Pace Environmental Law Review Online Companion

Volume 5
Issue 1 *Twenty-Sixth Annual Jeffrey G. Miller Pace National Environmental Law Moot Court Competition*

Article 2

March 2014

2014 Bench Memorandum

TWENTY-SIXTH ANNUAL NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION
PACE LAW SCHOOL

2014 Bench Memorandum

I. REGULATORY AND FACTUAL FRAMEWORK

A. PARTIES

Jacques Bonhomme (Bonhomme), a foreign national and president and member of the board of directors of a mining company (Precious Minerals International or PMI), owns property in the State of Progress that contains the terminus of Ditch C-1 where it discharges through a culvert into Reedy Creek. Bonhomme was a plaintiff in his action against Maleau and a defendant in the action brought by the State of Progress. On appeal he is an appellant and a cross-appellee.

Shifty Maleau (Maleau), a mine operator, created piles of mining waste (overburden and slag) on his property that allegedly discharge waste, including arsenic, into Ditch C-1, which then flows through Bonhomme's property where it discharges into Reedy Creek. Maleau was a defendant in Bonhomme's action against him and an intervenor-plaintiff in Progress's action against Bonhomme. He is an appellant and cross-appellee on appeal.

The **State of Progress (Progress)** contains a portion of Reedy Creek and its terminus in Wildman Marsh, which is solely contained within Progress, and both Bonhomme and Maleau's properties. The rest of Reedy Creek is contained in the State of New Union. Progress was a plaintiff in its action against Bonhomme and is an appellant and cross-appellee on appeal.

B. APPLICABLE RULES OF LAW

- U.S. CONST. art. IV, § 3, cl. 2.
- Fed. R. Civ. P. (17)(a).
- Federal Water Pollution Control Act (CWA) § 101, 33 U.S.C. § 1251 (2012).
- CWA § 301, 33 U.S.C. § 1311 (2012).
- CWA § 502, 33 U.S.C. § 1362 (2012).
- CWA § 505, 33 U.S.C. § 1365 (2012).
- 40 C.F.R. § 122.2 (2013).

C. SUMMARY OF FACTS

The undisputed facts established in the court below are as follows:

Reedy Creek begins in the State of New Union and flows 50 miles, eventually entering Progress and flowing into Wildman Marsh. Reedy Creek is used as the water supply for Bounty Plaza, a service area in New Union on a federally-funded interstate highway and as irrigation in both states for agricultural products that are sold in interstate commerce. Reedy Creek is not used and has never been used for waterborne transportation, and could not be so used with reasonable improvements. Wildman Marsh, wholly located in Progress and mostly contained in Wildman National Wildlife Refuge, is an extensive wetlands and an essential stopover for migratory waterfowl. Hunters from around the nation are drawn to the Marsh and add over $25 million to the local economy.

Bonhomme, a foreign national and the President and a member of the board of directors and largest shareholder of Precious Metals International (PMI), owns property in Progress that fronts the Marsh. He used the hunting lodge on the property up to eight times a year for hunting parties primarily consisting of business clients and associates of PMI; however, his use of the lodge has decreased in recent years to two times a year. The parties dispute the cause of his decreased use – Bonhomme asserts that it is due to his fear of the arsenic in the Marsh, while Maleau and Progress assert it is due to PMI's decline during the recent recession.

Ditch C-1 is a drainage ditch that contains running water except during annual periods of drought lasting from several weeks to three months. One average, it is three feet wide and one foot deep. The Ditch first flows through Maleau's property in Jefferson County and then continues through several agricultural properties before it runs through Bonhomme's property where it empties into Reedy Creek via a culvert.

Maleau operates a gold mine in Lincoln County, Progress along the Buena Vista River, but trucks the overburden and slag to his property in Jefferson County, Progress. Maleau places the piles of mining waste adjacent to Ditch C-1. When it rains, the rainwater percolates through the piles, eroding channels from the piles leading to Ditch C-1. These gravity-eroded channels carry arsenic and rainwater from the piles into Ditch C-1, which in turn carries the arsenic to Reedy Creek.

Upstream of Maleau's property, arsenic is undetectable in Ditch C-1; however, downstream of his property, arsenic is present in high levels. Additionally, in Reedy Creek, arsenic is undetectable upstream of Ditch C-1, but is present downstream of Ditch C-1 and in Wildman Marsh. Moreover, the U.S. Fish and Wildlife Service has detected arsenic in three Blue-winged Teal ducks in Wildman Marsh.

Bonhomme sued Maleau under the citizen suit provision of the CWA for Maleau's arsenic discharges into Ditch C-1 and Reedy Creek in violation of § 301(a). After proper notice, Progress filed a citizen suit against Bonhomme alleging that he was in violation of CWA § 301(a) by discharging arsenic from his culvert into Reedy Creek. Maleau intervened in Progress's action against Bonhomme as a matter of right under § 505(b)(1)(B). The cases were consolidated because the facts and law are the same. The defendant in each suit filed motions to dismiss.

On July 23, 2012, the district court granted Progress's and Maleau's motion to dismiss and denied Bonhomme's motion to dismiss, holding that (1) Bonhomme is not a real party in interest under the Federal Rules of Civil Procedure (FRCP) 17(a); (2) Bonhomme is not a citizen as defined in CWA §§ 505(g) and 502(5); (3) Maleau's waste piles are not point sources; (4) Ditch C-1 is not a jurisdictional water of the United States; (5) Reedy Creek is a jurisdictional water of the United States; and (6)

Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property regardless of whether Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

II. ISSUES

The parties have been ordered to brief the following issues on appeal:

- **Whether Bonhomme is the real party in interest under FRCP 17 to bring a suit against Maleau for violating § 301(a) of the CWA.**
  - Maleau and Progress argue that PMI, not Bonhomme, is the real party in interest.
  - Bonhomme argues that he is the real party in interest.
- **Whether Bonhomme—a foreign national—is a "citizen" under CWA § 505 who may bring suit against Maleau.**
  - On appeal, Maleau and Progress argue that Bonhomme is not a "citizen" under CWA § 505 and thus may not bring suit against Maleau.
  - Bonhomme argues that he is a "citizen" under CWA § 505 and thus may bring a suit against Maleau.
- **Whether Maleau's mining waste piles are "point sources" under CWA § 502(12) & (14).**
  - On appeal, Maleau and Progress argue that Maleau's mining waste piles are not point sources.
  - Bonhomme argues that Maleau's waste piles are point sources.
- **Whether Ditch C-1 is a water of the United States under CWA § 502(7) & (12).**
  - On appeal, Bonhomme and Progress argue that Ditch C-1 is a water of the United States.
  - Maleau argues that Ditch C-1 is not a water of the United States.
- **Whether Reedy Creek is a water of the United States under CWA § 502(7) & (12).**
  - On appeal, Bonhomme and Progress argue that Reedy Creek is a water of the United States.

