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Measuring Brief

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TWENTY-SIXTH ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Measuring Brief*

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CA. No. 155–CV–2012 & 165–CV–2012 (Consolidated)
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

JACQUES BONHOMME,
Plaintiff-Appellant, Cross-Appellee
v.
SHIFTY MALEAU,
Defendant-Appellant

STATE OF PROGRESS,
Plaintiff-appellant, Cross-Appellee
and
SHIFTY MALEAU,
Intervenor-Plaintiff-Appellant, Cross-Appellee
v.
JACQUES BONHOMME,
Defendant-Appellant

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

Brief for JACQUES BONHOMME

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

JURISDICTION

The parties below cross-alleged addition of pollutants to navigable waters of the United States in violation of section 301 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(a). The Act grants district courts federal question jurisdiction without regard to amount in controversy or diversity. 33 U.S.C. § 1365(a). The lower court's final order dismissed the case and Appellant Bonhomme filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

I. Can a French national bring a citizen suit under the Clean Water Act when a federal treaty guarantees French citizens equal access to United States courts?

II. Does the fact that a third party might gain a tertiary benefit from a lawsuit stop an individual who holds a substantive right under federal law, like Bonhomme, from being a real party in interest under Federal Rule of Civil Procedure 17?

III. Is Reedy Creek a "water of the United States" under the Clean Water Act because it flows between two states and into a federally-owned marsh?

IV. Does Clean Water Act jurisdiction extend to waters, like Ditch C-1, that are relatively permanent and continuously flowing tributaries of navigable interstate waters of the United States?

V. Under the Clean Water Act, are piles of mining waste point sources when they discharge pollutants from discernible and discrete eroded channels into waters of the United States?

VI. Is Bonhomme liable under the Clean Water Act and its implementing regulations when a culvert on his property simply transfers already-polluted water into Reedy Creek?

STATEMENT OF THE CASE

This case revolves around arsenic pollution, its entry into the environment, and the proper assignment of responsibility under the Clean Water Act. The arsenic originates in piles of mining waste that defendant Maleau trucks from his mine to the site at issue here. When it rains, the rainwater leaches arsenic out of the uncovered piles of waste. The polluted water then flows into an agricultural channel, makes its way into an interstate creek, and eventually ends up in an important national wildlife refuge.

Bonhomme, the plaintiff below, filed this citizen suit in an effort to clean up the arsenic-polluted waters that flow through and near his property in Progress. Bonhomme wants Maleau to control the pollution at its source through compliance with a discharge permit under the Clean Water Act. The State of Progress and Maleau filed a reciprocal suit countering that Bonhomme should be responsible for cleaning up the arsenic just because the polluted water happens to flow into Reedy Creek through a culvert on his property.

The district court disposed of the case by granting Maleau's motion to dismiss. It determined that Bonhomme's French nationality means that he is not a "citizen" under the Clean Water Act. It also found that Bonhomme is not a real party in interest under Federal Rule of Civil Procedure 17 because Precious Metals International might gain some benefit from Bonhomme's success. Finally, the court stated that it would have found for Maleau on all but one issue if the case had proceeded to the merits.

Bonhomme appeals from the granted motion to dismiss because his nationality is irrelevant to the Clean Water Act's citizen suit provision and his substantive rights under the Act make him a de facto real party in interest. This Court ordered additional briefing on the substantive merits of the case.

STATEMENT OF FACTS

Shifty Maleau. Mr. Maleau owns and operates a gold mine in Lincoln County, Progress. R. at 5. In the course of his business, Maleau trucks overburden and slag from his mine to a separate property in Jefferson County and piles the waste material there. R. at 5. When it rains, the water flows over and through the piles, leaching arsenic out of the waste material along the way. R. at 5. Over time, the rain has eroded channels that empty the contaminated water directly into Ditch C-1. R. at 5.

Ditch C-1. In 1913, a consortium of Progress landowners built Ditch C-1 to drain their saturated soils for agricultural use. R. at 5. From Maleau's property, the Ditch runs three miles through agricultural land before emptying into Reedy Creek. R. at 5. It averages three feet wide by one foot deep. R. at 5. Along the way, it gathers groundwater and surface water when it rains. R. at 5. Ditch C-1 flows continuously except for short intervals of drought. R. at 5. It terminates at Reedy Creek, emptying its contents into the Creek through a culvert on Bonhomme's land. R. at 5.

Reedy Creek and Wildman Marsh. Reedy Creek flows for fifty miles from New Union into Progress. R. at 5. It provides water for commercial and agricultural use in both states. R. at 5. The Creek runs past Bonhomme's property and ends in Wildman Marsh. R. at 5. The United States owns much of the extensive wetlands in the Marsh, and the U.S. Fish and Wildlife Service maintains the federal property and operates it as the Wildman National Wildlife Refuge. R. at 6. The Refuge attracts many hunters from across the nation and around the world. R. at 6. As a hunting destination, the Refuge is a boon—it adds over $25 million to the local economy. R. at 6.

Jacques Bonhomme and the Arsenic Contamination. Mr. Bonhomme is a French citizen, r. at 8, and President of Precious Metals International (PMI). R. at 6. He owns land in Progress that borders both Reedy Creek and Wildman Marsh, and Ditch C-1 also flows through his property. R. at 5. A large

lodge sits on his land near the Marsh and he uses it to go duck hunting with both professional and personal guests. R. at 6.

Before filing suit, Bonhomme tested the waters around his property. R. at 6. The tests show that Ditch C-1 contains no arsenic before it reaches Maleau's property, yet downstream from his property tests show high concentrations of the poison. R. at 6. On its way to the Reedy, the arsenic concentration drops proportionately to the additional water gathered by the Ditch. R. at 6.

Likewise, Reedy Creek contains no arsenic above the culvert on Bonhomme's property. R. at 6. Downstream of C-1's discharge, however, the Creek contains significant concentrations of arsenic. R. at 6. Tests also show detectable levels of arsenic throughout Wildman Marsh and in some of its wildlife. R. at 6. The arsenic contamination forced Bonhomme to reduce the use of his property by seventy-five percent. R. at 6.

SUMMARY OF THE ARGUMENT

This case arises under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (2006) (Clean Water Act or CWA). Appellant Bonhomme brought a CWA citizen suit against Appellee Maleau because pollutants discharged from Maleau's property are continually degrading waters on and near Bonhomme's property. The district court dismissed his claim. Bonhomme maintains that the district court erred in all but one of its holdings below. The court correctly found that Reedy Creek is a "water of the United States," and this Court should affirm. With respect to the remaining five issues, this Court should reverse and remand for further proceedings.

The district court dismissed Bonhomme's suit, holding that he is not a real party in interest under Federal Rule of Civil Procedure 17(a). The court incorrectly reasoned that Bonhomme was not a real party in interest simply because a third party might gain benefit from his success. Further, the district court determined that the CWA's citizen suit provision only applies to United States citizens, thus precluding Bonhomme, a French

national, from bringing his suit. In light of a bilateral United States treaty with France that grants French citizens full access to U.S. courts, Bonhomme's nationality has no bearing on his ability to maintain suit. Even without the treaty, a plain reading of "citizen" in the Act shows that the lower court's determination was wrong.

Second, the district court properly concluded that Reedy Creek, an interstate water with direct ties to interstate commerce and a federal wildlife preserve, was a "navigable water" under the CWA. But, its interrelated jurisdictional determination regarding Ditch C-1 was incorrect. The district court facially determined that, simply because Ditch C-1 is called a "ditch" and merges with Reedy Creek via a culvert, the Ditch is a point source. However, the court's reasoning and conclusion are flawed. The Ditch is a tributary to a water of the United States that is permanent, maintains a constant flow for the majority of the year, and significantly affects the chemical and biological integrity of interstate waters. Thus, under both Supreme Court precedent and agency interpretation of that precedent, the Ditch is a "water of the United States," not a point source.

