of the "fixed and permanent" nature of "an industrial plant" as required by the Storm Water Rule. *Id.* at 1336–37. The EPA further maintained that the activity within the "regulation's scope . . . could still require the discharges to be related in a direct way to operations 'at an industrial plant.'" *Id.* at 1337.

In *Decker v. Northwest Environmental Defense Center*, 133 S. Ct.1326, 1337 (2013), the Court granted the EPA's reading of the Industrial Storm Water Rule *Auer* deference, which states that an "agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court . . . defers to it unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The Court believed that the EPA

reasonably concluded that the logging site needed "to be more fixed and permanent . . . and have a closer connection to traditional industrial sites" to fall within the regulation of the rule. *Id.*

This Court should apply the logic of *Decker* to Maleau's overburden piles: Maleau was required to secure NPDES permits for the "discharges of channeled storm water runoff only if the discharges were 'associated with industrial activity'. . . . Otherwise, the discharges fall within the [CWA's] general exemption of 'discharges composed entirely of storm water' from the NPDES permitting scheme." *Id.* at 1336 (citing 33 U.S.C. § 1342(p)(1)). While mining is classified as an industrial activity, it still must be directly related to the manufacturing, processing, or storage of raw materials at an industrial plant. 40 C.F.R. § 434.11(b)(14)(iii) (2013). Maleau's piles, like the logs in *Decker*, do not directly relate to activity *at an industrial plant*. 133 S. Ct. at 1337. Maleau's piles are located on his personal property; therefore, Maleau does not need a NPDES permit. (R. at 5).

This Court should find that Congress did not intend to include "pile" into the statutory definition of a point source. The storm water that acts as a conveyance is exempted from the definition of a point source. Because the storm water is not classified as an "industrial activity," nor is it channeled or collected, it is not regulated. 33 U.S.C. § 1342(p)(1); 40 C.F.R. § 122.2.

C. <u>The waste piles are nonpoint source pollution, and therefore Maleau is not required to obtain a NPDES permit under 33 U.S.C. § 1342.</u>

"Congress consciously distinguished between point source and nonpoint source discharges, giving EPA authority under the [CWA] to regulate only the former." *Appalachian Power Co.*, 545 F.2d at 1373. A nonpoint source is "caused by rainfall or snowmelt moving over and through the ground" where it "picks up and carries away natural and human-made pollutants

and deposit[s] them into [bodies of water]."[1] This definition describes the process occurring on Maleau's property: the flow of rainfall results in discharge of material. Because Maleau's property is not an industrial site, and because Maleau does not intentionally collect and channel the rainwater, then a NPDES permit is not required. 33 U.S.C. § 1342.

Nonpoint sources are exempt from NPDES permits. 33 U.S.C. § 1342. Because the runoff from Maleau's overburden piles does not satisfy the definition of point source, then the runoff shall be regulated under a separate statute for nonpoint sources, which delegates the power to regulate to the states. 33 U.S.C. § 1329 (2012). This Court should affirm the district court's conclusion that Maleau is not in violation of the CWA because the piles are not point sources regulated by the NPDES permitting scheme.

IV. DITCH C-1 IS NOT A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER THE CWA

Bonhomme alleges that Ditch C-1 (the Ditch) is a "navigable water" under the CWA, thus subjecting the Ditch and activities affecting the Ditch to federal regulation. The Ditch is not a "navigable water" because the plain language of the CWA instructs that the Ditch is properly classified as a "point source," and the Ditch is not connected to a water that is navigable-in-fact, which is required in order for a non-navigable feature, such as the Ditch, to be deemed a "navigable water."

A. The Ditch should be classified as a point source under the plain language of the CWA and a reasonable interpretation of such language.

The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to *any . . . ditch . . .* from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (emphasis added). From this language, the plurality in

[1] Office of Water, U.S. Envtl. Prot. Agency, EPA-841-F-94-005, *Polluted* (1994).