  - Maleau argues that Reedy Creek is not a water of the United States.
- **Whether Bonhomme violates CWA § 301(a) by adding arsenic to Reedy Creek through a culvert on his property even if Maleau is the but-for cause of the presence of arsenic in Ditch C-1.**
  - On appeal, Maleau and Progress argue that Bonhomme is in violation of CWA § 301(a) because Bonhomme is the owner of the culvert discharging into Reedy Creek.
  - Bonhomme argues that Maleau is in violation of CWA § 301(a) because Maleau is the but-for cause of the presence of arsenic in Ditch C-1.

[See pages 22-23 for tables showing the parties' procedural postures and general arguments by issue.]

III. FRCP 17(A)—DID THE LOWER COURT ERR IN HOLDING THAT BONHOMME WAS NOT THE REAL PARTY IN INTEREST TO BRING SUIT AGAINST MALEAU FOR VIOLATING § 301 OF THE CWA, 33 U.S.C. § 1311?

Bonhomme argues that he is the real party in interest under Federal Rule of Civil Procedure (FRCP) 17(a) and that the court below erred in granting Progress' and Maleau's motion to dismiss on this issue. **Maleau and Progress** argue that Precious Metals International (PMI) is the real party in interest under FRCP 17(a) and that the court below did not err in granting their motion to dismiss on this issue.

Under FRCP 17(a), "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. (17)(a). The purpose of this requirement is to direct the court's "attention to whether the plaintiff has a significant interest in the particular action he has instituted." 6 CHARLES ALLAN WRIGHT, ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE, § 1542 (3d ed. 1998). The plaintiff has a significant interest in an action when he holds a substantive right to be enforced. *See Farrell Const. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990). To determine Bonhomme's substantive rights, the parties

must look to CWA § 505, 33 U.S.C. § 1365, which states that "any person or persons having an interest which is or may be affected" may bring an action on his behalf. *See* 6 WRIGHT & MILLER, *supra*, § 1544, at 639 (stating that where federal statutes create a substantive right of action, the issue of whether the plaintiff is a real party in interest must be resolved by looking to federal law).

Bonhomme will argue that although he is associated with PMI, he is still the real party in interest in this action as he has "an interest which . . . is affected." Bonhomme should recognize that his property has ties with PMI, but he should emphasize the economic ramifications on his ownership and use of his property in addition to his environmental interest in using the Marsh to hunt. *See* 118 CONG. REC. 33,699-700 (1972) (remarks of Sen. Edmund Muskie) (Congress intended that a proper interest under CWA § 505 can be economic, aesthetic, or environmental).

Bonhomme owns a hunting lodge that fronts Wildman Marsh, which he contends has been negatively affected by the discharge of arsenic. While Bonhomme does not reside at the hunting lodge, he is the owner of the property and had used the lodge up to eight times a year when the Marsh was not contaminated with arsenic. Bonhomme further alleges that the wildlife, including ducks, are being harmed by the arsenic, and thus he has decreased the use of his hunting lodge to only twice a year. Bonhomme will maintain that because the arsenic has negatively affected his use of his property and Wildman Marsh, he is a "person[] having an interest which is . . . affected," and thus holds a substantive right to be enforced under the CWA as the real party in interest.

Moreover, **Bonhomme** may argue that he is the real party in interest regardless of whether PMI may benefit from the prosecution of this action. *Reichhold Chemical Inc. v. Travelers Insurance Co.* held that the plaintiff need not be the ultimate economic beneficiary of the action in order to be the real party in interest. Bonhomme can thus argue that he is the real party in interest even if PMI may ultimately reap economic benefits from the action. 544 F. Supp. 645, 649 (E.D. Mich. 1982).

Conversely, **Maleau and Progress** will argue that PMI is the real party in interest in this action. Bonhomme is the president and a 3% shareholder of PMI in addition to being on its

board of directors. Bonhomme's hunting lodge is used sparingly and primarily for hunting parties comprised of business associates of PMI. Moreover, Maleau alleges that any decrease in use of the lodge is more likely to be a reflection of the economic health of PMI than the effect of any alleged arsenic discharges.

Maleau and Progress can also argue that Bonhomme has nothing to gain or lose from the prosecution of the action and thus is not a real party in interest. *Buhonick v. Am. Fidelity & Cas. Co.*, 190 F. Supp. 399, 402 (W.D. Penn. 1960). Since PMI is paying attorney fees and court costs, Bonhomme will not suffer negative economic consequences should he lose nor will he be entitled to attorney's fees under CWA § 505(d) should he win. However, Bonhomme may respond that he stands to gain or lose noneconomic interests in the improvement or continued pollution of the Marsh.

While Maleau and Progress will argue that the fact that PMI is paying for attorney's fees, witness fees, and paid for water testing demonstrates that PMI is the real party in interest, **Bonhomme** will respond that these facts are irrelevant to the real party in interest analysis. *See Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 35 F.R.D. 516, 518 (E.D.S.C. 1964) (holding that inquiries concerning who was paying for plaintiffs' attorney's fees were irrelevant to FRCP 17(a) analysis).

A. STANDING

Although the concepts of Article III standing and the plaintiff's status as a real party in interest are distinct considerations, the inquiries may still be intertwined. Some courts have recognized the interconnected relationship between the two concepts and have held that once a plaintiff has been found to have standing, any further litigation of his status as a real party in interest is foreclosed. *Apter v. Richardson*, 510 F.2d 351, 353 (7th Cir. 1975). In this case, the issue of standing was not litigated before the lower court; however, standing may be raised at any point in the litigation. *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994). **Bonhomme** could therefore argue that he meets the standing requirements to bring a suit under the CWA, and therefore he must also be the real party in interest.

Generally, in order for a plaintiff to have Article III standing, he must show that (1) he has suffered a "concrete and particular" injury which is "actual or imminent;" (2) "the injury is fairly . . . traceable to the challenged action of the defendant;" and (3) it is likely "that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Bonhomme can argue that he has suffered an injury by citing to his fear of using and his decreased use of the Marsh for duck hunting. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167, 183 (2000) ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity.") (internal quotation marks omitted). Since Bonhomme has used the Marsh in the past and will not continue to use it to the same extent due to its pollution, he has alleged an injury in fact. Additionally, the water tests suggest that the arsenic in the Creek and the Marsh originate from Maleau's waste piles, demonstrating that the injury is fairly traceable to Maleau's alleged discharges and that Maleau's cessation of discharging would redress his injury.

Alternatively, **Maleau and Progress** will argue that it is not settled law that a plaintiff's Article III standing automatically gives him status as the real party in interest. *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000) (citing 4 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE, ¶ 17.1 0[1] (3d ed. 1997)). Maleau and Progress may go on to argue that Bonhomme does not have Article III standing, however this argument is weak.[1]

1. If a party makes an argument against Bonhomme's Article III standing, make sure that they are attacking an element of the Article III standing based on evidence in the record and not speculation.

IV. CWA § 505—DID THE LOWER COURT ERR IN DETERMINING THAT BONHOMME, A FOREIGN NATIONAL, IS NOT A "CITIZEN" UNDER CWA § 505, 33 U.S.C. § 1365, AND THUS CANNOT MAINTAIN A SUIT AGAINST MALEAU?