Finally, the lower court concluded that Maleau's mining waste piles are not point sources under the CWA. Further, it decided that Bonhomme, not Maleau, is violating the Act because the arsenic passes through Bonhomme's culvert on its way to Reedy Creek. The court was wrong on both counts. Under existing case law, the mining piles are definitively point sources because they discharge pollutants into Ditch C-1, a water of the United States, through eroded channels that constitute discernible, confined, and discrete conveyances. Additionally, recent EPA rulemaking codifies that Bonhomme cannot be liable for CWA violations in this situation—Maleau's waste piles add arsenic into the Ditch first, so Bonhomme cannot re-add it because it is already in the water. Because the court misinterpreted the nature of the Ditch, it follows that its related point source conclusions are also incorrect. In light of the lower court's incorrect conclusions, Appellant Bonhomme requests that this Court reverse the motion to dismiss and remand his case for further proceedings.

STANDARD OF REVIEW

To withstand a motion to dismiss, a plaintiff need only allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). On review of a granted motion to dismiss, this Court accepts the complaint's well-pleaded allegations as true and reviews the district court's decision *de novo*. *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012).

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY DISMISSED BONHOMME'S CLAIM BECAUSE FEDERAL LAW ENTITLES HIM TO BRING SUIT UNDER THE CLEAN WATER ACT'S CITIZEN SUIT PROVISION.

Bonhomme's French nationality is irrelevant to his right to relief under the Clean Water Act. Under the broad citizen suit provision at section 505 of the CWA, any individual may seek judicial enforcement against anyone "alleged to be in violation of [the Act]." 33 U.S.C. § 1365(a)(1) (2006). Indeed, the Supreme Court recognizes "that the obvious purpose of [citizen suit provisions] is to encourage enforcement by so-called 'private attorneys general.'" *Bennett v. Spear*, 520 U.S. 154, 165 (1997). To that end, Congress opened citizen suit standing "to the full extent permitted under Article III." *Id.* at 165 (comparing environmental citizen suit provisions to the expansive standing granted by the Civil Rights Act). This expansive grant of standing comports with Congress's lofty policy goals and fits nicely with the CWA's other sweeping concepts.

However, the district court contravened Congress when it determined that Bonhomme's French nationality precluded his

suit. It denied itself subject matter jurisdiction to hear the case, thereby improperly restricting the breadth and purpose of the citizen suit provision. It erred for two reasons. First, the United States signed a bilateral treaty with France guaranteeing French citizens the same access to federal courts as U.S. citizens. Second, even absent the treaty, the citizen suit provision's only jurisdictional restriction is based on harm, not nationality.

A. The Convention of Establishment grants French nationals the same access to courts that United States citizens enjoy.

Under Federal law, United States courts must grant Bonhomme the same rights and privileges as United States citizens. According to the Constitution, "all treaties . . . shall be the supreme law of the land" and "bind the United States . . . and the courts as well." U.S. Const. art. VI, cl. 2; *Medellin v. Texas*, 552 U.S. 491, 543 (2008).

In 1959, President Eisenhower negotiated the Convention of Establishment Between the United States of America and France. Nov. 25, 1959, 11 U.S.T. 2398, *attached at* App'x A. The Senate ratified the treaty and it went into effect at the end of 1960. *Id.* It remains in effect. *See* U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States* 93 (2012), *available at* http://perma.cc/04ZAzdPZFQu.

The United States negotiated the Convention to "strengthen[] the ties of peace and friendship" and to "encourag[e] closer economic intercourse" between the two countries. 11 U.S.T. at 2399. The treaty speaks directly to that goal and is dispositive on this issue; Bonhomme *can* bring suit under the Clean Water Act. Article III of the treaty states: "Nationals and companies of either [country] shall be accorded national treatment with respect to access to the courts of justice . . . within the territories of the other [country], . . . both in pursuit and in defense of their rights." *Id.* at 2401.

The Convention of Establishment is the supreme law of the land and is self-executing. *See Medellin*, 552 U.S. at 571–72 (listing self-executing treaties). It guarantees French citizens equal access to U.S. courts, yet the district court dismissed

Bonhomme's citizen suit because of his French nationality. Therefore, this Court must reverse the lower court.

B. Even if the treaty did not apply, the Clean Water Act's plain language, supported by legislative history, grants a cause of action to *anyone* adversely affected by an effluent violation.

The plain language of section 505 is clear: A person's nationality has no bearing on her ability to bring suit under the Clean Water Act. Here, a plain reading of the entire citizen suit provision shows that the *only* restriction on who may bring a suit hinges on whether that person suffered an adverse effect. Placing the Act's definition of "citizen" in proper context illustrates Congress's clarity:

(g) Any "person or persons"
that have
(g) "an interest" which is "adversely affected"
may bring
(a) "a civil action on his own behalf."

33 U.S.C. §§ 1365(a), (g). In short, nationality plays no role.

Courts must "give effect to the intent of Congress," and the best way to do that is to follow the "plain and unambiguous meaning" of the statute. *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). And when the plain language is clear, "that is the end of the matter." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984). Hence, nationality is irrelevant, Congressional intent is clear, and the plain meaning controls.

Presuming that Congress said what it meant and section 505 means what it says, the only possible conclusion is that Bonhomme is a "citizen" for purposes of the Clean Water Act. Because the plain meaning is unambiguous, judicial inquiry is complete. But even if the statute's plain language did not end the inquiry, the district court's improper addition of a United States nationality requirement to the statute fails for two reasons. First, the court added words to the statute and used the wrong definition of "citizen." Second, the court contravened congressional intent.

The district court made its first mistake when it added language to the statute. Without inquiry or justification, the court determined explicitly that the single word "citizen" actually means "citizen of the United States." R. at 8. But, courts may not add, delete, or distort Congress's words because "[a]fter all, Congress expresses its purpose by words." *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951). The district court's modification of the CWA's language did just that; it added words and thereby distorted the provision's meaning.

Not only did it add words, but the lower court's narrow interpretation also ignored the dictionary definition of citizen: "A person who, by either birth or naturalization, is a member of a political community." Black's Law Dictionary (9th ed. 2009); *accord* Oxford English Dictionary (2d ed. 1989) ("a member of a state"). Hence, "citizen" is a broad and generic term unless specifically restricted to a certain place. This distinction is precisely why we say that a person is a citizen *of somewhere* when that is what we mean. Bonhomme is indeed a citizen—a citizen of France. If Congress had meant to add "of the United States" as a modifier to "citizen," it surely would have done so—as it has in many other statutes. *E.g.*, 46 U.S.C. § 12103 (2006) ("An individual who is a citizen *of the United States*"); 18 U.S.C. § 911 (2006) (". . . represents himself to be a citizen of the United States") (emphases added). (A strict search for the term "citizen of the United States" returns 1,046 results within West's United States Code Annotated.)

Second, the district court ignored the Clean Water Act's legislative history. Indeed, the CWA arose in direct response to "an almost total lack of enforcement" under the old state-centric regime. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672, *attached at* App'x B. As a result of that failure, Congress recognized that an "essential element in any control program involving the nation's waters is *public* participation." *Id.* at 3738 (emphasis added). Part of that recognition involved allowing individuals to act as so-called private attorneys general. "[I]f the Federal, State, and local agencies fail to exercise their enforcement responsibility, *the public* is provided the right to seek vigorous enforcement" under section 505. *Id.* at 3730 (emphasis added). In fact, the first sentence describing citizen

suits states: "*Anyone* may initiate a civil suit against any person who is alleged to be in violation of an effluent limitation." *Id.* at 3744 (emphasis added).