Rapanos v. United States, 547 U.S. 715, 735 (2006), stated that "the definitions [in the CWA] thus conceive of 'point sources' and 'navigable waters' as separate and distinct categories." As the plurality noted, by using the term "waters" and not "water" when explaining over which bodies Congress sought to exert jurisdiction, it is clear that Congress was referring to the more commonly understood bodies such as oceans, rivers, and lakes that form geographic features, and not the drainage ditches that are express examples of point sources. *Id*. at 732–733. This interpretation aligns with previous Supreme Court precedent that stated the term "waters of the United States" refers to "rivers, streams, and other hydrographic features more conveniently identifiable as 'waters.'" *Riverside Bayview*, 474 U.S. at 131. While the Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985), held that a wetland was a navigable water due to the difficulty in drawing a boundary between the wetland and the "water," the plurality in *Rapanos v. United States*, 547 U.S. 715, 735 (2006) (quoting *Riverside Bayview*, 474 U.S. at 132), explained that this does not mean that "waters" "should be expanded to include, in their own right, entities other than 'hydrographic features more conventionally identifiable as 'waters.'"

Whether the Ditch has a relatively continuous flow of water is also not dispositive that it is a "navigable water" because, "a relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." *Id.* at 736 n.7. While a conduit of water may frequently flow, more is required in order to classify that conduit as a traditionally recognized body of water, let alone a "navigable water" under the CWA.

The *Rapanos* plurality explained that while "navigable waters" is ambiguous to a degree, when coupled with a plain definition of "point source" that names features such as the Ditch at issue, such an extravagant interpretation of the Ditch as a "navigable water" is not reasonable.

See id. at 752. "[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations." *Id.*

Even if the term "navigable waters" were ruled to be ambiguous, this Court should consider that an interpretation that absorbs the Ditch within the definition of "navigable waters" would "result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 738 (quoting *SWANCC*, 531 U.S. at 174). As explained as one of the core goals and purposes of the CWA, "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . . ." 33 U.S.C. § 1251(b). A broad interpretation of "navigable waters" such as the one proposed by Progress and Bonhomme, would bring "virtually all 'plan[ning of] the development and use . . . of land and water resources' by the States under federal control." *Rapanos*, 547 U.S. at 737 (quoting 33 U.S.C. § 1251(b) (2012)). In the case at bar, the Ditch has been in existence since 1913, and restrictive covenants require the landowners to maintain it. (R. at 5). If the Ditch is found to be a "navigable water," these landowners will be subject to federal regulations every time they alter, repair, or maintain the Ditch because it might be seen as "construction" that requires a permit, rather than mere maintenance, which is allowed under 40 C.F.R. § 232.3(c)(3) (2013). Such covenants and activities are clearly in the purview of State interests. Land use and development is a "quintessential state and local power" that is not to be intruded upon short of a "clear and manifest" statement from Congress. *Rapanos*, 547 U.S. at 738. Under the plain language of the CWA and its stated intent, it is reasonable to understand that Congress expressly opposed such interpretations. For the foregoing reasons, this Court should affirm the lower

court's ruling that the Ditch is not a "navigable water," and is properly classified as a "point source."

B. Ditch C-1 cannot be considered a "navigable water" because it does not have a connection to traditionally, navigable-in-fact waters.

As the Supreme Court discussed in *Rapanos* and *SWANCC*, the term "navigable" is given limited effect in the defined term "navigable waters." 547 U.S. at 734; 531 U.S. at 167. However, both Courts also explained that "navigable" is not "devoid of significance" and is not to be read out of the CWA entirely. *Rapanos*, 547 U.S. at 734; *SWANCC*, 531 U.S. at 172. The remnant significance of the term "navigable" is that the body of water at issue, although it is not itself navigable, must have a connection between it and a body of water that is navigable-in-fact. *See Rapanos*, 547 U.S. at 726, 742; *SWANCC*, 531 U.S. at 167–168, 171, 172. In *Rapanos*, the ditches had a possible connection to navigable-in-fact waters. *See Rapanos*, 547 U.S. at 729. However, Ditch C-1 in this case is only connected to a culvert on Bonhomme's property, which is connected to Reedy Creek, a body of water that is not navigable-in-fact. (R. at 5, 9). It is undisputed that Reedy Creek is not connected to a navigable-in-fact body of water, which conclusively rules out the Ditch as a "navigable water."

In conclusion, the Ditch cannot be a "navigable water" because the plain language of the CWA classifies it as a "point source," judicial canons of statutory interpretation reject such expansive interpretations that invade State interests, and such a classification would be opposed to Supreme Court precedent.