Bonhomme argues that despite being a foreign national, he is nonetheless a "citizen" as defined in CWA §§ 505(g) and 502(5), 33 U.S.C. §§1365(g) and 1362(5). **Maleau and Progress** argue that as a foreign national, Bonhomme cannot be a "citizen" as defined by CWA §§ 505(g) and 502(5).

CWA § 505(a) provides that "any citizen may commence a civil action on his own behalf . . . against any person . . . who is alleged to be in violation of an effluent standard or limitation . . . ." 33 U.S.C. § 1365(g). Citizen is then further defined in CWA § 502(5) for the purposes of § 505 as "a person . . . having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Person is then defined 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). There is virtually no case law to support either Bonhomme's or Maleau and Progress's positions. Thus, the parties' arguments will be based on (perhaps creative) statutory interpretation.

Bonhomme's strongest argument is that although the word citizen is used in CWA § 505(a), Congress was silent as to the requirement of United States citizenship. Further, Congress's silence on the matter does not create a "clear and manifest purpose" to exempt foreign nationals from commencing a citizen suit under CWA § 505. *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 432 (2002) (stating that Federal Insecticide, Fungicide, and Rodenticide Act's (FIFRA's) silence as to whether local governments could regulate the sale of pesticides "cannot suffice to establish a clear and manifest purpose to pre-empt local authority . . ." under that statute.). Congress had the opportunity to include a U.S. citizenship requirement in the definition of citizen in CWA § 505(g), but did not do so. Bonhomme will argue that this silence on the matter cannot

disqualify a foreign national from bringing suit under the CWA's citizen suit provision.

Moreover, **Bonhomme** may assert that reading "citizen" so as to require United States citizenship frustrates the purpose of CWA § 505. Section 505 was intended to allow the public to supplement administrative response to water pollution. *See Com. of Mass. v. U.S. Veterans Admin.*, 541 F.2d 119 (1st Cir. 1976); S. REP. NO. 92-414, 3745-46 (1972). The additional requirement of United States citizenship would further restrict public participation and negatively affect the efficacy of the citizen suit provision.

Alternatively, **Progress' and Maleau's** strongest argument is for a plain reading of the word citizen. The Supreme Court has stated "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." *Cent. Trust Co. v. Official Creditor's Comm. of Geiger Enters., Inc.*, 454 U.S. 354, 359-60 (1982) (citing *Caminetti v. United States.*, 242 U.S. 470, 485 (1917)). The common meaning of citizen is "[a] person who legally belongs to a country and has the rights and protection of that country." *Citizen*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/citizen (last visited Dec. 2, 2013); *see also* BLACK'S LAW DICTIONARY 278 (9th ed. 2009) (defining citizen as "[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."). Thus, they will argue that the plain meaning of CWA § 505(a) prohibits the commencement of a suit by a foreign national such as Bonhomme.

However, **Bonhomme** may argue that the Supreme Court has already rejected the argument that the plain meaning of "citizen" prohibits the commencement of a citizen suit by a person or entity that is not a citizen as defined in the dictionary. In *United States Department of Energy v. Ohio*, the Supreme Court held that the State of Ohio was a "citizen" under CWA § 505(a) and was thus entitled to maintain its suit against the Department of Energy. 503 U.S. 607, 616 (1992). Moreover,

courts have consistently allowed nonprofit corporations to bring citizen suits without questioning their status as a "citizen" under the CWA. *See Laidlaw*, 528 U.S. 167; *Lujan*, 504 U.S. 555. Both states and corporations are not citizens under the plain meaning of the word, but have nevertheless been allowed to maintain citizen suits as "citizens" under the CWA. Thus, Bonhomme may argue that such a stringent reading of the statute is unwarranted.

Maleau and Progress will argue that the use of "person" in § 502(5) of the CWA to define citizen does not deprive the word "citizen" of all meaning. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Supreme Court held that Congress's use of "waters of the United States" in defining the narrower concept of "navigable waters" did not deprive the word navigable of all meaning. 531 U.S. 159, 172 (2001). Similarly, Congress's use of the broader term "person" in defining "citizen" cannot deprive the word citizen of all meaning. Therefore, Bonhomme must be a citizen in addition to a person in order to bring a suit under the CWA.

Further, **Maleau and Progress** will argue that such a plain reading of the CWA does not frustrate the purpose of the CWA or create an absurd result. There is no indication that Congress, by using the word "citizen," had any other intent than to make United States citizenship a prerequisite to the commencement of a citizen suit.

V. POINT SOURCES—DID THE LOWER COURT ERR IN HOLDING THAT MALEAU'S MINING WASTE PILES ARE NOT POINT SOURCES?

Bonhomme contends that Maleau's mining waste piles are point sources under CWA §§ 502(12) & (14), 33 U.S.C. §§ 1362(12) & (14). However, **Maleau and Progress** respond that Maleau's mining waste piles are not point sources under CWA §§ 502(12) & (14).

Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with CWA permits. 33 U.S.C. § 1311(a). Under CWA § 502(12), the discharge of a pollutant is defined as the addition of a pollutant from a point source to a navigable water. 33 U.S.C. § 1362(12). Furthermore,

CWA § 502(14) defines a point source as "any discernible, confined, and discrete conveyance." 33 U.S.C. § 1362(14). Conversely, the CWA does not prohibit the addition of a pollutant from nonpoint sources. Therefore, whether Maleau's waste piles are point sources is crucial to the question of whether Maleau has violated the CWA.

Although § 502(14), 33 U.S.C. § 1362(14), lists potential point sources as "any pipe, ditch, channel, tunnel, conduit, well, [or] discrete fissure . . . [,]" courts generally define the term broadly while still "exclud[ing] unchanneled and uncollected surface waters." *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976). Courts in the Second and Fourth Circuits have already addressed the issue of whether mining waste is a point source and these cases provide arguments for the parties to present.

Bonhomme's strongest argument in asserting that Maleau's mining waste piles are a point source is based on the court's holding in *Sierra Club v. Abston Cons. Co.*, 620 F.2d 41 (5th Cir. 1980). In *Abston*, the defendant coal mining company, while engaging in strip mining, created highly erodible piles of overburden and built sediment basins to catch any discharges from the piles. However, during periods of heavy rain, pollutants were discharged into the creek from both overflow from the sediment basin and erosion-created ditches and gullies leading to the stream from the spoil piles.