Anyone. The public. These are the words Congress used to explain the CWA's citizen suit provision. They are not limiting words; they are not geographical terms. The district court distorted Congress's intent by relying on a single off-topic case to support the proposition that, when Congress defined "citizen" as "a person or persons," all it did was expand possible plaintiffs from "individuals" to "various entities." R. at 8. In so doing, the district court relied on inapposite case law and compared complicated navigability doctrine to the straight-forward concept of citizenship. "Navigable waters" is a complex concept and also a term of art; "citizen" is neither. This Court should reverse and remand.

II. BONHOMME IS A REAL PARTY IN INTEREST UNDER RULE 17 BECAUSE HE HOLDS THE SUBSTANTIVE RIGHT TO ENFORCE WATER QUALITY STANDARDS UNDER THE CLEAN WATER ACT.

The fact that Precious Metals International might benefit from Bonhomme's suit has no bearing on whether Bonhomme is a real party in interest under Federal Rule of Civil Procedure 17. The purpose of the rule is to ensure that the "plaintiff has a significant interest in the particular action" and also "possesses the right to enforce the claim." *Frommert v. Conkright*, 535 F.3d 111, 120 (2d Cir. 2008); *Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973). Therefore, the touchstone real-party inquiry looks at the underlying cause of action: "the 'real party in interest' is the one who, under the applicable substantive law, . . . is the party entitled to bring suit." *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir. 1983).

In this case, Bonhomme clearly satisfies the real party requirement and this Court should reverse the district court for two reasons. First, Bonhomme has a significant personal interest in the water quality of Wildman Marsh and the Clean Water Act grants him a substantive cause of action to enforce effluent

standards. Second, the district court dismissed Bonhomme's case just because a different entity might gain a tertiary benefit through his success, which is not part of the Rule 17 inquiry.

To the first point, Bonhomme alleges that arsenic from Maleau's land pollutes Reedy Creek and Wildman Marsh. R. at 6. The pollution significantly impairs Bonhomme's use of the Marsh; he decreased his yearly hunting trips by seventy-five percent as a direct result. *See* r. at 6. These allegations, taken as true, more than satisfy any necessary showing that Bonhomme "has a significant interest in the particular action." *Conkright*, 535 F.3d at 120. *Cf. Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 193 (2d Cir. 2003) (suffering a "pecuniary loss" makes one a real party in interest); *Wilderness Soc. v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974) (finding a company with financial interests at stake "unquestionably was a major and real party at interest"). Bonhomme's case also satisfies the other interrelated element of Rule 17—the Clean Water Act's citizen suit provision grants Bonhomme the substantive right to seek judicial enforcement against polluters that discharge without a permit. Indeed, the CWA specifically authorizes Bonhomme to file "a civil action *on his own behalf*" because he is adversely affected by the arsenic pollution. 33 U.S.C. § 1365(g) (emphasis added).

The second reason this Court must reverse relates to the district court's flawed preference for one party over another—"PMI rather than Bonhomme is the real party in interest." R. at 8. This reasoning contains a fatal flaw—the trial court assumed that there can be only *one* real party in interest. However, that assumption finds no support. Being a real party in interest does not exclude others from also being so interested. *Prevor-Mayorsohn Caribbean, Inc. v. P.R. Marine Mgmt., Inc.*, 620 F.2d 1, 4 (1st Cir. 1980) ("it is not necessary that there always be only one real party in interest"). *See also Wilderness Soc.*, 495 F.2d at 1036 (finding that both a private company and the federal government were real parties in interest). Further, other civil procedure rules, such as those governing intervention and joinder, expressly recognize that multiple parties may simultaneously hold an interest in particular litigation. *E.g.*, Fed. R. Civ. P. 18, 19, 24.

Additionally, the district court incorrectly emphasized PMI's potential benefit from the litigation as a reason to bar Bonhomme's suit. R. at 7. Just because "[PMI] is in direct competition with Maleau" does not mean that Bonhomme is not a real party in interest. R. at 7. The fact that another party might benefit is irrelevant to the Rule 17 question. "The real party in interest is . . . not necessarily the person who will ultimately benefit from the [suit]." *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir. 1990). And that makes sense. In fact, the very nature of a citizen suit expects that others benefit when individuals act as private attorneys general. *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976) (stating that "citizens [are] performing a public service" when they "bring[] legitimate actions under this section").

Even if these reasons did not compel this Court to reverse, Rule 17 itself allows Bonhomme to sue on behalf of PMI. Rule 17 provides a non-exclusive list of people that "may sue in their own names without joining the person for whose benefit the action is brought." Fed. R. Civ. P. 17(a)(1); *Farrell Constr.*, 896 F.2d at 141 ("Rule 17(a)'s list is descriptive, not exclusive"). Among those exceptions, Rule 17 lists "an administrator" at subsection (a)(1)(B). An administrator is a "person who manages or heads a business." Black's Law Dictionary (9th ed. 2009). Because he is the president of the company, Bonhomme can bring a suit that benefits PMI under his own name.

In sum, the CWA is substantive law and its citizen suit provision grants Bonhomme a cause of action. This makes him a de facto real party in interest. The district court improperly dismissed Bonhomme's suit simply because it determined that PMI was a more interested party. This Court should reverse and remand.

III. BOTH AGENCY REGULATION AND RELEVANT CASE LAW ESTABLISH THAT REEDY CREEK IS A "NAVIGABLE WATER" UNDER THE CLEAN WATER ACT.

Considering the facts at bar, Reedy Creek is a "navigable water" within the CWA's reach because of its interstate flow and impacts on interstate commerce. There is no "single definitive

test" for determining navigability, and this ultimate determination "involve[s] questions of law inseparable from the particular facts to which they are applied." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). Under current law, a "navigable water" subject to the Act is one that is navigable-in-fact, crosses state lines, or is tributary to water that is either of the former. *See Rapanos v. United States*, 547 U.S. 715, 742 (2006); U.S. Envtl. Prot. Agency & U.S. Army Corps of Eng'rs, *Draft Guidance on Identifying Waters Protected by the Clean Water Act* 7, 11 (Apr. 27, 2011) [hereinafter *2011 Guidance*], *available at* http://perma.cc/0yfV1i6VbJJ, *attached at* App'x C. Here, the district court's application of law to fact led to a correct finding of navigability because EPA regulation, relevant case law, and the Commerce Clause all compel a finding that the Creek is a "navigable water."

A. Because Reedy Creek flows across state borders and draws significant revenue from out-of-state hunters, the Creek falls within two regulatory definitions of "waters of the United States."

Historic use of a water body for commerce and travel is not the sole test to determine "navigable waters." Under the CWA, regulatory definitions, and agency guidance, Reedy Creek is subject to federal oversight. The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2006). Although courts traditionally used the "navigable in fact" test† to determine which waters were subject to federal control under the commerce clause, subsequent case law confirms that "the meaning of 'navigable waters' [in the CWA] . . . is broader than the traditional understanding of the term." *Rapanos*, 547 U.S. at 73; *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) ("Congress chose to define the waters covered by the [CWA] broadly . . . 'navigable' as used in the Act is of limited import."). Considering the "hopelessly indeterminate" reach of the CWA, *see Sackett v. EPA*,

†. Navigable in fact are those waters that are "used or are susceptible of being used" as highways for commerce and travel. *Appalachian Elec. Power*, 311 U.S. at 406 n.21.

132 S. Ct. 1367, 1375 (2012) (Alito, J., concurring), EPA promulgated a regulation to clarify the Act's jurisdiction. As set forth in Part 122.2, "waters of the United States" includes, (1) all interstate waters and (2) all other waters, including wholly intrastate water bodies, "the degradation or destruction of which" could impact interstate commerce. 40 C.F.R. § 122.2 (2013). The latter category explicitly includes any such waters used by interstate travelers for recreation. *Id.* Reedy Creek falls within both of these categories.

