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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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Civ. App. No. 13-01234 (Consolidated)
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

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

Brief for JACQUES SHIFTY MALEAU
Intervenor-Plaintiff-Appellant, Cross-Appellee

* 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.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked as an appeal upon a final order from the United States District Court for the District of Progress. 28 U.S.C. § 1291 (2006). The jurisdiction of the district court was appropriate under federal question jurisdiction as authorized under 28 U.S.C. § 1331 (2006). The original jurisdiction falls under federal question jurisdiction because the controversy surrounds the Clean Water Act ("CWA" or "Statute"), 33 U.S.C. §§ 1251-1387 (2000). The notice of appeal was filed in a timely manner. Fed. R. App. P. 4(a); (R. at 5).

STATEMENT OF THE ISSUES

I. Whether Bonhomme, a French nationalist without particularized injury, is the real party in interest under Fed. R. Civ. P. 17 to bring suit against Maleau for violating the CWA.

II. Whether Bonhomme is a "citizen" under 33 U.S.C. § 1365(g), who may bring suit against Maleau.

III. Whether Maleau's mining waste piles are "point sources" under the CWA, 33 U.S.C. § 1362(12), (14).

IV. Whether Ditch C-1, a seasonal irrigation ditch that discharges into a water that is not navigable-in-fact, is a navigable water/water of the United States under the CWA, 33 U.S.C. § 1362(7), (14).

V. Whether Reedy Creek, a stream that is not navigable-in-fact or a channel in interstate commerce, is a navigable water/water of the United States under the CWA, 33 U.S.C. § 1362(7), (12).

VI. Whether Bonhomme violates the CWA by adding arsenic to Reedy Creek through a culvert on his property even if Bonhomme is not the but-for cause of the presence of arsenic in Ditch C-1.

STATEMENT OF THE CASE

Appellee Jacques Bonhomme ("Bonhomme"), a French national living in the State of Progress and working for Precious Minerals International, Inc., commenced this action against Maleau under the citizen suit provision of the CWA, 33 U.S.C. § 1365. (R. at 4). Bonhomme alleges that Maleau violates the CWA because waste from Maleau's business contaminates Ditch C-1 with arsenic, eventually discharging into Reedy Creek, an alleged interstate, navigable water. (R. at 5).

The State of Progress ("Progress") joined this action by filing a citizen suit against Bonhomme, alleging that Bonhomme was in violation of the CWA because arsenic is entering Reedy Creek through a culvert on Bonhomme's property. *Id.* Maleau subsequently intervened in Progress's action against Bonhomme under 33 U.S.C. § 1365(b)(1)(B). *Id.* The cases were consolidated as *Bonhomme v. Maleau*. *Id.*

The defendant in each suit filed motions to dismiss. *Id.* The district court dismissed Bonhomme's suit, holding that he was not a proper plaintiff. (R. at 10). The district court held:

> (1) Bonhomme is not a real party in interest according to Fed. R. Civ. P. 17;
> (2) Bonhomme is not a "citizen" entitled to file a citizen suit under the CWA, § 33 U.S.C.
> 1365(g);
> (3) Maleau's mining waste piles are not "point sources" under the CWA, 33 U.S.C. § 1265(12), (14);
> (4) Ditch C-1 is not a navigable water because it is a point source;
> (5) Bonhomme violates the CWA by discharging pollutants into Reedy Creek through his culvert;
> (6) Reedy Creek is a water of the United States under the CWA, 33 U.S.C. § 1362(7), (12).

(R. at 1-2).

Bonhomme appeals the district court's decision with respect to the first four issues. Progress appeals the district court's

decision on issue (4). Maleau appeals the district court's decision for issue (6).

STATEMENT OF THE FACTS

Jacques Bonhomme is a French citizen residing in the United States where he serves as President of Precious Minerals International, Inc. ("PMI"), an international gold mining and extraction business. Bonhomme is a member of the PMI Board of Directors, President, and owns the largest proportion of its stock as a three percent shareholder. Bonhomme owns a hunting lodge in Lincoln County, Progress, where he hosts hunting parties for PMI clients and associates.

Shifty Maleau owns a nearby gold mining operation in Lincoln County that directly competes with PMI. Maleau transports waste materials generated by the operation to his other property in neighboring Jefferson County, and places them in piles on his land. During periods of precipitation, rainwater flows through the piles and forms naturally occurring channels in the soil, which eventually deposit into a seasonal drainage ditch running through his property known as Ditch C-1.

Previous landowners constructed Ditch C-1 to sufficiently drain their properties for agricultural uses. The ditch runs through several neighboring land parcels and contains drained groundwater derived from saturated soil and rainwater runoff. PMI facilitated testing of Ditch C-1 that indicates the presence of the pollutant arsenic. The ditch ultimately discharges the contaminated water through a culvert on Bonhomme's property into Reedy Creek, three miles from Maleau's land.