In addressing whether the spoil piles fell under the definition of point source, the Fifth Circuit noted that the "ultimate question is whether pollutants were discharged from discernible, confined, and discrete conveyance(s)" and considered two situations in which mining spoil piles could be considered a point source. *Id.* at 45 (internal quotation marks omitted). In the first situation, the court opined that a spoil pile may be a point source where "[g]ravity flow, result[s] in a discharge into a navigable body of water . . . if the miner at least initially collected or channeled the water and other materials." *Id.* In the second situation, the court stated that a spoil pile may be a point source "where miners design spoil piles from discarded overburden such that, during periods of precipitation, erosion of spoil pile walls results in discharges into a navigable body of water by means of

ditches, gullies and similar conveyances, even if the miners have done nothing beyond the mere collection of rock and other materials." *Id.*

Bonhomme will argue that Maleau's waste piles clearly fall under the second situation described in *Abston* and are thus included in the definition of point source. Here, much like in *Abston*, Maleau has created highly erodible piles of mining overburden in close to proximity to a waterway. These piles have predictably eroded and created a series of ditches and gullies leading to Ditch C-1 where they discharge arsenic. Thus, under *Abston*, it is enough that Maleau has "done nothing beyond the mere collection of rock and other minerals." *Id.* It is irrelevant that the ditches and gullies have been created by gravity and erosion and not by human intervention; these waste piles are a point source since they are discharging pollutants through "discernible, confined, and discrete conveyance(s)." *Id.*

Maleau and Progress will argue that his waste piles are not point sources because they do not fall under either of the scenarios described in *Abston*. First, they can argue that although he has collected the waste materials, he has not "initially collected the water" discharged from his waste piles. *Id.* Thus, his waste piles do not fall under the first *Abston* scenario. As for the second *Abston* scenario, they can argue that although his spoil piles have eroded, creating ditches and gullies, they are not discharging into a navigable water. In order for Maleau's waste piles to fit into the second situation described by the court, the erosion from those piles would have to "discharge[] into a navigable body of water." *Id.* Since the court in *Abston* clearly included a requirement that the erosion discharge into a navigable water, Maleau's waste piles are not point sources. *Id.* (The navigability of Ditch C-1 is discussed *infra* at 16.)

However, **Bonhomme** may note that the non-navigability of Ditch C-1 does not necessarily foreclose the Court finding that the waste piles are point sources. Courts have held that discharges into non-navigable conveyances leading to a navigable water are still classified as discharges from a point source. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005) (holding that a mine shaft was a point source where 2.5 miles of tunnel separated shaft and navigable water); *Concerned Area*

Residents for Env't v. Southview Farm, 34 F.3d 114 (2d Cir. 1994) (holding that a pipe discharging into a ditch which then discharged into a navigable water was a point source).

Further, **Maleau and Progress** will argue that *Abston* should not be applied because it is not established law as to mining waste discharge, as the Fourth Circuit has also had the opportunity to address the issue of discharges from mining waste in *Appalachian Power Co. v. Train*, 545 F.2d 1351 (4th Cir. 1976) and *Consolidation Coal Co. v. Costle*, 604 F.2d 239 (4th Cir. 1979), *rev'd sub nom. on other grounds, Envtl. Prot. Agency v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). In *Appalachian Power*, the Fourth Circuit considered a challenge to EPA's regulation of the runoff from areas used for material storage. While in *Consolidation Coal*, the Fourth Circuit considered challenges to EPA's regulation of coal preparation areas. In both cases, the court held that unchanneled water from materials storage or coal preparation does not fall under the definition of point source.

In *Appalachian Power*, the court remanded EPA's rainfall runoff regulations because the regulations were not confined to point source pollution. 545 F.2d at 1372. In coming to this conclusion, the court decided that the regulations, as written, could apply to runoff that was neither channelized or collected and held that "[the definition of point source] does not include unchanneled and uncollected surface waters." *Id.* Additionally, the court recognized that runoff from storage areas was not typically routed through a point source collection system, indicating that those areas could not be point sources without a collection system. *Id.*

In *Consolidation Coal*, the court upheld EPA's regulations regarding surface runoff at coal preparation plants. The relevant portion of the challenged regulation applied to "discharges from coal preparation plants and associated areas, including discharges which are pumped, siphoned or drained from coal storage." 604 F.2d at 249. In upholding the regulations, the court again noted that "unchanneled and uncollected surface waters" are not included in the definition of point source and found that the regulation excluded those nonpoint sources. *Id.*

Maleau and Progress will argue that together *Appalachian Power* and *Consolidation Coal* stand for the proposition that waste piles are not point sources unless their runoff is channeled and collected. They will argue that here, although there has been erosion, there has been no channelization or collection by Maleau of the runoff from the piles in any collection system. Thus under the Fourth Circuit's decisions, Maleau's piles are not point sources and the discharge is merely "unchanneled and uncollected surface water[]."604 F.2d at 249.

Bonhomme will argue that although *Appalachian Power* and *Consolidation Coal* may stand for the proposition that waste piles are not point sources unless their runoff is channeled and collected, the cases did not address the issue of channelization by erosion and gravity and can still be read in conjunction with *Abston*. This argument is supported by the fact that the *Abston* court used both *Appalachian Power* and *Consolidation Coal* in support of its decision. 620 F.2d at 45. Moreover, mining discharges caused by rain fall, but traceable to a discrete source, have been found to be point sources. *See Trs. for Alaska v. Envt'l Prot. Agency*, 749 F.2d 549, 558 (9th Cir. 1984) ("When mining activities release pollutants from a discernable conveyance, they are subject to NPDES regulation, as are all point sources."); *Wash. Wilderness Coal. v. Hecla Mining Co.*, 870 F. Supp. 983, 988 (E.D. Wash. 1994) (reasoning that because discharges from mining ponds and refuse piles are easily traceable to their source, they are discharges from point sources even if the discharge was caused by rain fall).

Bonhomme may also argue that *Appalachian Power* and *Consolidation Coal* do not apply because they predate EPA's NPDES Permit Application Regulations for Storm Water Discharges Rule, which requires a NPDES to discharge contaminated storm water from a mining operation. 55 Fed. Reg. 47990, 48029 (Nov. 16, 1990) (not requiring NPDES permits for discharges of storm water "that are not contaminated by contact with any overburden, raw material, intermediate products, finished product, by product or waste products . . . ."). Since the discharges from Maleau's piles are contaminated with overburden and waste products, Maleau must obtain a NPDES permit for the

discharges. Given that NPDES permits regulate point sources, Bonhomme can argue that Maleau's waste piles are point sources.

VI. NAVIGABILITY—DID THE LOWER COURT ERR IN DETERMINING THAT REEDY CREEK IS A NAVIGABLE WATER/WATER OF THE UNITED STATES?

The CWA prohibits the discharge of pollutants into navigable waters, defined as "waters of the United States, including territorial seas." 33 U.S.C. §§ 1311(a) & 1362(7). Therefore, the navigability of both Ditch C-1 (discussed *infra* at 16) and Reedy Creek are necessary elements in determining whether either Maleau or Bonhomme is violating the CWA. **Bonhomme and Progress** contend that Reedy Creek is a water of the United States (or water of the U.S.). **Maleau** asserts that Reedy Creek is not a water of the U.S.

In the context of the CWA, the Supreme Court has noted that actual navigability, like that discussed in *The Daniel Ball*, 10 Wall. 557, 563 (1871) (holding that a river is navigable if it is navigable in-fact, meaning that it is used or is susceptible of use as a highway of commerce), is of "limited import." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). On the other hand, the Supreme Court has made it clear that the word navigable cannot be devoid of all meaning in determining whether waters are jurisdictional waters of the U.S. under the CWA. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs.*, 531 U.S. 159, 172 (2001) (commonly referred to as *SWANCC*).