First, Reedy Creek is a water of the United States because it meets the unambiguous "interstate waters" provision. Recent agency guidance defines "interstate waters" as those that "flow across, or form a part of, State boundaries." *2011 Guidance* at 7. Starting in the State of New Union, Reedy Creek flows for approximately fifty miles before it terminates in Wildman Marsh, located in the State of Progress. R. at 5. Because the Reedy begins in one state and crosses into another, it is squarely within the regulatory definition of "interstate waters."

Second, the "use, degradation, or destruction" of Reedy Creek affects interstate commerce and recreation, which subjects it to CWA regulation. 40 C.F.R. §122.2. Indeed, wholly intrastate waters still fall under CWA jurisdiction if they have an "interstate impact." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979); *see also Utah v. Marsh,*740 F.2d 799, 802–04 (10th Cir.1984) (holding the wholly intrastate Utah Lake to be a "water of the United States" because it was used to irrigate crops, support a fishery that marketed its fish out-of-state, and offered recreational opportunities). In *Earth Sciences*, the Tenth Circuit held that even though Rito Seco Creek was located entirely within the state of Colorado, it was nonetheless subject to CWA provisions because of the stream's "interstate impact." *Earth Sciences*, 599 F.2d at 375. These interstate impacts included waterborne recreation and the use of Rito Seco for irrigation to grow crops sold in interstate commerce. *Id.*

Considering the similarities between Reedy Creek and Rito Seco Creek, the Reedy falls well within EPA's definition of "waters of the United States." Like Rito Seco Creek, the Reedy supplies the water needed to grow crops that are sold in interstate markets. R. at 5. Additionally, the Creek and Wildman

Marsh are a major destination for local, interstate, and foreign duck hunters. *See* r. at 6. Indeed, out-of-state hunters contribute over $25 million to the local economy. R. at 6. The Reedy has an added connection to interstate commerce beyond those of Rito Seco: it provides water to Bounty Plaza, a service area on a federally-funded interstate highway, which encourages interstate travel. *See* r. at 5.

While the district court recognized that *Earth Sciences* would otherwise control, it stated that the case is no longer good law in the wake of *Rapanos*. R. at 10. But, the *Rapanos* Court did not directly address the validity of *Earth Sciences*, nor did it discuss the extent of the impact on commerce required to bring an intrastate water under CWA jurisdiction. Therefore, *Rapanos* did not invalidate *Earth Sciences*. Because Reedy Creek is both an interstate stream and has more interstate impact than Rito Seco Creek, the Reedy is a water of the United States under Part 122.2 and this Court should affirm.

B. In the alternative, Reedy Creek is a water of the United States because it is a tributary of Wildman National Wildlife Refuge.

Even if Reedy Creek was not a "navigable water" in its own right, the fact that the Creek flows into Wildman National Wildlife Refuge puts the Creek within the purview of the CWA. As the district court acknowledges, the plain meaning of "waters of the United States" encompasses waters under federal ownership. R. at 10. The government "doubtless has a power over its own property analogous to the police power of the several states." *Kleppe v. New Mexico*, 426 U.S. 529, 539–40 (1976). Indeed, Congress's ability to "make all needful rules and regulations respecting . . . the property of the United States" is an enumerated constitutional power. U.S. Const. art. IV, § 3, cl. 2. Because the Refuge is federally owned it is a "navigable water" for the purposes of the Act. R. at 10.

According to Part 122.2, "waters of the United States" also includes tributaries of covered waters. In the CWA context, "tributary" refers to any watercourse, whether man-made or natural, that "contributes flow to a traditional navigable water or interstate water, either directly or indirectly . . . ." 40 C.F.R. §

122.2; *2011 Guidance* at 11. Reedy Creek terminates in, and empties its flow directly into, Wildman Marsh, which is encompassed within the Reserve. R. at 5. Because the Marsh is federally owned, it is a "navigable water" and Reedy Creek is clearly a tributary to a "water of the United States." Therefore, the district court correctly determined that the Reedy is a navigable water subject to the CWA.

C. Regulating pollution in Reedy Creek is a permissible exercise of Congress's Commerce Clause power because the Creek is an interstate waterway with impacts on interstate commerce.

Because Reedy Creek is an interstate water body that draws a large number of waterborne recreators and is a crucial link to providing goods sold in interstate commerce, Congress can regulate it under the Commerce Clause. The Constitution grants specific powers to Congress, one of which is the power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Today, the Supreme Court recognizes three broad categories that Congress can regulate pursuant to this power: the use of channels of interstate commerce; the instrumentalities, persons, or things of interstate commerce; and activities that have a significant relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). In essence, Congress has vast regulatory power under the commerce clause. *Id.* at 553.

When Congress enacts laws that regulate channels of interstate commerce—the first prong articulated in *Lopez*—it has the power to protect the *flow* of commerce, not just the economic activity that occurs within the channels. *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003); *see also Appalachian Elec. Power*, 311 U.S. at 404–05 ("Congress may keep the 'navigable waters of the United States' open and free and provide by sanctions against any interference with the country's water assets."). Courts also recognize that the ability to regulate the flow of commerce enables Congress to pass laws that keep interstate channels "free from immoral and injurious uses." *See Deaton*, 332 F.3d at 706 (listing cases in which courts have upheld laws enacted to avoid such injurious uses). The power of

the CWA is couched in the first prong of *Lopez* because navigable waters are channels of interstate commerce. *See id*. ("Congress enacted the Clean Water Act under 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'") (quoting *Solid Waste Agency v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 172 (2001)).

As established above, Reedy Creek is a navigable water because it flows between two states, which makes it an interstate channel subject to regulation under the first prong of *Lopez*. The Creek is also subject to regulation under the second *Lopez* prong because it affects goods sold in interstate commerce as well as interstate recreation and travel. What's more, Maleau's actions degrade this interstate waterway. *See* Issues 0–0, *infra*. Considering Congress's ability regulate injurious uses of interstate commerce channels, extending CWA jurisdiction over Reedy Creek is a permissible exercise of the commerce clause power. This Court should affirm.

IV. DITCH C-1 IS A "WATER OF THE UNITED STATES" BECAUSE IT IS RELATIVELY PERMANENT AND HAS A SIGNIFICANT NEXUS WITH REEDY CREEK.

Ditch C-1's size, flow, and history, taken with relevant case law, regulations, and agency guidance, compel a finding that the Ditch is a navigable water under the CWA, not a point source. The district court incorrectly stated that *Rapanos* definitively stands for the proposition that ditches cannot be "navigable waters" because "ditch" is mentioned in the CWA definition of "point source." R. at 9 (citing *Rapanos*, 547 U.S. at 735–36, and CWA section 502(14)). *Rapanos* made no such finding. To the contrary, rather than draw definitive lines as to what constitutes a "water of the United States," the *Rapanos* decision further "mudd[ied] the jurisdictional waters." *Rapanos*, 547 U.S. at 800 (Stevens, J., dissenting). When analyzed under *Rapanos*, the facts in this case show that Ditch C-1 fits within the statutory definition of "navigable waters."

"The reach of the Clean Water Act is notoriously unclear," *Sackett v. EPA*, 132 S. Ct. 1376, 1375 (2012) (Alito, J.,

concurring), and the Supreme Court has addressed the scope of "navigable waters" subject to the CWA on three occasions. First, in *Riverside Bayview Homes*, the Court upheld the Army Corps's determination that the CWA covered freshwater wetlands adjacent to navigable and interstate waters and their tributaries. 474U.S. 121, 139 (1985). Next, in *Solid Waste Agency,* the Supreme Court invalidated the Corps's "Migratory Bird Rule," which previously allowed the Corps to extend CWA jurisdiction over any water body, even unconnected, intrastate waters, on the sole basis that it provided migratory bird habitat. 531 U.S. at 172. Most recently, the Court issued its *Rapanos* decision that again addressed whether particular wetlands were within CWA jurisdiction. 547 U.S. at 729. To answer that question, the Court had to determine when a "tributary" is a "water of the United States." *Id.* at 742. While five justices concurred in judgment, a majority did not agree on a standard for such waters. *See id.* at 758 (Roberts, C.J., concurring).