Reedy Creek serves commercial and agricultural purposes in both Progress and neighboring New Union. It is neither navigable-in-fact nor used for transporting commercial goods. The creek ends in a wetlands area primarily owned and maintained by the United States Fish and Wildlife Service known as Wildman Marsh. PMI's data indicates the existence of arsenic in both the creek and the marsh.

Bonhomme's property partially fronts Wildman Marsh, which he uses during his corporate hunting events. However, recently both PMI's profitability and the frequency of Bonhomme's parties have declined.

SUMMARY OF THE ARGUMENT

Bonhomme lacks standing in this matter because he is not the real party in interest. Pursuant to Federal Rule of Civil Procedure (Fed. R. Civ. P.), 17(a), defendants should not be subjected to double liability if sued by third parties not properly joined in suits where those third parties are real parties in interest. In the instant case, PMI is the real party in interest, for which Bonhomme is a front. PMI, rather than Bonhomme, finances the sampling and analysis of Ditch C-1, Reedy Creek, and Wildman Marsh. It additionally pays all of Bonhomme's attorney and expert witness fees. Lastly, PMI is the true beneficiary of Bonhomme's hunting events, many of which entertain corporate clients and associates. Bonhomme therefore does not have a direct injury or interest as required under the CWA to bring a citizen suit.

The citizen suit provision of the CWA applies exclusively to United States citizens and Bonhomme consequently lacks standing as a French national. Congress did not authorize foreign citizens to bring claims under the CWA. Rather, it notably excluded foreign citizens from the definition of "person" in the context of citizen suits, while incorporating juridical entities that hold vested authority and domestic interests such as the State, municipalities, corporations, and partnerships. Nowhere in the CWA does Congress authorize litigation by foreign citizens.

Maleau is not liable as a polluter under the CWA because his waste piles are not "point sources" pursuant to 33 U.S.C. § 1362(14). The Statute defines point sources as "discernible, defined, discrete conveyance[s]" and provides a representative list of structures that meet the definition, all of which connote human made discharge or drainage systems. The Statute's plain

language and supporting case law demonstrate that gravity-formed soil channels depositing rainwater runoff from Maleau's waste piles into Ditch C-1 do not constitute a discrete conveyance, therefore alleviating Maleau of CWA liability.

Ditch C-1 does not meet the statutory definition of "navigable water" and therefore falls outside of the CWA's jurisdiction. Congress specifically intended to preserve traditional state powers over land use planning and water resource management. While Congress strove to clean the nation's waters, it did not intend to strip the States' authority over their own waterways. Accordingly, Congress limited the federal government's jurisdiction over navigable waters. Courts have acknowledged that while the definition of "navigable" for purposes of the CWA surpasses a traditional understanding of the word, its conventional meaning is nonetheless significant. Thus, for federal jurisdiction over water that is not navigable-in-fact, the Supreme Court held that the isolated water must have a significant nexus or a continuous surface connection to a navigable-in-fact water. Ditch C-1 does not qualify as navigable water because it is not itself navigable-in-fact and it does not satisfy the crucial element of connectivity to a navigable-in-fact water. Ditch C-1 is a man-made drainage ditch that terminates into Reedy Creek. Because Reedy Creek is a non-navigable water, CWA jurisdiction does not extent to Ditch C-1.

Ready Creek is neither a traditionally navigable water nor attached to a navigable-in-fact water body, and is therefore beyond the reach of the CWA. Reedy Creek is not alleged to be navigable-in-fact or capable of becoming navigable with reasonable improvements. Reedy Creek is consequently not a traditionally navigable water meaning it must connect to a traditionally navigable-in-fact water for federal jurisdiction to attach. Reedy Creek terminates into Wildman Marsh, an area that does not qualify as a traditionally navigable water. Although Reedy Creek crosses state lines and may affect interstate commerce, Commerce Clause powers are extended over navigable waters through the channels of the interstate commerce prong. Reedy Creek is not used as an interstate channel, which makes jurisdiction based on Commerce Clause authority unjustified.

If this Court determines that Reedy Creek is a navigable water, Bonhomme is consequently liable under the CWA. The Statute requires a federally issued National Pollutant Discharge Elimination System ("NPDES") permit for discharging a pollutant into a navigable water via a point source. Contrary to Bonhomme's claim, causation is not contemplated by this provision of the CWA, making his assertion that Maleau is the but-for cause of the arsenic contamination irrelevant. Bonhomme's ownership of the point source implicates his liability under the CWA.

In light of the forgoing, the district court's dismissal of Bonhomme's claims on the issues of standing and CWA liability should be affirmed and the district court's determination of Reedy Creek as a navigable water under the CWA should be reversed.

STATEMENT OF APPELLATE STANDARD OF REVIEW

A motion to dismiss is properly granted when a plaintiff alleges facts that, accepted as true, fail to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). To avoid dismissal, the complaint's factual allegations must comprise more than labels and conclusions or a simple recitation of the cause of action's elements, and the right to relief must rise above a speculative level. *Bell A. Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

Courts of Appeals review motion to dismiss determinations *de novo*, in which legal issues are reconsidered. Findings of fact by the district court are reviewed for "clear error." *United States v. Ziskin*, 360 F.3d 934, 942 (9th Cir. 2003).