Bonhomme and Progress's first and most obvious argument is that Reedy Creek is a water of the U.S. because it is an interstate water. EPA's definition of waters of the U.S. includes "[a]ll interstate waters." 40 C.F.R. § 122.2. Since Reedy Creek begins in the State of New Union and ends in the State of Progress, it is clearly an interstate water and thus falls under the definition of waters of the U.S. The Fourth Circuit indicated that the interstate nature of a water may be enough for classification as a water of the U.S. when it stated that "the phrase navigable waters refers to waters which, if not navigable in fact, are at least interstate." *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir.

1997). Additionally, Bonhomme and Progress can bolster their argument that Reedy Creek is a water of the U.S. due to its interstate nature by citing the Supreme Court's emphasis of the intrastate nature of the ponds in *SWANCC*, which the Court held were not waters of the U.S.; the parties might argue that the *SWANCC* opinion indicates that the ponds may have been waters of the U.S. if they were interstate. *SWANCC*, 531 U.S. at 171-72.

Maleau, however, may raise the point that the interstate nature of Reedy Creek alone may not necessarily make it a water of the U.S. He can argue that since Congress's authority to regulate waters of the U.S. rests on the Commerce Clause, the fact that it is interstate is not sufficient for Congress's regulation under the Commerce Clause. *See ONRC Action v. U.S. Bureau of Reclamation*, No. 97–3090–CL, 2012 WL 3526833 at *12 (D. Idaho 2012) (citing *Kaiser Aetna v. United States*, 44 U.S. 164, 174 (1979)).

In *ONRC*, the court held that the Klamath Straits Drain was a water of the U.S. as it was interstate and substantially affected interstate commerce. The court considered the drain as part of a much larger watershed, including a river and a lake, which helped provide irrigation for $120 million dollars' worth of agricultural products and hydroelectric power for parts of California and Oregon. In comparison, Reedy Creek's only uses are as a water supply for a singular rest stop and irrigation for agriculture along its 50-mile stretch. **Maleau** can argue that because the interstate effects of Reedy Creek are significantly smaller than that of the drain in *ONRC*, it is not clear that the Creek has "an indisputable direct and significant impact on interstate commerce." *Id.* Thus, the Creek is not a water of the U.S.

In response, **Bonhomme and Progress** may argue that even if the interstate nature of the Creek is alone is not enough for it to be classified as a water of the U.S., the Creek's effects on interstate commerce are similar to that of the Drain in *ONRC*. Although the Creek's agricultural use may be more limited than that in *ONRC*, it is still used primarily for the irrigation of

agricultural products sold in interstate commerce.[2] Additionally, the Creek affects Wildman Marsh, which draws hunters from other states, adding $25 million to the local economy. Thus, Bonhomme and Progress may contend that the Creek is a water of the U.S. since it is interstate in nature and adequately affects interstate commerce.

Maleau may point to *SWANCC* to support the proposition that Reedy Creek's use for irrigation does not make it a water of the U.S. In *SWANCC*, the Supreme Court held that the "Migratory Bird Rule," which contained a provision including intrastate waters used to irrigate crops sold in interstate commerce in the definition of waters of the U.S., exceeded Congress's power under the Commerce Clause. 531 U.S. at 174. However, **Bonhomme and Progress** will point out that the regulations in *SWANCC* were applicable to intrastate waters, so it is unclear if they would be found to exceed the Commerce Clause powers if applied to an interstate water such as Reedy Creek.

Additionally, **Bonhomme and Progress** may argue that Reedy Creek is a navigable water by relying upon *United States v. Earth Sciences*, 599 F.2d 368 (10th Cir. 1979). In *Earth Sciences*, the Fourth Circuit held that a creek that supported wildlife and provided water for irrigation for agriculture sold in interstate commerce was a water of the U.S. because it affected interstate commerce. *Id.* at 374. However, **Maleau** may call *Earth Science's* validity into doubt by pointing out that it predates both *Rapanos* and *SWANCC*.

Bonhomme and Progress can argue that Reedy Creek still falls within the definition of waters of the U.S. regardless of whether it is an interstate water since it is a tributary of Wildman Marsh, which is mostly contained within Wildman National Wildlife Refuge. Although EPA does not include intrastate wetlands that are on Federal lands in their definition

2. An interesting (and creative) argument for Bonhomme to make is that Reedy Creek's use for irrigation makes the water in the creek a commodity of interstate commerce, making federal jurisdiction under the CWA and the Commerce Clause proper. *Cf. Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (holding that garbage, as an object of interstate trade, invoked the dormant commerce clause).

of waters of the U.S., 40 C.F.R. § 122.2, Bonhomme and Progress can argue that the Marsh is a water of the U.S. as it falls within the plain meaning of the phrase in 33 U.S.C. § 1362(7) because Congress may regulate the waters on its lands through the Property Clause. U.S. CONST. art. 4, § 3, cl. 2. Thus, since the definition of waters of the U.S. include tributaries to those waters and Reedy Creek is a tributary of Wildman Marsh, Reedy Creek falls within that definition. 40 C.F.R. § 122.2. **Maleau**, on the other hand, can point out that EPA's definition of waters of the U.S. includes no such interpretation that federal wetlands are included in waters of the U.S. 40 C.F.R. § 122.2. Moreover, a tributary is only considered a water of the U.S. if it is a tributary to a water described in 40 C.F.R. § 122.2. Thus, Reedy Creek, as a tributary, does not fall under EPA's definition of waters of the U.S.

VII. NAVIGABILITY—DID THE LOWER COURT ERR IN HOLDING THAT DITCH C-1 IS NOT A NAVIGABLE WATER/WATER OF THE UNITED STATES?

Bonhomme and Progress argue that Ditch C-1 is a water of the United States (or water of the U.S.), while **Maleau** contends that Ditch C-1 is not a water of the U.S. The main issue in determining whether Ditch C-1 is a water of the U.S. is whether the term water of the U.S. includes intermittent channels that are tributaries to a water of the U.S. While *Rapanos* ultimately dealt with the classification of wetlands adjacent to navigable waters and tributaries, the Supreme Court also discussed the issue of intermittently dry tributaries in that case. *Rapanos v. United States,* 547 U.S. 715 (2006). The fragmented opinion created two tests for determining if a water is a water of the U.S., the "relatively permanent waters" standard as espoused by the plurality and the "significant nexus" standard created by Justice Kennedy's concurrence. The question of which test is controlling leaves room for both sides to make arguments as to whether Ditch C-1's is a water of the U.S.[3] *Rapanos*, 547

3. Since *Rapanos* is a plurality opinion, there is debate as to the proper application of the two tests. Some circuits have used only Justice Kennedy's

U.S. at 758 (Roberts, C.J., dissenting) (noting that the lack of a majority gives no precise limit on CWA's jurisdiction).