As described in the following sections, two tests to determine CWA jurisdiction emerged from *Rapanos*: (A) the plurality's "relatively permanent, standing, or continuously flowing" test; and (B) Justice Kennedy's "significant nexus" test. *See id.* at 739, 779. Because neither received support from a majority of the justices, *Rapanos* did not establish a definitive standard for determining the reach of the CWA. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position'" that least restricts federal jurisdiction. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation omitted); *United States v. Donovan*, 661 F.3d 174, 180 (3rd Cir. 2011).

In the wake of *Rapanos*, federal courts split on which test reflects the "narrowest grounds." *Donovan*, 661 F.3d at 180. The Seventh, Ninth, and Eleventh Circuits hold that Justice Kennedy's "significant nexus" test alone is the measure of CWA jurisdiction. *See United States v. Gerke Excavating, Inc.*,464 F.3d 723, 724–25 (7th Cir. 2006); *N. Cal. River Watch v. City of Healdsburg*,496 F.3d 993, 999–1000 (9th Cir. 2007); *United States v. Robinson*, 505 F.3d 1208, 1221–22 (11th Cir. 2007). The First, Third, and Fourth Circuits, as well as the federal government,

have determined that, if either the plurality test *or* Kennedy's significant nexus test is met, the water body falls within the CWA regulatory scheme. *See United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006); *Donovan*, 661 F.3d at 180–84; *Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 501 F. App'x 268 (4th Cir. 2012); *2011 Guidance* at 2. On the other hand, no circuit has found that only the plurality's "relatively permanent, constantly flowing" test applies.

This Court need not decide which test to adopt because Ditch C-1 is subject to CWA regulation under both: (A) the plurality standard and (B) the substantial nexus test; and also (C) because the CWA's policy goals contemplate control over waters like Ditch C-1.

A. Ditch C-1 is a "water of the United States" because it is a relatively permanent and continuously flowing body of water.

Despite the fact that Ditch C-1 is a man-made feature, its constant existence over the past 100 years and continuous flow during at least nine months out of every year mean that the Ditch falls under CWA jurisdiction. The plurality test in *Rapanos* holds that only relatively permanent, standing, or continuously flowing bodies of water are "waters of the United States." 547 U.S. at 739. Further, those waters must be "continuously present, fixed bodies of water as opposed to dry channels through which water occasionally flows," and, at minimum, exhibit "continuous flow in a permanent channel." *Id.* at 733. Under this test, the CWA does not extend to watercourses through which water flows "only intermittently or ephemerally." *Id.* at 739. While Justice Scalia mentions that "ditch" is included in the Act as an example of a point source because the term *implies* intermittence, *id.* at 736, the ultimate determination of Clean Water Act jurisdiction is fact-dependent. *Id.* at 732 n.5; *id.* at 736 n.7.

For instance, a court recently employed this fact-dependent inquiry when it found that a seasonal canal *was* subject to the CWA. *United States v. Vierstra*, 803 F. Supp. 2d 1166 (D. Idaho 2011). In *Vierstra*, Low Line Canal fell under CWA jurisdiction even though it was man-made, lacked an interstate connection, and flowed only seasonally. *Id.* at 1167. The Canal carried water

continuously during the six-to-eight month irrigation season. *Id.* at 1169. It discharged into a naturally-occurring stream, which in turn emptied into the Snake River, a traditionally navigable water. *Id.* at 1168–69. On these facts, the court determined that Low Line Canal was properly deemed a "water of the United States" as a non-navigable tributary under Part 122.2, as well as under *Rapanos*'s plurality and significant nexus tests. *Id.* at 1169–72.

As in *Vierstra*, the totality of the facts alleged in this case, taken as true, show that Ditch C-1 is a relatively permanent tributary of Reedy Creek that is subject to the CWA. Not only does Ditch C-1 maintain a continuous flow for a longer period than Low Line Canal—a minimum of nine months versus a maximum of eight—the Ditch is also supplied by a more permanent water source, groundwater. R. at 5. Running water has passed through the Ditch since 1913, and it will continue to do so because restrictive property covenants ensure its existence and maintenance. R. at 5. Furthermore, Ditch C-1 flows directly into Reed Creek, r. at 5, making it a direct tributary of a navigable water as opposed to the more attenuated connection in *Vierstra*. Thus, Ditch C-1 is more clearly a "water of the United States" than Low Line Canal, which also satisfied *Rapanos*'s fact-specific inquiry.

EPA's position on regulating tributaries under the *Rapanos* plurality test also supports finding CWA jurisdiction over Ditch C-1. To be a tributary, a water body must have a bed, bank, ordinary high water mark, and one of five additional qualities. *2011 Guidance* at 12. Ditch C-1 has defined measurements, r. at. 5, which suggests that it meets the first three requirements or, at minimum, requires additional fact-finding. It also exhibits "relatively permanent flowing water," one of the five additional qualities under the Guidance. The Ditch is therefore within EPA's definition of tributary. Furthermore, the Ditch connects directly to Reedy Creek, r. at 5, and is therefore a jurisdictional, non-navigable tributary. *2011 Guidance* at 13.

The *Rapanos* plurality admits that ditches can hold water permanently as well as intermittently, but when they do we call them by another name, such as "moat" or "canal." *Rapanos*, 547 U.S. at 736 n.7. In light of this language, the characteristics of a

particular water body, not the title attached to it, determine whether it falls under the CWA. As Chief Justice Roberts stated, "[l]ower courts and regulated entities will now have to feel their way on a case-by-case basis" to determine whether a water body is protected by the CWA. *Id.* at 758 (Roberts, C.J., concurring). Because Ditch C-1 is a tributary to Reedy Creek and is relatively permanent, both in flow and in existence, the Ditch is properly classified as a "water of the United States."

B. Ditch C-1 is a "water of the United States" because it substantially affects the chemical and biological integrity of Reedy Creek.

The pattern of measured arsenic concentrations in Ditch C-1 and Reedy Creek shows the "significant nexus" between the two and brings the Ditch within the CWA. Drawing on the Supreme Court decisions in *Riverside Bayview Homes* and *Solid Waste Agency*, Justice Kennedy's jurisdictional test asks if a non-navigable tributary has a "significant nexus" with a traditionally navigable water. *Rapanos*, 547 U.S. at 778–80 (Kennedy, J., concurring). Stated differently, the CWA applies even to non-navigable waters if the non-navigable water "significantly affect[s] the chemical, physical, and biological integrity" of a traditionally navigable water. *Id.* at 780. Under this test, it does not matter if the "significant effect" results from the water's direct connection to the navigable water or through a tributary system. *Id.*

EPA and the Corps use the significant nexus test to determine jurisdiction over non-navigable tributaries that are not relatively permanent. *2011 Guidance* at 13. The Guidance describes non-navigable tributaries as natural or man-made water bodies with defined beds and banks that "contribute[] flow to a traditional navigable [] or interstate water, either directly or indirectly by means of other tributaries." *Id.* at 11. When engaging in the significant nexus analysis, the agencies consider a variety of factors including: flow characteristics, proximity to a traditional navigable water, physical characteristics of the tributary, capacity to carry pollutants, and other hydrological factors the agencies deem relevant. *Id.* at 11. While courts are not bound to adhere to the Guidance, EPA's interpretations of

relevant law are entitled to deference to the extent they have the "power to persuade." *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 291 (4th Cir. 2011) (applying *Skidmore* deference).