V. REEDY CREEK IS NOT A "NAVIGABLE WATER/WATER OF THE UNITED STATES" UNDER THE CWA

Reedy Creek is not a navigable water—it is not used, nor has it ever been used for waterborne transportation, nor could it with reasonable improvements. *See United States v.*

Appalachian Elec. Power Co., 311 U.S. 377, 407–408 (1940). Reedy Creek is also not connected physically or by a substantial nexus to any traditionally navigable water.[2] This is the requirement in order for a water to be a "navigable water" as decided by the United States Supreme Court. *See Rapanos*, 547 U.S. at 742; *SWANCC*, 531 U.S. at 168; *Riverside Bayview*, 474 U.S. at 134. Progress and Bonhomme argue that Reedy Creek is a "navigable water" within the meaning of the CWA for various other reasons that either have no basis under Congress' enumerated powers, reasons that have already been struck down by the Supreme Court, or for reasons that are at odds with the guidelines given by the Supreme Court. For these reasons, this Court should overturn the ruling of the lower court that Reedy Creek is a "navigable water."

A. Reedy Creek cannot be a "navigable water" merely based on its interstate nature.

It is universally accepted that the federal government can "exercise only the powers granted to it." *McCulloch v. Maryland,* 17 U.S. 316, 405 (1819). The power to regulate "navigable waters" is derived from Congress' power to regulate the channels of commerce under the Commerce Clause in Article I, Section 8, Clause 3 of the Constitution. *See Riverside Bayview,* 474 U.S. at 133; *The Daniel Ball*, 77 U.S. 557, 563–64 (1870). It is beyond constitutionally granted powers for Congress or the EPA to subject a water to federal authority only based on that water's interstate nature without any mention of commerce, as Progress and Bonhomme seek to do. Even under the most expansive view of "navigable waters" it would still be required that the body of water have a connection to commerce. *See* 40 C.F.R. § 122.2. For the foregoing reasons, this Court should overturn the lower court's ruling that Reedy Creek can be considered a navigable water solely because it spans more than one state.

[2] The Buena Vista River, which is a traditionally navigable water, is fifty miles away, and it has not been alleged, nor is there any evidence that there is a connection between Reedy Creek and the Buena Vista River or that any pollutant associated with Maleau's mining activities at either of his sites has reached the Buena Vista River. (R. at 5, 7).

B. Waters such as Reedy Creek that have no connection to traditionally, navigable in-fact waters, cannot be considered "navigable waters."

1. Congress did not intend to exert its full commerce power in the CWA.

"For a century prior to the CWA [the United States Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the [CWA's] predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so." *Rapanos*, 547 U.S. at 723 (citing *The Daniel Ball*, 77 U.S. at 563). This is the classical understanding of "navigable," which stems from Congress' power to regulate the channels of commerce. *See Caminetti v. U.S.*, 242 U.S. 470, 491 (1917). When Congress passed the CWA, it again sought to regulate the "navigable waters of the United States." *See* 33 U.S.C. § 1362(7), (12)(A). It is against this historical backdrop that this Court should view the disputed terms and their relation to Congress' broader commerce power.

In recognizing Congress' approval to include those waters "inseparably bound up with the 'waters' of the United States," the Supreme Court noted, the term "navigable" is of limited import, and the term "navigable waters" encompasses more than these traditionally navigable waters that are navigable in-fact. *Rapanos*, 547 U.S. at 731; *SWANCC*, 531 U.S. at 167; *Riverside Bayview*, 474 U.S. at 132–33. However, those Courts also noted that "it is one thing to give a word limited effect and quite another to give it no effect whatever." *SWANCC*, 531 U.S. at 172. A basic tenet of statutory interpretation says a "statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). And in fact, the *SWANCC* Court ruled that "a separate definitional use of the phrase 'waters of the United States' [does not constitute] a basis for reading the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. The Court further stated that "the term 'navigable' has at least the import of showing [the Court] what Congress had in mind