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S RULING THAT BONHOMME IS NOT THE REAL PARTY IN INTEREST UNDER FED. R. CIV. P. 17(A) BECAUSE HE RESTS HIS CLAIM ON THE INTERST OF A THIRD PARTY.

Fed. R. Civ. P. 17(a)(1) states, "An action must be prosecuted in the name of the real party in interest." The purpose of Rule 17(a) is to protect a defendant against a subsequent claim, ensuring the benefit of *res judicata*. *See Curtis Lumber Co. v. Louisiana Pac. Corp.*, 618 F.3d 762, 771 (8th Cir. 2010) (finding that the real-party-in-interest rule does not bar suit because the third party in question suffered no injury necessary to make the defendant at risk of being doubly liable); *Marina Mgmt. Servs., Inc. v. Vessel My Girls*, 202 F.3d 315, 318-19 (D.C. Cir. 2000) (reversing a denial of a motion to dismiss because the district court's judgment does not protect the defendant against a subsequent claim by a third party, suggesting the plaintiff is not the interested party under Rule 17(a)); *United HealthCare Corp. v. Am. Trade Ins. Co., Ltd.*, 88 F.3d 563, 569 (8th Cir. 1996) (highlighting that Rule 17(a) is for the benefit of the defendant). A plaintiff lacks the prudential standing to bring suit if he "rest[s] his claim to relief on the legal rights or interests of third parties." *Lans v. Digital Equip. Corp.*, 252 F.3d 1320, 1328 (Fed. Cir. 2001) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

The primary purpose of Rule 17(a) is to "protect the defendant against a subsequent action by the party actually entitled to recover." Fed. R. Civ. P. 17(a), Advisory Committee Note. In *Curtis Lumber*, Curtis Lumber Company ("Curtis Lumber") sold its siding materials by taking advantage of a promotional rebate offered by the Louisiana Pacific Corporation ("LP"), a national manufacturer of building materials. 618 F.3d at 767. Upon discovering additional requirements attaching to the rebate, Curtis Lumber's customers cancelled their orders and

refused to pay. *Id.* Curtis Lumber sued based on lost profits, and LP attempted to bar suit through Rule 17(a). *Id.* at 769. The court decided that Curtis Lumber's individual customers did not suffer an injury in fact, which meant there was not a risk of subsequent claims being filed against LP. *Id.* at 771. Accordingly, the court found Curtis Lumber to be the real party in interest under Rule 17(a). *Id.*

In *Marina Management,* the D.C. Circuit Court of Appeals questioned whether Marina Management Services, Inc. ("Marina Management"), acting as an agent, had the right to sue the defendant on behalf of MIF Realty, L.P. ("MIF Realty"). 202 F.3d at 318. The court ultimately reversed the denial of the defendant's motion to dismiss because there were no protections from a subsequent claim by MIF Realty for the money that Marina Management sought to recover, thus in "noncompliance with Rule 17(a)." *Id.* at 319.

Rule 17(a) bars Bonhomme from bringing suit against Maleau because he is not the real party in interest, which would leave Maleau open to subsequent claims. PMI is the real party in interest in the current matter. PMI has financed all of Bonhomme's attorney and expert fees associated with this case. (R. at 7). PMI, not Bonhomme, funded the samples and analyses supporting Bonhomme's contention that the arsenic in Ditch C-1, Reedy Creek, and Wildman originated on from Maleau's property. *Id.* If this Court allows Bonhomme's claim to proceed, Maleau would be subject to further claims brought by PMI, which is contrary to the purpose of Rule 17(a). Unlike the facts in *Curtis Lumber*, where the third-party customers of Curtis Lumber had no injury, PMI has a very real injury in the form of lost profits, which leaves Maleau open to duplicate liability. Bonhomme claims an injury of hosting six less hunting parties per year than he previously held. (R. at 6). Yet, the Record states he "is afraid to use the marsh for his hunting parties," which is not actually owned by Bonhomme. *Id.* Bonhomme only owns the property adjacent to the marsh, including his hunting lodge, where he does not reside year-round, making the claim of injury tenuous. *Id.* Additionally, losing six opportunities to host hunting parties is not a direct injury to Bonhomme because these events serve the business interests of PMI. *See* (R. at 6). Moreover, the

connection between Reedy Creek and Bonhomme's ability to throw lavish parties for corporate executives and prospective business associates is likely a spurious correlation. *See Id.* Rather, the decrease in hunting parties is more likely attributed to a declining economy that mirrors PMI's loss in profitability. PMI is the chief financier for all evidence and services related to Bonhomme's claim because of its deep-rooted financial stake in the matter, which makes PMI the real party in interest rather than Bonhomme.