A. THE "SIGNIFICANT NEXUS" TEST

Bonhomme and Progress may rely upon Justice Kennedy's "significant nexus test" in arguing that Ditch C-1, as a tributary to a water of the U.S., is in turn a water of the U.S. In his concurrence, Justice Kennedy called into doubt the plurality's requirement that waters of the U.S. are necessarily permanent, reasoning that a requirement that would allow federal jurisdiction over a continuous trickle, but not a seasonal high volume stream "makes little practical sense in a statute concerned with downstream water quality." *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring). Moreover, Justice Kennedy stated that waters, whether or not they are intermittent, having a significant nexus with a water that is navigable in fact are waters of the U.S. *Id.* at 759. A significant nexus exists between two bodies of water if there is evidence of a hydrological connection demonstrating the "significance of the connection for downstream water quality." *Id.* at 784.

Bonhomme and Progress may assert that Justice Kennedy's opinion is controlling, citing the decisions of the Seventh, Ninth, and Eleventh Circuits, and thus Ditch C-1 is a water of the U.S. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007); *United States v. Robinson*, 505 F.3d 1208, 1221 (11th Cir. 2007). Accordingly, since Bonhomme and Progress may establish a relatively permanent hydrological connection and an effect on the water quality of the creek, they will argue that Ditch C-1 is a water of the U.S.

"significant nexus" test, relying on *Marks v. United States*, 430 U.S. 188 (1977) (holding where there is a fragmented Supreme Court decision, the concurrence on the narrowest ground may be considered to be the holding of the case). However, other circuits have interpreted *Marks* differently or have not applied *Marks* and found that a water is a jurisdictional water of the United States using either test. *See, e.g.*, *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (holding that Justice Stevens' dissent finding jurisdiction using either test to be "controlling").

However, **Maleau** may call into question the applicability of the "significant nexus" test to the facts of this case. First, Maleau will point out Justice Kennedy's significant nexus test – requiring that the water in question have a significant nexus with a navigable-in-fact water – is not clearly applicable to the facts of this case. Here, Reedy Creek is not navigable in fact, as it has never been used as waterborne transportation and it could not be used so without modification, as noted by the lower court. *The Daniel Ball*, 77 U.S. 557, 563 (1870) ("[Waters] 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."). Still, **Bonhomme and Progress** may be able to argue that Ditch C-1 is a water of the U.S. regardless of whether Reedy Creek is navigable in fact. *See Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 823 (N.D. Cal. 2007) (holding that in order to find that streams are waters of the U.S., plaintiff needed to demonstrate a significant nexus between intermittent streams and creek which was a water of the U.S., without the court finding that the creek was navigable in fact.).

Second, **Maleau** may argue that the "significant nexus" test only applies to wetlands and thus does not apply to Ditch C-1. *See S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) (holding that a court cannot use the "significant nexus" test to evaluate the navigability of non-wetlands); *see also Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1215 (D. Or. 2009). However, **Bonhomme and Progress** will point out that other courts have also examined whether the "significant nexus" test applies to tributaries and have concluded that the test does apply. *See Robinson*, 505 F.3d at 1222-23; *Pac. Lumber Co.*, 469 F. Supp. at 823; *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1171 (D. Idaho 2011).

B. "RELATIVELY PERMANENT WATERS" TEST

Whether or not the significant nexus test applies, **Bonhomme and Progress** may still argue that Ditch C-1 is a water of the U.S. even under the *Rapanos* plurality's "relatively permanent waters" test. Under this test, only waters that are

"relatively permanent, standing or continuously flowing bodies of water" can be classified as waters of the U.S. *Id.* at 733. The test thus excludes "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* at 739. However, Bonhomme and Progress will point out that the plurality noted that this test does not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought." *Id.* at 732 n. 5. Since Ditch C-1's flow is more than intermittent since it contains flowing water for up to eleven months out of the year at the maximum and nine months at minimum. *Vierstra*, 803 F. Supp. 2d at 1168, *aff'd* 492 Fed. Appx. 738 (9th Cir. 2012) (holding that a canal that only held water for six to eight months a year was a water of the U.S. since it met both the "relatively permanent" and "significant nexus" standards). Additionally regardless of the period of flow, Ditch C-1 flows only with the exception of periods of drought. Thus under the plurality's "relatively permanent waters" test, the Ditch's lack of water during drought does not preclude it from being a water of the U.S. *Rapanos*, 547 U.S. at 732 n.5.

Moreover, **Bonhomme and Progress** can argue that the Twelfth Circuit should adopt the Ninth Circuit's interpretation of *Rapanos* that a "seasonally intermittent stream which ultimately empties into a . . . water of the United States can, itself, be a water of the United States." *United States v. Moses*, 496 F.3d 984, 989 (9th Cir. 2007). Under this interpretation, Ditch C-1 would clearly be included in the waters of the U.S. **Maleau**, however, can distinguish *Moses* from the case at bar as the water in question here is not a natural stream but a manmade ditch created for drainage.

Maleau will argue that Ditch C-1 is not a water of the U.S. under the "relatively permanent waters" test. The plurality excluded "ditches, channels, and conduits" from its "relatively permanent waters" on the basis that they could not be at once both listed a point source and included in the definition of navigable waters. *Rapanos,* 547 U.S. at 737. While Maleau should address the dissent's and Justice Kennedy's argument that excluding ditches from the definition of waters of the U.S. is a matter of semantics, ultimately he can contend that the

distinction stands. He can argue that while there are times when a "ditch" can be a "stream," this is not one of them. When a ditch does not permanently hold water, like Ditch C-1, it should not be classified as a stream or as a water of the U.S. *Id.* at 736 n.7.

Additionally, **Maleau** can argue that even if the "relatively permanent waters" test could include ditches that did not contain a permanent flow, the fact that Ditch C-1 dries up for up to three months every year makes the water flow intermittent. However, **Bonhomme and Progress** should note that this argument is relatively weak. Although the Supreme Court has yet to decide how many moths per year water must flow in order for the water to be "relatively permanent," lower courts have generally found that anywhere from 3-6 months is an acceptable minimum. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 501 Fed. Appx. 268, 271 (4th Cir. 2012) (3 months); *Vierstra*, 803 F. Supp. 2d at 1168 (6-8 months).

VIII. VIOLATION—DID THE LOWER COURT ERR IN HOLDING THAT BONHOMME IS IN VIOLATION OF § 301(A) OF THE CLEAN WATER ACT?

Section 301(a) of the CWA states that "the discharge of any pollutant by any person shall be unlawful," subject to enumerated exceptions. 33 U.S.C. § 1311(a). **Bonhomme** argues that he does not violate the CWA because Maleau indirectly adds arsenic to the Ditch via his waste piles. **Maleau and Progress** argue that Bonhomme is liable regardless of who added the arsenic because Bonhomme owns the culvert/point source discharging the pollutant into Reedy Creek.