The significant nexus test is also a fact-specific analysis. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n v. U.S. Army Corps of Eng'rs*, 801 F. Supp. 2d 446, 454 (D.S.C. 2011) (applying EPA CWA jurisdictional guidance from 2008 and detailing the facts the Corps relied upon to make its significant nexus determination). In *Deerfield Plantation*, the district court upheld the Corps's determination that no significant nexus existed between the ditches, swales, and ponds at issue in the case. *Id.* at 465. The structures were designed primarily to retain water and thus had low volume, duration, and frequency of flow. *Id.* The ditches and swales contained significant vegetation and merely"'convey[ed] water from ponds and surrounding upland areas during and following storm events and there [was] no evidence of groundwater recharge.'" *Id.* at 456. Furthermore, none of these features had any direct or indirect connection to a traditionally navigable water. *Id.*

The facts of this case distinguish it from *Deerfield Plantation*. Unlike the *Deerfield* ditch, Ditch C-1 is primarily supplied with groundwater and receives additional flow from storm events. R. at 5. The Ditch also connects directly to Reedy Creek, a navigable water in its own right. R. at 5. Most importantly, the pattern of arsenic concentrations in Ditch C-1 and Reedy Creek shows that the Ditch has a significant effect on the chemical and biological integrity of the Creek. Arsenic is undetectable in Ditch C-1 until just below Maleau's property. R. at 6. Similarly, the chemical is only detectable in Reedy Creek at locations downstream from its confluence with the Ditch. R. at 6. The U.S. Fish and Wildlife Service also found arsenic in several Blue-winged Teal in Wildman Marsh. R. at 6. These facts indicate that the Ditch C-1 significantly affects Reedy Creek's "chemical, physical, and biological integrity."

At the pleading stage, a plaintiff need only allege those facts that, accepted as true, state a claim for relief that is plausible on its face. Bonhomme easily met this burden and plausibly alleges a

significant nexus between Ditch C-1 and Reedy Creek that would bring the Ditch within the purview of the CWA.

C. Exempting Ditch C-1 from Clean Water Act jurisdiction is contrary to the purpose of the Act.

Both the explicit statutory purpose of the CWA and its legislative history counsel against exempting Ditch C-1 from regulation under the Act. As articulated in Section 101, the objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). This objective is a broad one and takes a "systematic view of the goal of maintaining and improving water quality." *Riverside Bayview Homes*, 474 U.S. at 132.

To realize this goal, Congress understood it would be necessary for the Act to reach the widest range of waters permissible under the Constitution. *See Utah v. Marsh*,740 F.2d 799, 802 (10th Cir.1984) ("It is generally agreed that Congress, by adopting this definition, intended to assert federal jurisdiction over the nation's waters to the maximum extent permissible under the Constitution, unlimited by traditional concepts of navigability"); *see also* S. Conf. Rep. No. 92-1236 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822, *attached at* App'x B (specifying that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."). Indeed, the Supreme Court has recognized three times that in order to fulfill its purpose, the CWA must extend to waters that are not navigable in the traditional sense. *See* Issue 0, *supra*. In the words of the district court, "it would be difficult or impossible to prevent pollution of a navigable stream without preventing pollution of its tributaries." R. at 10. Ditch C-1 is a permanent and consistently flowing tributary with a significant connection to navigable waters and federal property reserved for biological purposes. It is a perfect example of waters not traditionally navigable, but inextricably linked to maintaining the integrity of the nation's waters.

The overwhelming weight of legal authority militates in favor of finding Ditch C-1 is within the regulatory universe of the Clean

Water Act. Both *Rapanos* and subsequent agency guidance establish that Ditch C-1, despite its name, is actually a jurisdictional, non-navigable tributary of Reedy Creek. Furthermore, the same policy considerations that led Congress to enact the CWA compel this Court to recognize jurisdiction over the Ditch. Considering the facts and the law applicable here, the district court was incorrect in concluding that Ditch C-1 is not a "navigable water" under the CWA. This Court should reverse and remand for further proceedings.

V. THE PILES OF MINING WASTE THAT MALEAU DEPOSITED ON HIS PROPERTY ARE POINT SOURCES UNDER THE CLEAN WATER ACT BECAUSE THEY HAVE DISCRETE CHANNELS THAT CONVEY POLLUTION INTO DITCH C-1.

Piles of dirt are not always point sources, but that does not mean that Maleau's piles of overburden and mine waste *cannot* be a point source. The CWA bans "any addition of any *pollutant* to *navigable waters* from a *point source*." 33 U.S.C. § 1362(12)(A) (emphasis added to the three key elements). Arsenic is a pollutant and the Ditch is a navigable water. R. at 8; Issue 0, *supra*. The crux of this issue is the CWA's definition of "point source" as "any discernible, confined and discrete conveyance" not including discharges from agricultural stormwater and return flows. 33 U.S.C. § 1362(14).

Although the district court determined otherwise, Maleau's unpermitted discharges of arsenic from his property into Ditch C-1 are unlawful under the CWA because they originate from discernible, confined and discrete conveyances. As described below, Bonhomme alleged sufficient facts, taken as true, to make a plausible showing that Maleau's piles of mining waste are point sources that add pollution into Ditch C-1.

Accordingly, this Court should reverse the district court and remand for proceedings consistent with applicable law for two reasons. First, Maleau's piles of mining waste constitute a point source because rainwater carries pollutants from the piles through eroded channels into navigable waters. Second, the

district court relied on inapplicable case law that does not affect Bonhomme's argument.

A. Maleau's piles discharge arsenic through discrete channels into navigable waters, violating the Clean Water Act.

An eroded channel counts as a discrete conveyance under the CWA, but Maleau argues otherwise. He asserts that his piles of slag and overburden are not point sources because they do not constitute a "discernible, confined and discrete conveyance." R. at 9 (citing *Consol. Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976)). In its decision the district court agreed, stating that none of the CWA's statutory examples "remotely resemble a pile of dirt and stone," while adding that "[p]iles are not normally considered to be conveyances." R. at 9. But this analysis was not rigorous enough. Just because piles of mining waste are not *normally* considered conveyances does not mean they *cannot* be conveyances. *See Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980).

Under the CWA, a point source is "any discernible, confined and discrete conveyance" such as a channel, conduit, or discrete fissure, and courts liberally construe the definition. 33 U.S.C. § 1362(14); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("a point source . . . embrac[es] the broadest possible definition of any identifiable conveyance"). Accordingly, courts have held that the statutory definition of point source excludes only unchanneled and uncollected surface waters. *Appalachian Power*, 545 F.2d at 1373; *accord Abston*, 620 F.2d at 47. It follows that diffuse surface water *becomes* a point source when it channels and collects. *See Abston*, 620 F.2d at 45. The waste piles on Maleau's property fall squarely within the statutory and court-interpreted definition. Indeed, courts hold exactly that: piles of mining overburden are point sources when runoff gathers a pollutant and carries it from the piles through gullies or other discrete conveyances created by erosion. *Id.*

In *Abston*, a coal company placed overburden into spoil piles. *Id.* at 43. The piles were highly erodible and rainwater leached acid from them and carried it into an adjacent stream. *Id.* The

district court determined that the piles were not a point source because the pollution arose from "natural erosion and rainfall." *Id.* at 44. However, the Fifth Circuit disagreed. It reversed and focused on the "discernible, confined and discrete" language in the definition of a point source. *Id.* at 44. The court made it clear that "[g]ravity flow" is a point source discharge when precipitation erodes "ditches [or] gullies" in the "spoil pile walls." *Id.* at 45. Further, the piles are point sources "*even if* the miners have done nothing beyond the mere collection of rock and other materials." *Id.* (emphasis added). Accordingly, the court in *Abston* determined that piles of mining waste constitute a point source if they discharge pollutants from "discernible, confined, and discrete conveyance(s)," and are a "component of a mine drainage system." *Id.*

The piles of slag and overburden that Maleau transports to his property fit precisely into the *Abston* court's two-part definition of point source. First, much like the spoil piles in *Abston*, rainwater and gravity eroded channels on and between Maleau's waste piles extend all the way to Ditch C-1. R. at 4. Rainwater flows through these channels and picks up arsenic as it flows into the Ditch. R. at 5. Thus, Maleau's piles constitute a point source because they add arsenic to Ditch C-1 through a discrete conveyance.