Where the court in *Curtis Lumber* did not favor the use of Rule 17(a) as a bar to bringing suit, this Court should acknowledge the clear difference between a wealthy company such as PMI and Curtis Lumber customers who simply decided not to make a purchase. Similar to the circumstances surrounding *Marina Management*, where the court found Marina Management to be an illegitimate agent for MIF Realty's real interest, Bonhomme, having no real injury, is not the real party in interest. Bonhomme serves on the Board of Directors and as President of PMI. (R. at 6-7). However, just as in *Marina Management*, Bonhomme, as an agent is not expressly given the right to sue on behalf of PMI. The possibility of Maleau being sued by Bonhomme, and then again by PMI is precisely what Rule 17(a) is designed to prevent. Maleau properly raised in a timely manner PMI's interest in his answer to Bonhomme's complaint in the lower court. (R. at 7). This Court should following Fed. R. Civ. P. 17(a) and affirm the dismissal of Bonhomme's suit because Maleau had given a reasonable amount of time for PMI to rightfully join the suit. *Id.* Because Bonhomme is not the real party in interest and PMI can no longer join the suit this Court should affirm lower court's dismissal of the Bonhomme's claims on Rule 17(a) grounds.

II. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S RULING THAT BONHOMME IS NOT A "CITIZEN" UNDER § 33 U.S.C. 1365(G).

The CWA authorizes any "citizen" to maintain suit against violations of the Statute by using the citizen suit provision. 33 U.S.C. §1365. Citizen is defined as, "a person or persons having an interest which is or may be adversely affected." *Id.* "Person"

is further defined as individuals, corporations, partnerships, government, entities, etc. 33 U.S.C. §§ 1365(g), 1362(5). Foreign nationals are not expressly given authorization to commence citizen suits under the CWA. *Id.* The Supreme Court held that by broadening the term "navigable waters" as "waters of the United States," Congress did not deprive the term "navigable" of all meaning. *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 the *SWANCC* case); 33 U.S.C. §1362; (R at 8). "Similarly, the CWA's definition of the narrow concept of a 'citizen' of the United States as the broader concept of a 'person,' does not deprive 'citizen' of its meaning." (R. at 8). The entities listed, including corporations, partnerships, States, municipalities, etc. are used to define "persons." 33 U.S.C. § 1362(5). If Congress intended to broaden the definition of citizen beyond that of American citizenship and domestic entities in the juridical form, it would have expressly written the section of the CWA as such.

The court, in *Corrosion Proof Fittings v. EPA*, found that foreign entities do not have standing to challenge the EPA's actions under TSCA. 947 F.2d 1201, 1210-11 (5th Cir. 1991). The Fifth Circuit cites *Clarke v. Securities Industry Ass'n*, in its determination that it was unlikely foreign entities were "intended [by Congress] to be relied upon to challenge agency disregard of the law." 479 U.S. 388, 399 (1987). If the Fifth Circuit believes foreign entities are not able to challenge the EPA on its decision-making to enforce environmental statutes like TSCA, then surely the CWA, 33 U.S.C. § 1365(g), in its definition of "citizen" as "any person or persons having an interest," excludes foreign nationals. In *Corrosion Proof Fittings*, Canadian petitioners interpreted "any person" to mean anyone who could arrange transportation to the courthouse. 947 F.2d at 1209. The court denied the petitioners' standing. *Id.* at 1211. The court further stated, "[P]arties that Congress specifically did not intend to participate in, or benefit from, an administrative decision have no right to challenge the legitimacy of that decision." *Id.* at 1210.

A reasonable application of *SWANCC* would hold that foreign nationals are not given standing under the CWA to bring a citizen suit because such a holding would deprive "citizen" of all import. Accordingly, Bonhomme, as a foreign national of France,

does not have standing to bring suit against Maleau under the CWA. 33 U.S.C. §§ 1365(g), 1362(5); (R. at 8). Further, *Corrosion Proof Fittings* supports this determination, albeit for another United States environmental statute. This Court should affirm the lower's court's decision to bar Bonhomme's suit because he lacks standing to bring a citizen suit under the CWA. 33 U.S.C. §§ 1365(g), 1362(5).

III. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S RULING THAT MALEAU'S WASTE PILES ARE NOT POINT SOURCES UNDER 33 U.S.C. § 1262(14) BECAUSE WASTE PILES ARE NOT A DISCERNIBLE, CONFINED, OR DISCRETE CONVEYANCE.

The district court properly dismissed Bonhomme's claim that Maleau's waste piles constitute point sources under the CWA. The Statute defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating aircraft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Point sources from which pollutants discharge into "navigable waters" require a permit issued by the U.S. Environmental Protection Agency ("EPA") under the NPDES. 33 U.S.C. § 1341(a)(1). Though the statutory list is not exhaustive, the court may not indiscriminately add items to it. Reading "waste piles" into the provision would require an unjustified finding that they are analogous to the discrete conveyances enumerated. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). As the district court properly determined, the plain language of the CWA and relevant case law demonstrate that waste piles do not constitute point sources, thus alleviating Maleau of liability under the Statute. Bonhomme's claim on this issue was therefore justly dismissed and should be affirmed by this Court.