as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*

Had Congress intended to confer its entire commerce power, Congress could have used unqualified language to reach all waters "affecting commerce," which "signal[s] Congress' intent to invoke its full authority under the Commerce Clause. *Jones v. United States*, 529 U.S. 848, 854 (2000). Congress did exactly that in another statute that used the term "navigable waters." *See* 16 U.S.C. § 817(1) (2012). In that statute, Congress sought to exert its commerce power over truly navigable waters and also over those waters that were not navigable in fact, but would affect "the interests of interstate or foreign commerce." *Id.* Also, in recent efforts to amend the CWA, bills have been proposed to "provide protection to the waters of the United States to the fullest extent of the legislative authority of Congress under the Constitution." *See, e.g.*, Clean Water Restoration Act of 2007, H.R. 2421, 110th Cong. § 2(3) (2007). The CWA, however, *does* qualify its jurisdiction by limiting it to "navigable waters," and provides this Court with further evidence of the intention to not exert Congress' full commerce power by stating that: "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The regulation of land use, on which this Court is ultimately asked to rule, is a "quintessential state and local power." *Rapanos*, 547 U.S. at 738 (citing *FERC v. Mississippi*, 456 U.S. 742, 767–68, n.30 (1982)). Intrusion into these areas of state and local law generally require a "'clear and manifest' statement from Congress" authorizing them. *Rapanos*, 547 U.S. at 738 (quoting *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994)). To the contrary, the CWA contains an express purpose to not intrude into such areas. 33 U.S.C. § 1251(b). Therefore, Congress did *not* intend to cover waters such as Reedy

Creek, which are not navigable and are not connected in any way to traditionally navigable waters.

2. *SWANCC's* holding limits CWA jurisdiction beyond the "Migratory Bird Rule."

The *SWANCC* Court reviewed the Army Corps of Engineers' (the Corps) jurisdiction over a tract of land that the Corps deemed to be jurisdictional wetlands. *SWANCC*, 531 U.S. at 164–165. The Corps' basis for its assertion of power was that "waters of the United States" could be bodies of water including any intrastate body of water, wetland, or potentially any intermittently damp, low-lying area as long as it could be connected to effects on interstate or foreign commerce. *See* 33 C.F.R. § 328.3(a)(3) (2013). In the case at bar, Progress and Bonhomme seek to apply the same language under 40 C.F.R. § 122.2 to bring Reedy Creek within the jurisdiction of the CWA. (R. at 10). In *SWANCC*, the Corps sought jurisdiction pursuant to 51 Fed. Reg. 41,217 (1986), which was to "clarify" that 33 C.F.R. § 328(a)(3) included waters used by migratory birds that cross state lines. *Id.* at 164–65. The Court was asked to decide whether non-navigable, isolated waters could be considered "navigable waters," and if so, whether Congress could exercise its commerce power over these waters due to the substantial effect the migratory birds have on interstate commerce. *See id.* at 162, 165–66. The Court did not reach the commerce issue because the text of the CWA does not allow for jurisdiction over waters that are not adjacent to open waters, i.e., traditionally navigable waters. *See id.* at 162, 168. By determining that the touchstone of federal jurisdiction under the CWA is a "substantial nexus" to traditionally navigable waters, the Migratory Bird Rule was merely the vehicle by which the Court struck down the Corps' and the EPA's jurisdiction over waters that are not themselves navigable-in-fact, and are not connected in any way, via a physical connection or a substantial nexus, to waters that are navigable-in-fact. *See Rapanos*, 547 U.S. at

742; *SWANCC*, 531 U.S. at 167–68, 173. Activity substantially affecting interstate commerce may have existed in *SWANCC* because, as the court of appeals found, millions of Americans cross state lines to spend over one billion dollars to hunt and observe migratory birds. *SWANCC*, 531 U.S. at 166. The substantial effect on interstate commerce was of no import to the Court because as an initial matter, waters without a connection to traditionally navigable waters are a "far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the [CWA] by its terms extends." *Id*. at 173.

In the case at bar, Progress and Bonhomme argue that Reedy Creek falls within the jurisdiction of the CWA because of the commerce activity associated with it. (R. at 5, 10). Such facts and arguments are irrelevant in light of *SWANCC*. As the *SWANCC* dissent conceded, the ruling "invalidates the 1986 migratory bird regulation as well as the Corps' [and EPA's] jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." 531 U.S. at 176–77. Additionally, part of the Migratory Bird Rule that was struck down in *SWANCC* attempted to exert jurisdiction over waters that are "[u]sed to irrigate crops sold in interstate commerce." 51 Fed. Reg. 41,217. Progress and Bonhomme seek to resurrect this invalid rule in this case. The *SWANCC* Court refused to consider jurisdiction over non-navigable waters that are isolated from traditionally navigable waters based on commercial effects because such waters are outside the statute's plain language that requires "navigable" to have at least some residual meaning. *See* 531 U.S. at 162, 168, 172. Regardless of economic effects, the water must be actually navigable or adjacent to an actually navigable water in order for jurisdiction to exist. Reedy Creek has none of those properties. For the foregoing reasons, this Court should overturn the lower court's decision that Reedy Creek is navigable based on interstate commerce effects.