Furthermore, Maleau's piles constitute a "mine drainage system" just like the piles in *Abston*. Although the waste in *Abston* was stored on site, the fact that Maleau transported the waste fifty miles from his mine, r. at 7, is a difference without a distinction. It is their configuration, not their location, that makes the piles a mine drainage system. *See Abston*, 620 F.2d at 45. Accordingly, Maleau cannot escape liability for the arsenic pollution simply by transporting his mine waste drainage system from one site to another.

As indicated by the *Abston* court's thorough analysis, the determination of whether or not a waste pile is a conveyance is a fact-specific inquiry. *See Abston*, 620 F.2d at 45. Bonhomme's complaint alleges more than enough facts to satisfy the *Twombly* pleading standard—it claims that Maleau arranged mining waste on his property such that rainwater runoff from eroded channels in the piles discharged arsenic into Ditch C-1. R. at 4–5. Based on

Bonhomme's complaint and the *Abston* decision, this Court should remand for proceedings on the merits.

B. The district court used the wrong case law to determine that Maleau's piles do not constitute a point source under the Act.

The holdings in *Consolidation Coal* and *Appalachian Power* do not mean that the piles of slag and overburden on Maleau's property are not point sources under the CWA. In both cases, industrial petitioners sought judicial review of EPA regulations promulgated under the CWA, which is not the issue in this case. *Appalachian Power* stands for the proposition that EPA, through rulemaking, cannot exceed the statutory scope of "point source" intended by Congress. *Appalachian Power*, 545 F.2d at 1373 (upholding industrial petitioners argument that construction runoff regulations exceeded the statutory scope of a point source under the CWA). The holding in *Consolidation Coal*, on the other hand, stands for the proposition that, in the absence of an as-applied challenge, courts cannot determine whether EPA regulations exceed the scope of the statutory definitions. *Consol. Coal Co.*, 604 F.2d at 249–50 (dispensing with industrial petitioners facial challenge that EPA regulations could be applied to surface runoff outside the statutory definition of a point source).

The district court erroneously relied on these cases as controlling. Unlike the petitioners in *Consolidation Coal* and *Appalachian Power*, Bonhomme does not argue that an expanded regulatory definition of a point source applies to the mining waste piles on Maleau's property. Rather, Bonhomme seeks to enforce the CWA's basic statutory provision banning the discharge of pollutants without a permit. Accordingly, the holdings in *Consolidation Coal* and *Appalachian Power* are not dispositive because they analyze regulations, not the underlying statute. Bonhomme simply argues that Maleau's piles of slag and overburden adjacent to Ditch C-1 fit within the statutory definition of "point source." Therefore, the holdings of *Consolidation Coal* and *Appalachian Power* do not impact Bonhomme's argument.

In sum, the *Abston* rule holds that piles of mining waste constitute a point source when rainwater carries pollutants from the pile through eroded channels into navigable waters. The district court erred when it dismissed this issue because Bonhomme's complaint contained sufficient factual information to support a claim for relief under *Abston*. Finally, even if it could have reached the merits on a motion to dismiss, the district court relied on inapplicable cases that do not affect Bonhomme's arguments. Accordingly, this Court should reverse and remand for proceedings consistent with appropriate law.

VI. BONHOMME DID NOT VIOLATE THE CLEAN WATER ACT WHEN ALREADY-POLLUTED WATER FLOWED THROUGH HIS PROPERTY INTO REEDY CREEK.

Even though a culvert can be a point source, Bonhomme's culvert does not add pollutants to a navigable water because the arsenic was already in the water. As identified in Issue 0, *supra*, Section 301(a) of the CWA bars "the discharge of any pollutant" without a permit. 33 U.S.C. § 1311(a) (2006). To violate the CWA, Bonhomme must add a pollutant to a navigable water from a point source. 33 U.S.C. § 1362(2). Bonhomme concedes that culverts *can* be point sources, but his culvert is not because it is simply a part of Ditch C-1. *See* Issue 0, *supra* (showing that the Ditch is a water of the United States). Thus, this issue turns on the term "addition," which the CWA does not define. *See id.*; *Friends of Everglades v. S. Fla Water Mgmt. Dist.*, 570 F.3d 1210, 1217 (11th Cir. 2009). However, EPA regulations do. National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) [hereinafter Water Transfers Rule Preamble] (codified at 40 C.F.R. pt. 122.3(i)), *attached at* App'x D. According to the rule, "addition" to navigable waters under the CWA does not include the transfer of pollutants within the same body of navigable water or between two distinct navigable waters. *Id.*; 40 C.F.R. § 122.3(i).

The district court failed to acknowledge and apply the Water Transfers Rule in its decision to dismiss Bonhomme's suit. Even in the absence of the Rule, Bonhomme should not face CWA

liability based solely on the fact that a culvert under his property carries arsenic from Maleau's waste piles into Reedy Creek. This Court should reverse the lower court and remand with instructions to apply the Water Transfers Rule because: (A) the Water Transfers Rule is the applicable law; (B) the Rule properly assigns CWA responsibility; and (C) public policy supports assigning responsibility to Maleau.

A. The district court applied the wrong law to determine that transfer of water through Bonhomme's culvert into Reedy Creek constitutes an unlawful addition of pollutants under the CWA.

Both of the cases that the district court applied do not control here because the Water Transfers Rule superseded them. R. at 9 (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004); and *Dague v. Burlington*, 935 F.2d 1343, 13154–55 (2d Cir. 1991)). EPA's definition of "addition" in the Water Transfers Rule arises from two interrelated theories in CWA jurisprudence: the "outside world" and "unitary waters" theories. *See* Water Transfers Rule Preamble, 73 Fed. Reg. 33,697. This new definition changes the playing field.

Under the outside world theory, an "addition" only occurs the *first* time a point source "*introduce*[s] the pollutant into navigable water from the outside world." *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (emphasis added). In *Gorsuch*, the D.C. Circuit grappled with whether pollution flowing *through* a dam constituted an "addition" of pollutants. *Id.* The court determined that addition does not occur when pollution "merely passes . . . from one body of navigable water (the reservoir) into another (the downstream river)." *Id.* In other words, "addition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world." *Id.* at 175.

Other courts follow *Gorsuch*'s outside world reasoning. For instance, the Supreme Court explained the theory using a simple analogy: "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not added soup or anything else to the pot." *Miccosukee Tribe of Indians*, 541 U.S. at 110 (quotation omitted). Therefore, "addition" only occurs when a

point source introduces a pollutant into a navigable water from the outside world.

The second piece of jurisprudence that EPA incorporated into the Water Transfers Rule is the unitary waters theory, which extends the outside world theory. Under it, an addition of pollutants to navigable waters cannot occur when pollutants move from one navigable water body to another. *Friends of Everglades*, 570 F.3d at 1217. Therefore, an addition occurs "only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters." *Id.* The approach taken by EPA under the Water Transfers Rule makes sense. But for the unitary waters theory, a discrete addition of pollution could give rise to multiple violations as it made its way from source to sea. Rather than requiring a series of permits for a single source of pollution, it is more efficient to require a permit when the pollution first reaches navigable waters—it can be more easily reduced or remediated there.

To be fair, the circuit courts generally disapproved of the unitary waters theory before EPA promulgated the recent Water Transfers Rule. *E.g.*, *Miccosukee Tribe of Indians* v. *S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491–93 (2nd Cir. 2001). However, EPA's promulgation of the Rule in 2008 resolved the disapproval in Bonhomme's favor. Indeed, *Friends of Everglades* remains the only direct appellate review of the Rule, which it expressly upheld. 570 F.3d at 1228 ("EPA's regulation adopting the unitary waters theory is a reasonable . . . construction of the [statute].").