Bonhomme incorrectly asserts that Maleau's piles of overburden and slag constitute a point source pursuant to the CWA. Overburden is characterized as the worthless layer of soil and rock removed by miners to gain access to ores and minerals

below the surface. *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1337-38 (D.N.M. 1995). Slag is a similar stony byproduct of the smelting process. *A & W Smelter and Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1109 (9th Cir. 1998). The district court dismissed Bonhomme's claim based on the CWA's plain language, emphasizing that none of the point source examples enumerated in the Statute remotely resemble waste piles of such materials, and concluded "piles are not normally considered to be conveyances." (R at 9). The district court's reasoning is supported by the Second Circuit's ruling in *U.S. v. Plaza Health Labs., Inc.*, establishing that the defining terms and examples given in the Statute ("pipe, ditch, channel, tunnel, conduit, well, discrete fissure, etc.") conjure images of physical structures and systematic conveyances delivering pollutants from industrial sources to navigable waterways. 3 F.3d 643, 646 (2d Cir. 1993). ("Although by its terms, the definition of 'point source' is nonexclusive, the words used to define the term and examples given . . . evoke images of physical structures and instrumentalities that *systematically act* as a means of conveying pollutants from an industrial source to a navigable waterways") (emphasis added). *Id.* By contrast, Maleau's waste piles do not comprise a pollution delivery system designed to discharge into a navigable waterway.

In *Greater Yellowstone Coal v. Lewis*, the Ninth Circuit held that regarding mining operations, Congress intended precipitation runoff involving pollutants to be considered nonpoint sources. 628 F.3d 1143, 1152 (9th Cir. 2010). There the court established that merely asserting a hydrologic connection between contaminated groundwater and surface waters is insufficient to warrant point source classification. Such claims must initially establish the existence of a point source to which pollutants can be attributed, and that unless groundwater-transported pollution is traceable to a point source such as a tank, pipeline, ditch or other such conveyance, it is not subject to NPDES permitting requirements. *Id. Lewis* further established that a "storm water drainage system" is precisely the type of collection or channeling intended for regulation by the CWA. *Id.* at 1152-53. Maleau's property lacks the type of pollution drainage scheme contemplated in *Lewis*. Unlike the examples enumerated by the court, pollution from his waste piles is not

discharged by a human made conveyance and should therefore be classified as a nonpoint source.

Further bolstering Maleau's assertion that his waste piles are nonpoint sources pursuant to the CWA is the Government's definition of nonpoint source pollution ("NPS"), characterized by EPA as that which is "caused by rainfall or snowmelt moving over and through the ground." EPA's Polluted Brochure EPA-841-F-94-005, (1994), *available at* http://www.epa.gov

/owow/nps/qa.html. EPA further states, "as the runoff moves, it picks up and carries away natural and human-made pollutants finally depositing them into lakes, rivers, wetlands, coastal waters, and even our underground sources of drinking water." *Id.* EPA's representation of nonpoint source pollution mirrors the situation occurring on Maleau's property in Lincoln County, where precipitation flows through his discarded waste via naturally occurring channels in the soil eventually terminating at Ditch C-1.

Bonhomme's reliance on *Sierra Club v. Abston Cont. Co., Inc.* is misplaced because the decision effectuates a circuit split that is not supported by the weight of authority. 620 F.2d 41 (5th Cir. 1980). The Fifth Circuit's designation of waste piles in the mining context as a point source is contrary to rulings mandating that mining waste constitutes a point source only when discharged from a source designed to collect or convey storm water. *See* Consol. *Coal Co. v. Costle*, 604 F.2d 239, 249 (4th Cir. 1979) (stating the definition of point source excludes water that has not been collected and channeled) (rev'd on other grounds); *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (finding that though the statutory definition is somewhat broad it does not include uncollected and unchanneled rain water runoff).

Lastly, the final element of the CWA's point source definition supports both the district court's determination that Maleau's waste piles do not violate the Statute and Bonhomme's invalid dependence on *Abston.* In the current matter, gravity-formed channels discharge into Ditch C-1, which (as established in the following section) does not qualify as a navigable water or a water of the United States under the Statute. Bonhomme's reliance on *Abston* in attempting to overcome the statutory

language and establish Maleau's waste piles as point sources is invalid because the piles at issue in *Abston* discharged pollutants into a navigable water. 620 F.2d at 44. The *Abston* court specified that discharge from waste piles constitutes a point source if channeled into a navigable water through "ditches, gullies and similar conveyances." *Id.* Maleau's waste piles discharge into Ditch C-1, which is not a navigable water, as evidenced by the *Abston* court's classification of ditches as potential point sources. *Id.* Maleau's waste piles are therefore not a point source pursuant to the CWA because they discharge into Ditch C-1, which does not qualify as a navigable water under the Statute.