Bonhomme may argue that he does not violate the CWA because Ditch C-1 is a jurisdictional water of the U.S., and therefore the point source discharge to waters of the U.S. occurs on Maleau's property. (The navigability of the Ditch and the Creek is discussed *supra* at 16 and 14 respectively.) Under CWA § 502(12), a discharge occurs only when a pollutant is added to waters of the U.S. from a point source. 33 U.S.C. § 1362(12). EPA interprets the term addition to mean the physical addition of a pollutant to the water from the outside world and this interpretation has been upheld in various circumstances. *See*

Nat'l Wildlfe Found. v. Gorsuch, 693 F.2d 156, 175 (D.C. Cir. 1982) (rejecting petitioner's argument that NPDES permitting should apply to dams because under EPA's interpretation of "addition" dams do not add pollutants to water); *Nat'l Wildlife Found. v. Consumers Power Co.*, 862 F.2d 580, 862 F.2d 580, 584 (6th Cir. 1988) (upholding EPA's determination that turbines releasing water contaminated by entrained fish were not subject to NPDES permitting because the pollutants were already in the water); *see also L.A. Cnty. Flood Control Dist. v. Natural Res. Def. Council, Inc.*, 133 S. Ct. 710, 713 (2013) (holding that no addition occurs when water flows between two parts of the same water body) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee*, 541 U.S. 95, 109-12 (2004)). Thus, Bonhomme will argue that Ditch C-1's release of arsenic, which is already present in its water, into Reedy Creek cannot be an addition under EPA's interpretation. Since Maleau has already added the arsenic to Ditch C-1, Bonhomme is not discharging a pollutant and cannot be in violation of CWA § 301. However, **Maleau and Progress** will respond that Ditch C-1 is not a jurisdictional water of the U.S. and thus Bonhomme is liable for the discharge of arsenic into Reedy Creek since the discharge occurs on Bonhomme's land.

Bonhomme will reply that even if NPDES permitting applies to the discharge from Ditch C-1—meaning that Ditch C-1 is not a water of the U.S.—into Reedy Creek, he is still not liable for the CWA violation as Maleau is the but-for cause of the addition of arsenic into the Creek. In *Rapanos*, the plurality noted in dicta that "[t]he [CWA] does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" 547 U.S. at 743 (emphasis in original). The plurality concluded that it is likely a violation of the CWA to discharge pollutants into a conveyance that would naturally wash downstream into a navigable water. *Id.*

Moreover, lower courts have rejected the idea that a pollutant must be discharged directly into a navigable water for a violation of the CWA to occur. In *United States v. Velsicol Chemical Corporation*, the defendant discharged pollutants into the city sewer system that ultimately discharged into the Mississippi River. 438 F. Supp. 945, 946-47 (W.D. Tenn. 1976).

The court found that although the defendant was not discharging directly into the Mississippi, "[t]he fact that defendant may discharge through conveyances owned by another party does not remove defendant's actions from the scope of this Act." *Id.* at 947. In *Sierra Club v. El Paso Gold Mines, Inc.*, the court found that the defendant's discharge of pollutants from mining waste piles into a mineshaft that then discharged into a navigable water violated the CWA. 421 F.3d 1133, 1141 (10th Cir. 2005). Much like in *Velsicol* and *El Paso Gold Mines*, Maleau is discharging pollutants from his waste piles into a conveyance that flows into a water of the U.S. Since Bonhomme can argue that a discharge of pollutants into a conveyance that naturally wash downstream is a violation of the CWA, he can argue that it is Maleau who is in violation by discharging pollutants into the Ditch that then naturally wash down stream into the Creek.

Maleau and Progress have several ways of attacking the argument that Maleau is liable for a discharge that naturally washes downstream to water of the U.S. since he is the but-for cause of the discharge. First, Maleau and Progress can discount both *Rapanos'* and *Velsicol's* application to this case. The plurality in *Rapanos* did not decide the issue of discharges into a conveyance that wash downstream to a water of the United States, and thus the language relating to such discharges contained therein is dicta and is not binding precedent. 547 U.S. at 743. Further, Maleau and Progress can argue that the discharge at issue here is distinguishable from that of *Velsicol*. In *Velsicol*, the defendant was discharging not into a privately owned ditch but into a publicly owned treatment works. 438 F. Supp. at 946-47.

Second, **Maleau and Progress** can make the argument that discharge and addition are not defined in terms of causation. In *West Virginia Highlands Conservancy, Inc. v. Huffman*, the Fourth Circuit stated that the CWA "bans the discharge of any pollutant by any person regardless of whether that person was the root cause or merely the current superintendent of the discharge." 625 F.3d 159, 167 (4th Cir. 2010). Although *West Virginia Highlands* involved the liability of the West Virginia Department of Environmental Protection for discharges from an inactive mine that it owned but had never operated or caused

discharges from the mine, the underlying reasoning that ownership, not causation, is the inquiry for determining liability still applies.

El Paso Gold Mines also stands for the proposition that liability is predicated on ownership, not causation. In that case the defendant was held liable for a violation of the CWA not only because he discharged pollutants into mineshaft that led to a water of the United States, but also because he owned the mineshaft. 421 F.3d at 1137 ("[T]he key to liability under the CWA is the ownership . . . of a point source which 'adds' pollutants to navigable waters, and liability therefore attaches not on the activity which results in the point source discharge, but rather on the point source discharge itself.") (quoting *Sierra Club v. El Paso Gold Mines*, Civ. No. 01-PC-2163 (OES), slip op. at 23-24 (D. Colo. Nov. 15, 2002)).

Maleau and Progress can argue that these cases demonstrate that liability for a discharge is determined by ownership, not causation. Here, Maleau's waste piles discharge into the Ditch, but Bonhomme owns the culvert through which it discharges into Reedy Creek. Maleau and Progress can argue that Maleau is not liable for the violation since liability under the CWA does not contemplate who causes the discharge, but simply who owns the point source. Thus, Bonhomme, as owner of the conveyance, is liable for the violation of the CWA.

However, **Bonhomme** may point out that in both *West Virginia Highlands Conservancy* and *El Paso Goldmines*, the owner of the point source was also the owner of the initial discharge. Bonhomme may be able to distinguish these cases from the situation here since Maleau owns the property where the waste piles are discharging arsenic. Thus, Bonhomme could argue that this case requires a different result.

Maleau and Progress can further bolster the argument that Bonhomme is liable for the violation by virtue of his ownership of the Ditch by extending the logic from *Miccosukee*. In *Miccosukee*, the Supreme Court held that "[the] definition [of point source] includes within its reach point sources that do not themselves generate pollutants." 541 U.S. at 105. Maleau and Progress can argue that this again shows that the § 301(a) of the CWA is not interested in the cause of addition but rather with

where the discharge to a water of the United States occurs. Since Bonhomme owns the culvert and since the culvert, although it does not generate a pollutant, is a point source, he is liable for the discharges under the CWA.

This is not intended to be an exhaustive analysis of the problem, merely an indicative list of issues to be discussed in teams' written submissions and oral arguments. One should appreciate reasoned and reasonable creativity and ideas beyond those in this limited analysis.

[See pages 42-44 for issue tables and sample judges' questions.]