The key distinction here is that the earlier courts rejecting the unitary waters theory were reviewing EPA actions *before* any rulemaking took place. *Id.* at 1218. As such, the agency received no *Chevron* deference towards its enforcement actions. *Id.* Now, the agency *has* promulgated a rule and is therefore entitled to *Chevron* deference regarding its interpretation. *Id.* The Water Transfers Rule is now the law of the land. It is supported both by EPA's expertise in water pollution regulation as well as the common sense notion that pollution should be subject to permitting when it enters navigable waters, not at each transfer between navigable water bodies.

A federal court of appeals has also upheld the Water Transfers Rule. As identified by the Eleventh Circuit, *Chevron* deference applies to the Water Transfers Rule because EPA is the agency charged with granting and enforcing NPDES permits under the CWA, and because the term "addition" in section 1362(2) of the Clean Water Act is ambiguous. *Id.* at 1227 (noting that EPA chose one of the two reasonable interpretations of "addition"). EPA's construction of "addition" is a reasonable one; it therefore cannot be "arbitrary, capricious, or manifestly contrary to the statute." *Id*. (citing *Chevron*, 467 U.S. at 844). Accordingly, the Eleventh Circuit upheld the unitary waters theory. *Id.* at 1228. Rather than rely on outdated case law, Bonhomme asks this Court to apply the Water Transfer Rule and determine that the culvert on his property does not constitute an addition of pollutants to navigable waters.

B. Under the Water Transfers Rule, addition of a pollutant can only occur once—Bonhomme cannot be liable for adding arsenic again.

Because Maleau already added arsenic from his piles into the Ditch, Bonhomme cannot re-add it to Reedy Creek through his culvert. This follows from applying both of the theories that form EPA's definition of "addition" under the Water Transfers Rule. First, the outside world theory dictates that an addition of pollutants can only occur from an outside point source. *Gorsuch*, 693 F.2d at 175; Water Transfers Rule Preamble, 73 Fed. Reg. at 33,701. Second, the unitary waters theory means that an addition cannot occur when pollutants are transferred from one navigable water body into another. *Friends of Everglades*, 570 F.3d at 1217; Water Transfers Rule Preamble, 73 Fed. Reg. at 33,701 (citing EPA's "long-standing practice of generally not requiring NPDES permits for transfers between [navigable] water bodies").

As identified in Issue 0, *supra*, Ditch C-1 is a navigable water body because it is a tributary to the Reedy, which is itself navigable. R. at 10. The Water Transfers Rule defines a water transfer as, "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. § 122.3(i). Thus, under the Rule, addition from a point source to

navigable waters only occurs when rainwater flows through the eroded channels in Maleau's waste piles and into Ditch C-1. Accordingly, the logic of the outside world theory dictates that the addition of arsenic from a point source—the piles of mining waste—into a navigable water body—Ditch C-1—precludes holding Bonhomme liable when the arsenic flows through his culvert into Reedy Creek.

Under the unitary waters theory, Bonhomme cannot add pollutants from Ditch C-1 into Reedy Creek through the culvert because both bodies are navigable. The facts in this case are analogous to the hypothetical situation used by the Eleventh Circuit to explain the unitary waters theory. *Friends of Everglades*, 570 F.3d at 1228. In the hypothetical, two buckets sit side by side. One bucket holds four marbles; the other holds none. A rule prohibits "any addition of any marbles to buckets by any person." *Id.* If a person takes two marbles from the first bucket and places them in the second bucket, did they "add" any marbles in violation of the rule? No. *Id.* Under the Water Transfers Rule, there were four marbles in buckets to begin with, and there are still four marbles in buckets after the transfer. No addition of marbles occurred. *Id.*

Just like the marble hypothetical, no addition of pollutants between Ditch C-1 and Reedy Creek occurred in this case. Arsenic already present in the Ditch passively transfers between navigable water bodies when it flows through the culvert into the Reedy. Therefore, under EPA's interpretation of the Water Transfers Rule, upheld by the Eleventh Circuit in *Friends of Everglades*, enforcement of the CWA must occur on Maleau's property where his waste piles add arsenic to the Ditch, not at the culvert on Bonhomme's property where water transfers into Reedy Creek.

C. Public policy also supports regulating the pollution at Maleau's source piles, not where it transfers from one water of the United States to another.

Public policy and federalism both favor enforcing the CWA at the pollution's source rather than where Ditch C-1 and the Reedy converge. However, the district court violated both concepts when it held Bonhomme liable for Maleau's arsenic. First, classic

principles of federalism prevent the federal government from interfering with the states' primary authority to manage water transfers within their own boundaries. Second, general notions of fairness and legislative history favor CWA enforcement where Maleau's arsenic enters Ditch C-1, not downstream where the Ditch reaches a confluence with Reedy Creek.

To the first point, the Water Transfers Rule exempts water transfer points from permitting, which makes sense under traditional notions of federalism. "Water transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under *State* law." Water Transfers Rule Preamble, 73 Fed. Reg. at 33,702 (emphasis added). Congress agrees, acknowledging the importance of water allocation under state water law: "[i]t is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]." 33 U.S.C. § 1251. To that end, the power to allocate water to their citizens rests almost exclusively with the states. *See* 33 U.S.C. § 1370(2) (2006). Justice Scalia also articulates the federalism concerns associated with state control over regulation in *Rapanos*, arguing "[w]e ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006). Because the CWA does not contain a "clear and manifest" intent from Congress to invade traditional state spheres of control, EPA cannot rely on the ambiguity of the word "addition" to take regulation of water transfers away from states.

On the second point, general notions of fairness also support the determination that the CWA should be enforced at the piles of mining waste rather than at the culvert leading into Reedy Creek. In 1972 when Congress passed the CWA, it specifically targeted *point source discharges*, not water transfers. S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742 ("it is essential that discharge of pollutants be controlled at the source"). The Water Transfers Rule Preamble explains why: "Rather than discharg[ing] effluent, water transfers convey one water of the U.S. into another." 73 Fed. Reg. at 33,702. Essentially, a water transfer just *moves* water; operators of

transfer facilities, like Bonhomme and his culvert, cannot control the upstream addition of pollutants in the waters they convey. *Id.* Both Congress's language and the Water Transfers Rule Preamble recognize that it is more efficient and effective to control water pollution at the source of effluent, rather than at water transfer points occurring miles downstream.

The district court contradicted that principle though, and assigned liability not to the *source* of the arsenic pollution, but to a downstream party that neither actually nor proximately caused it. Bonhomme's only so-called fault in this case revolves around his property's unfortunate geographic location. Regulating the arsenic at its source—Maleau's waste piles—fits precisely within Congress's CWA policy choice. Regulating the arsenic at Bonhomme's culvert does not.

In sum, the transfer of water from Ditch C-1 into Reedy Creek through Bonhomme's culvert does not violate the CWA. Under the Water Transfers Rule, the term "addition" excludes transfers of water from one body to another. The CWA's language, as well as its legislative history, support the same conclusion—punishing Bonhomme for Maleau's pollution is unfair in these circumstances and violates principles of federalism. The district court, however, applied outdated law and ignored the Water Transfers Rule when it determined the opposite. This Court should reverse and remand.

CONCLUSION

For the above reasons, Bonhomme asks this Court to affirm the district court on one issue: Reedy Creek is a "navigable water" under the Clean Water Act. However, the district court erred on the other five issues: Bonhomme's French nationality does *not* bar his suit; he *is* a real party in interest to the litigation; Ditch C-1 *is also* a water of the United States; Maleau's waste piles are *point sources*; and Bonhomme's culvert is *not*. These issues require expansive legal analysis and fact-specific inquiries that the lower court failed to address, making the district court's grant of

Maleau's motion to dismiss inappropriate. This Court should reverse and remand for further proceedings consistent with the applicable law outlined above.