The plain language of the CWA and judicial interpretation of its application clearly indicate that Maleau's waste piles do constitute a point source under the Statute. Because Maleau's waste piles are not within the CWA's jurisdiction this court should uphold the district court's ruling on this issue.

IV. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S RULING THAT DITCH C-1 DOES NOT QUALIFY AS A NAVIGABLE WATER OR A WATER OF THE UNITED STATES UNDER 33 U.S.C. § 1362(7), (12) BECAUSE DITCH C-1 DOES NOT HAVE A CONTINUOUS SURFACE CONNECTION OR A SIGNIFICANT NEXUS TO A NAVIGABLE-IN-FACT WATER.

The CWA intends to preserve traditional State power to regulate local pollution. The Statute specifically called for "[c]ongressional recognition, preservation, and protection of [the] primary responsibilities and rights of [the] States." 33 U.S.C. § 1251(b). As a result, the federal government's jurisdiction over water is limited to navigable waters, which the Statute defines as "waters of the United States, including the territorial seas." *Id.* § 1362(7).

The definitional ambiguity required both EPA to promulgate regulations and courts to further clarify the agency's jurisdiction. The traditional definition of navigable waters was set forth in *United States v. Appalachia Electric Power Co.*, which defined navigable waters as those having been used for waterborne

transportation or could be so used with reasonable improvements. 311 U.S. 377, 408 (1940). EPA vastly expanded the original understanding of "navigable waters" by defining "waters of the United States" to include such waters as all tributaries to navigable waters, all interstate waters, and all inter and intrastate waters that affect interstate commerce. 40 C.F.R. § 122.2 (2011).

While EPA has continuously extended its jurisdiction of "navigable waters" and "waters of the United States," the Supreme Court clearly demonstrates by shaping federal authority over navigable waters in recent cases that EPA's jurisdiction under the CWA is not limitless. *See Rapanos v. United States*, 547 U.S. 715, 810 (2006) (a plurality decision resulting in two tests for determining when isolated wetlands fall under the jurisdiction of the CWA); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (holding that navigable waters did not include isolated ponds and wetlands used as a habitat by migratory birds crossing state lines); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985) (holding that federal CWA jurisdiction over wetlands extends only to those wetlands adjacent to traditionally navigable waters). Following these precedential decisions, neither Ditch C-1 nor Reedy Creek qualify as navigable waters or waters of the United States. Thus, Maleau is not liable for illegal discharges into either water.

Non-navigable ditches with regularly flowing water that are not adjacent to or sufficiently connected to a traditionally navigable water do not qualify as navigable waters or waters of the United States under the CWA. *See* 474 U.S. at 134; 531 U.S. at 172; 547 U.S. at 739. In *United States v. Riverside Bayview Homes, Inc.* the Court held that the Army Corps of Engineers' jurisdiction under the CWA extended to wetlands adjacent to navigable waters. 474 U.S. at 134. The Court stressed the difficulty of determining when water becomes solid ground in approving the breadth of the Corps jurisdiction. *Id.* at 132. Importantly, the Court focused on Congressional intent limiting CWA jurisdiction over navigable waters. *Id.* at 136.

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("*SWANCC*") further defined

jurisdiction over navigable waters by rejecting the Army Corps of Engineer's assertion of jurisdiction over isolated wetlands based on its use as a habitat by migratory birds that cross state lines. 531 U.S. at 164. The Court found that when an administrative interpretation of a Statute extends to the outer bounds of Congressional power, a clear demonstration of Congressional intent is required. *Id.* at 172. To extend CWA jurisdiction to isolated, non-navigable waters would effectively write navigable out of the Statute contrary to the Statute's legislative intent. *Id.* at 171.

Rapanos v. United States concerned two consolidated cases (*United States v. Rapanos* and *Carabell v. United States*) in which four Michigan wetlands located adjacent to ditches or human made drains that eventually emptied into navigable waters were subject to federal jurisdiction by the EPA and the U.S. Army Corps of Engineers. 547 U.S. 715, 729. Although the *Rapanos* Court did not deliver a majority opinion, the plurality held that wetlands not adjacent to traditional interstate navigable waters must have a continuous surface connection to such waters so that the distinction between waters and wetlands is unclear. *Id.* at 742.

Justice Kennedy's concurrence supported a "significant nexus" test to determine when jurisdiction could be exerted over a wetland not immediately adjacent to a navigable-in-fact water. To satisfy Justice Kennedy's test, a significant nexus between the wetland and navigable-in-fact water would be "assessed in terms of the [CWA's] goals and purposes," including the restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters. *Id.* at 779. Justice Kennedy suggested a case-by-case analysis for regulation of wetlands adjacent to non-navigable tributaries of navigable-in-fact waters. *Id.* at 782. Finally, the dissent would have held that CWA jurisdiction applied following either the continuous surface connection or the significant nexus test and encouraged lower courts to use either test. *Id.* at 810. Under the plurality's holding, an intermittently flowing ditch would not qualify as navigable water, while under Justice Kennedy's concurrence, a ditch, whether intermittent or continuous, may support navigable water jurisdiction if a

significant nexus between the ditch and a traditionally navigable water is determined. *Id.* at 736, 803.