Issue Table 1

Summary of Parties' Positions by Issue				
	District Court	**Progress**	**Maleau**	**Bonhomme**
Is Bonhomme the real party in interest under FRCP 17(a)?	**No.**	**No.**	**No.**	**Yes.**
Is Bonhomme a "citizen" as defined by the CWA?	**No.**	**No.**	**No.**	**Yes.**
Are Maleau's waste piles are point sources?	**No.**	**No.**	**No.**	**Yes.**
Is Ditch C-1 a water of the United States?	**No.**	**Yes.**	**No.**	**Yes.**
Is Reedy Creek a water of the United States?	**Yes.**	**Yes.**	**No.**	**Yes.**
Does Bonhomme violate the CWA as owner of the culvert?	**Yes.**	**Yes.**	**Yes.**	**No.**

Issue Table 2

Summary of Parties' Procedural Postures by Issue				
Bonhomme Complaint	**District Court Holding**	**Progress Posture on Appeal**	**Maleau Posture on Appeal**	**Bonhomme Posture on Appeal**
Bonhomme is the real party in interest under FRCP 17(a).	**No. Bonhomme is not the real party in interest.**	**(Agrees)**	**(Agrees)**	**Appeals**
Bonhomme is a "citizen" as defined by the CWA.	**No. Bonhomme is not a "citizen."**	**(Agrees)**	**(Agrees)**	**Appeals**
Maleau's waste piles are point sources.	**No. Maleau's piles are not point sources.**	**(Agrees)**	**(Agrees)**	**Appeals**
Ditch C-1 is a water of the United States.	**No. Ditch C-1 is not a water of the United States.**	**Appeals**	**(Agrees)**	**Appeals**
Reedy Creek is a water of the United States.	**Yes. Reedy Creek is a water of the United States.**	**(Agrees)**	**Appeals**	**(Agrees)**
Bonhomme violates the CWA as owner of the culvert.	**Yes. Bonhomme violates the CWA.**	**(Agrees)**	**(Agrees)**	**Appeals**

SAMPLE QUESTIONS

These questions are developed as a starting point. Please feel free to develop your own.

Issue 1 (FRCP 17) Questions

- Maleau and Progress
  - Why does Bonhomme's association with PMI automatically mean that he is not the real party in interest? Why can't two parties be real parties in interest?
  - Does Bonhomme really have nothing to gain or lose from this action? Does the fact that Bonhomme may have a noneconomic stake in the ecological health of the Marsh change the answer to that question?
- Bonhomme
  - If PMI also has an interest in this action, why shouldn't PMI be the real party in interest under FRCP 17(a)?
  - Does it make sense that standing should grant a party status as the real party in interest?
    - Could there be a situation where a plaintiff has standing but is still not a real party in interest?

Issue 2 ("Citizen" under CWA § 505) Questions

- Maleau and Progress
  - Doesn't the fact that "citizen" is further defined as a person or entity indicate that Congress did not intend for "citizen" to be narrowly read so as to actually require US citizenship to bring a CWA citizen suit?
  - If the purpose of the CWA citizen suit provision is to improve the enforcement of the CWA, wouldn't requiring US citizenship frustrate that purpose?

- Bonhomme
    - Does it matter whether a state, municipality, or corporation is domestic and not foreign when suing under CWA § 505?
    - Wouldn't allowing a foreign national to bring a suit under CWA § 505 as a "citizen" completely write out the word citizen from § 505?
    - Wouldn't allowing foreign individuals or companies to sue under CWA § 505 be bad public policy since the US would be allowing foreign companies to sue and possibly damage US corporations?

Issue 3 (Point Source) Questions

- Maleau and Progress
    - How are Maleau's waste piles in this case any different than those of the defendants in *Abston*?
        - If there is no factual difference then why shouldn't this court adopt the Fifth Circuit's reasoning that waste piles that cause water to create ditches and gullies running to a stream are point sources?
    - Even if a pile itself is not a "discernable, confined, and discrete conveyance," aren't the channels running from the piles "discernable, confined, and discrete conveyance[s]?"
    - Channels are included in the definition of point source. Why shouldn't the channels in this case be classified as a point source?
    - Even if Ditch C-1 is not navigable, aren't Maleau's waste piles still point sources?
- Bonhomme
    - If this court finds that Ditch C-1 is not a water of the U.S. can Maleau's waste piles still be point sources under the CWA?
    - Does *Abston* still apply to Maleau's waste piles if this court finds that Ditch C-1 is not a water of the U.S.?

Issue 4 (Navigability—Reedy Creek) Questions

- Maleau
  - 40 C.F.R. § 122.2 includes interstate waters in the definition of waters of the U.S. without qualification. Why should the requirement that an interstate water significantly affect interstate commerce be read into the definition?
  - Couldn't the court view Reedy Creek's water, which is used as irrigation for interstate agriculture, as a commodity and thus an instrumentality of commerce? Would that then make Reedy Creek regulable under the CWA?
- Bonhomme and Progress
  - How is Wildman Marsh, an intrastate wetland, a water of the U.S. under 40 C.F.R. § 122.2?
    - Does it even matter that most of the Marsh is on federal land under 40 C.F.R. § 122.2?
  - Does *SWANCC* rule out the argument that:
    - Wildman Marsh is a water of the U.S. due to its use by interstate duck hunters? or
    - Reedy Creek's is a water of the U.S. due to its use as irrigation in interstate agriculture?

Issue 5 (Navigability—Ditch C-1) Questions

- Maleau
  - Although the plurality in *Rapanos* said that a point source cannot also be a navigable water, what is the real difference between a ditch that contains a relatively permanent flow of water and a stream?
  - Why shouldn't this court adopt the Ninth Circuit's reasoning that a tributary to a seasonally intermittent stream is a water of the United States?
  - Does the fact that Ditch C-1 runs dry only up to 3 months of the year actually make it an intermittent

stream under the plurality's "relatively permanent waters" test?
    - Should both the plurality's and Justice Kennedy's tests apply?
    - What result does *Marks* mandate? Does *Marks* even apply in this case?
- Bonhomme and Progress
    - Can Justice Kennedy's "significant nexus" test apply to the facts of this case since Reedy Creek in not navigable in-fact?
    - Why should Ditch C-1 be a water of the United States when under *Rapanos* those conveyances listed as point sources cannot simultaneously be waters of the United States?
    - Should both the plurality's and Justice Kennedy's tests apply?
        - What result does *Marks* mandate? Does *Marks* relevant here?
        - (*Marks v. United States*, 430 U.S. 188 (1977) stands for the proposition that concurrence on the narrowest ground should be considered the holding of the case.)

Issue 6 (Violation of CWA 301) Questions

- Maleau and Progress
    - How do you respond to the plurality in *Rapanos* who concluded that it is likely that a person who discharges into a conveyance that then washes downstream to a water of the U.S. is in violation of the CWA?
    - Can the cases supporting the proposition that ownership of a point source is the ultimate determination of liability for a CWA violation be differentiated from the case at bar since Bonhomme only owns the culvert and not the original point of discharge?

- Bonhomme
    - Assuming that Ditch C-1 is not a water of the U.S., doesn't *Miccosukee* suggest that Bonhomme is liable as the owner of a point source regardless of whether the point source he owns generated the pollutant?
    - Is *Velsicol* distinguishable from this case since the defendant in *Velsicol* was discharging into a publicly owned treatment works?