3. Reedy Creek cannot be considered a navigable water based on its connection to the Wildman Marsh National Wildlife Refuge.

While Reedy Creek abuts the Wildman Marsh National Wildlife Preserve (the Marsh), which is federal property, the assertion of CWA jurisdiction over Reedy Creek for this reason is inappropriate. Congress expressly limited the reach of the CWA to only those waters connected to Congress' commerce power over navigation, not Congress' absolute commerce power, *see supra* Part V.B1, so such an interpretation that declares Reedy Creek to be a tributary of a "navigable water" would not be reasonable, and to consider Reedy Creek a jurisdictional water based on its connection to a wetland would be inapposite with the Supreme Court's rulings in this area as well as the plain language of the CWA.

Under either the plurality's or the concurrence's test in *Rapanos*, it is still "only those wetlands with a . . . connection to bodies that are [navigable waters] in their own right" that can be considered "such waters and covered by the [CWA]." 547 U.S. at 742. To consider Reedy Creek a jurisdictional water would negate the teaching of *Rapanos*. *Id.* As wetlands are only marginal waters and are considered "navigable" only when they are "inseparably bound up with the 'waters' of the United States, and because of the "difficulty of drawing any clear line between the [wetland and what is conventionally considered water,]" a wetland itself cannot be the body of water from which jurisdiction is seized. *See Riverside Bayview*, 474 U.S. at 132, 134. The *Rapanos* plurality summarized *SWANCC* by stating that in order for wetlands to be jurisdictional, they must be adjacent to "a relatively permanent body of water connected to traditional interstate navigable waters." 547 U.S. at 742. It is undisputed that no traditionally navigable water is adjacent to any of the waters at issue here. A ruling that waters such as Reedy Creek are jurisdictional based on the Marsh would declare a wetland to be the "navigable water" and the tributaries of such wetlands, such as Reedy Creek, to be jurisdictional due to their

connection. This is plainly at odds with the Supreme Court's precedent and the plain language of the CWA. Therefore, it is not a reasonable interpretation to consider the Marsh a "navigable water" under the CWA.

It is clear that Congress never intended to reach waters such as Reedy Creek via their connection to tracts of land in which the federal government has merely a proprietary interest without regard to the statutory boundaries that Congress clearly laid out in the CWA. For these reasons, this Court should overturn the lower court's decision to declare Reedy Creek a jurisdictional water due to its connection to the Marsh.

In conclusion, for the waters in this case, the Supreme Court of the United States has clearly interpreted the meaning and scope of terms "navigable waters" and "waters of the United States." The theories expounded by Progress and Bonhomme are invalid, as they are plainly at odds with the language of the CWA, established Supreme Court precedent, and even our Constitution. For these reasons, this Court should reverse the lower court's decision that Reedy Creek is a "navigable water/water of the United States" under the CWA.

VI. IF THIS COURT FINDS REEDY CREEK TO BE A NAVIGABLE WATER OF THE UNITED STATES, THEN BONHOMME IS IN VIOLATION OF 33 U.S.C. § 1342 FOR HIS FAILURE TO OBTAIN A NPDES PERMIT FOR HIS EFFLUENT DISCHARGE

Bonhomme is in violation of 33 U.S.C. § 1311, which prohibits the discharge of any pollutants unless compliant with the NPDES permitting scheme. 33 U.S.C. § 1342. An individual is in violation of the CWA where he (1) discharges (2) a pollutant, (3) from a point source, (4) into the navigable waters of the United States, (5) without a permit. *See United States v. Ortiz*, 427 F.3d 1278, 1282 (10th Cir. 2005). The term discharge of a pollutant describes the addition of any pollutant to navigable waters from any point source, and a point source is defined as a "discernible, confined and discrete conveyance . . . ." 33 U.S.C. § 1362(12), (14). The

culvert found on Bonhomme's property transfers water from Ditch C-1 to Reedy Creek. (R. at 9). If this Court believes that Reedy Creek *is* a navigable water, then Bonhomme is discharging arsenic into that body of water in violation of the CWA. 33 U.S.C. § 1342. Because a culvert is a point source, Bonhomme is required to obtain a NPDES permit pursuant to 33 U.S.C. § 1342. *Dague v. Burlington*, 935 F.2d 1343, 1354–55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992) (holding that a culvert was a relevant point source and the release of pond water through the culvert was a discharge, and required a permit under NPDES).