For the plurality, Justice Scalia stressed the plain-meaning of the Statute's words, positing that even when ditches continuously hold water, ordinary parlance would describe such a water as a river, creek, or stream. *Id.* at 736. When "ditch" is invoked, it generally refers to something less than "waters." *Id.* Most importantly, under both the plurality and the concurrence, an isolated water must be connected to a water that is navigable in its own right.

In the current case, Ditch C-1 is not a navigable water because it is not navigable-in-fact and is not adjacent to navigable water. In *Riverside Bayview Homes, Inc.*, the Court allowed jurisdiction over a wetland that naturally flowed into a navigable water so that it was difficult to determine where the navigable water ended and the wetland began. 474 U.S. at 132. Determining where Ditch C-1 ends and Reedy Creek begins is irrelevant since Reedy Creek is not a navigable water. Ditch C-1 does not flow into a navigable water, and therefore, the deference given in *Riverside* does not extend to this case.

Next, the Court's holding in *SWANCC* demonstrated that jurisdiction under the CWA cannot be extended to the outer bounds of Congressional authority without clear authorization from Congress. 531 U.S. at 172. Extending jurisdiction over Ditch C-1—a non-navigable, manmade ditch that is not adjacent to navigable water—would expand CWA jurisdiction to the point of giving navigable no meaning. Such an expansion cannot be sustained without clear support from Congress. On the contrary, Congressional history demonstrates that the CWA was designed to protect traditional States rights. 33 U.S.C. § 1251(b).

Finally, *Rapanos* does not extend CWA jurisdiction in this case. Since Ditch C-1 ends at Reedy Creek, which is not a traditional interstate navigable water, the ditch cannot satisfy either the continuous surface connection test or the significant nexus test, because the key element of both tests—connection to a navigable water—cannot be satisfied. Even following Justice Kennedy's concurrence, and assuming that Ditch C-1 has a significant nexus to Reedy Creek, jurisdiction would still not

extend to Ditch C-1 because Reedy Creek is neither a navigable-in-fact water or a tributary of a navigable water.

In conclusion, this Court should uphold the lower court's finding that Ditch C-1 does not qualify as navigable water or water of the United States under the CWA because Ditch C-1 does not have a connection to a traditionally navigable water.

While this section has assumed that Reedy Creek is not a navigable water or a water of the United States for purposes of the CWA, the next section will demonstrate that under relevant case law, Reedy Creek cannot be considered a navigable water or a water of the United States.

V. THIS COURT SHOULD RESERVE THE DISTRICT COURT'S RULING THAT REEDY CREEK QUALIFIES AS NAVIGABLE WATER OR A WATER OF THE UNITED STATES UNDER 33 U.S.C. § 1362(7), (12) BECAUSE REEDY CREEK IS NEITHER A NAVIGABLE-IN-FACT WATER NOR A WATER WITH A CONTINUOUS SURFACE CONNECTION OR A SIGNIFICANT NEXUS TO A NAVIGABLE-IN-FACT WATER.

As previously discussed, the CWA intends to maintain traditional state power over local land use planning, including the development and use of water resources. 33 U.S.C. § 1251(b). Congress recognized that the sovereignty of the States entitled each State to exert control over the restoration, preservation, and enhancement of their own water resources. *Id.* Reedy Creek is neither navigable-in-fact nor connected to a navigable-in-fact water. To extend federal jurisdiction over waters, such as Reedy Creek, would improperly extend the power of the Commerce Clause. As articulated by the *SWANCC* Court, expansion to the outer limits of Commerce Clause authority must be accompanied by a clear demonstration of Congressional intent. 531 U.S. at 172. This Court should hold that Reedy Creek does not qualify as a "navigable water" or a water of the United States because interstate waters must be navigable-in-fact or connected to navigable-in-fact waters for CWA jurisdiction to apply. *See Rapanos v. United States*, 547 U.S. 715, 739 (2006); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *United States v.*

Moses, 496 F.3d 984, 991 (9th Cir. 2007); *United States v. Deaton*, 332 F.3d 698, 706 (4th Cir. 2003).

Rapanos concerned the connection between wetlands and navigable-in-fact waters to determine whether CWA jurisdiction applied to the isolated wetlands. For the plurality, Justice Scalia specifically noted the importance of States' rights to control land and water resources and that "waters of the United States" was not a clear authorization from Congress to stretch the Commerce Clause power to encroach on States' rights. 547 U.S. at 737-8. The plurality concluded that "waters of the United States" means "a relatively permanent body of water connected to traditional interstate navigable waters." *Id.* at 741. Thus, if a water is not navigable-in-fact, it can only be covered under the CWA if there is a connection to a navigable-in-fact water.