A. Bonhomme is discharging a pollutant in violation of the CWA.

Discharge is defined as "any addition of any pollutant to the waters of the United States." 33 U.S.C. § 1362(12). Bonhomme maintains that he is not discharging (or adding) any pollutant into Reedy Creek. (R. at 9). However, the Supreme Court has held that "discharge of a pollutant" includes "within its reach point sources that do not themselves generate pollutants." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 104–05 (2004). In this case, the Court rejected the water district's argument that the NPDES program "applies to a point source 'only when a pollutant originates from the point source,' and not when pollutants originating elsewhere merely pass through the point source." *Id.* at 104. Therefore, the Court has held that "discharge" of a pollutant can occur with conveyance alone through a point source. *Id.* Bonhomme's culvert is conveying a pollutant into the Reedy Creek, and meets the criteria proffered by the Supreme Court as "discharge." *Id.*

B. A culvert is clear and unambiguous point source.

A point source is a "discernible, confined and discrete conveyance." 33 U.S.C. § 1362(14). The statute further lists examples, including such items such as a "pipe, ditch, channel, tunnel, conduit . . .[or] discrete fissure." *Id.* Random House defines culvert as "a drain

or pipe that allows water to flow under a road." *Random House Unabridged Dictionary* 488 (2d ed. 2001). If a culvert is a drain or pipe, it is unequivocally defined as a point source under the CWA. 33 U.S.C. § 1362(14). A culvert is a discernible, confined and discrete conveyance of water, and therefore subject to regulation under the NPDES permitting system of the CWA. *Dague*, 935 F.2d at 1354.

Bonhomme argues that he is not in violation of the CWA because he is not required to obtain a NPDES permit. (R. at 9). Bonhomme maintains that because his culvert, a statutorily defined point source, is not the "but-for cause" of any pollutants in Reedy Creek. *Id.* This argument is irrelevant; a point source, by definition, cannot generate a pollutant. *Rapanos*, 547 U.S. at 736. Justice Scalia notes in *Rapanos* that section 502 defines "'discharge of a pollutant' as 'any addition of any pollutant *to* navigable waters *from* any point source." *Id.* (citing 33 U.S.C. § 1362(12)(A)). Thus the statute should be read to conceive of "addition of any pollutant" and "point source" as "separate and distinct categories." *Id.*

The Supreme Court has held the definition of point source "makes plain that a point source need not be the original source of the pollutant; it need only to convey the pollutant to 'navigable waters.'" *S. Fla. Water Mgmt Dist.*, 541 U.S. at 105. Bonhomme maintains that he is not the "but-for cause" of the pollutants discharged through his culvert, but this analysis is not relevant. (R. at 9). Bonhomme argues that *his* point source is not the cause of the arsenic in the water, but as noted in *Rapanos*, this is an insignificant distinction because it is *his* point source that adds a pollutant to a water of the United States. 547 U.S. at 736.

A culvert is a "classic 'point source' discharge." *Plaza Health Labs.*, 3 F.3d at 648 (holding that a human being is not a point source). Bonhomme is the owner and operator of the

culvert point source that discharges arsenic into Reedy Creek. (R. at 5). The culvert on Bonhomme's property falls under the jurisdiction of the NPDES permit. 33 U.S.C. § 1342.

CONCLUSION

This Court should hold that Bonhomme is not the real party in interest under Rule 17(a), as PMI is the real party in interest, and that Bonhomme is also not a "citizen" who can bring suit under the CWA. This Court should further hold that Maleau did not violate the CWA because mining waste piles are not "point sources," Ditch C-1 and Reedy Creek are not "navigable waters," or in the alternative, that Bonhomme violated the CWA by his addition of a pollutant through a "point source," his culvert. Therefore, this Court should affirm the district court's decision to grant Progress' and Maleau's motion to dismiss.

Respectfully Submitted,

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Counsel for Shifty Maleau