Following *Rapanos*, the Eleventh Circuit held in *Robison* that CWA jurisdiction can be exerted over a non-navigable creek if there is a significant nexus to a navigable-in-fact water. 505 F.3d at 1221. Concluding that Justice Kennedy's concurrence was controlling precedent in *Rapanos*, the Eleventh Circuit remanded the case because the jury instructions concerning "navigable waters" did not include "significant nexus." *Id.* at 1222. Accordingly, the jury was to decide if the Avondale Creek, a non-navigable water, caused chemical, physical, or biological effects on the Black Warrior River, a navigable-in-fact body of water. *Id.* Thus, under either the plurality or concurrence in *Rapanos*, the water in question must be connected to a navigable-in-fact water. Without that essential element, CWA jurisdiction cannot be extended to the water in question.

Furthermore, the Fourth Circuit held in *Deaton* that federal jurisdiction over navigable waters is derived from the federal government's authority to regulate the channels of interstate commerce. 332 F. 3d 698, 706. The court established the three prongs of federal Commerce Clause authority *United States v. Lopez*—the channels of interstate commerce, the instrumentalities of interstate commerce, and activities substantially related to interstate commerce—before concluding that navigable water is situated under the channels prong. *Id.* at 705-6. The court then likened channels of interstate commerce to highways, which move goods from one state to another. *Id.* at

707. Therefore, when the federal government exerts Commerce Clause power over a water, it must be based on the water's use as a highway of interstate commerce to move goods across state lines.

Similarly, the Ninth Circuit held in *Moses* that an interstate creek qualified as a water of the United States under the CWA because it eventually flowed into a navigable-in-fact water. 496 F.3d at 988. In this case, the court held the defendant liable for attempting to divert Teton Creek without a CWA permit because Teton Creek qualified as a water of the United States as a tributary to Teton River. *Id.* Although Teton Creek was an interstate water, that fact alone was not enough to satisfy CWA jurisdiction; the court additionally relied on the connection to a navigable-in-fact water.

In the current case, it is undisputed that Reedy Creek is not navigable-in-fact and cannot be made so with reasonable improvements. (R. at 9). To hold that Reedy Creek is a water of the United States would unduly infringe upon the States' traditional rights to control land and water resources, specifically addressed in *Rapanos*. 547 U.S. at 737-8. Both the plurality and the concurrence based jurisdiction over non-navigable water on that water's connection to a navigable-in-fact water. *Id.* at 741. Reedy Creek is not navigable-in-fact and terminates in Wildman Marsh, a wetland that is also not navigable-in-fact. (R. at 5-6). Therefore, Reedy Creek lacks the connection to a traditionally navigable water necessary to exert jurisdiction.

This argument finds further support in *Robison*, where the court concluded that a creek could qualify as a water of the United States as a non-navigable tributary if the creek had a significant nexus to a navigable-in-fact water. 505 F.3d at 1222. Reedy Creek terminates into Wildman Marsh, a wetland that is not navigable-in-fact. (R. at 5). Although Wildman Marsh is used as a habitat by migratory birds, the Court rejected using this argument for "waters of the United States" purposes in *SWANCC*. 531 U.S. 159, 174. The opposing parties' argument for jurisdiction rests on the presumption that since Wildman Marsh is located on federal land, it qualifies as a water of the United States, making Reedy Creek a tributary of a water of the United States. Although the CWA requires that all branches of

the federal government with jurisdiction over any property comply with all federal laws, the CWA does not regulate non-navigable wetlands that do not have a connection to a navigable-in-fact water. 33 U.S.C. § 1323(a). Wildman Marsh is not navigable-in-fact and does not have a continuous surface connection or significant nexus to a navigable-in-fact water, therefore, Wildman Marsh is not covered by the CWA. Thus, Wildman Marsh is not governed by CWA requirements.

The opposing parties next argue that Reedy Creek is necessary for interstate travel, because Reedy Creek is used as a water supply for a service area supporting interstate travelers and irrigation for agricultural purposes. (R. at 5). However, this argument supports Commerce Clause jurisdiction based on Reedy Creek's affect on interstate commerce, rather than Reedy Creek's use as a channel of interstate commerce. The Fourth Circuit held that Commerce Clause jurisdiction over navigable waters is based on the government's authority to regulate the channels of interstate commerce. 332 F. 3d 698, 706. Reedy Creek is not used to move goods in interstate commerce, which means Commerce Clause jurisdiction does not extend to Reedy Creek.

Moreover, the *Rapanos* Court's focus on traditional, interstate navigable waters to limit federal regulation clearly demonstrates how authority under the Commerce Clause may only be used in connection to channels of interstate commerce. 547 U.S. 715, 739. The opposing parties point to *United States v. Earth Science*, in which an interstate creek with uses similar to Reedy Creek was included under CWA jurisdiction. 599 F.2d 368, 375 (10th Cir. 1979); (R. at 10). *Earth Science* is a pre-*Rapanos* case that improperly focuses on an interstate creek's affects on interstate commerce instead of an interstate creek's use as a channel of interstate commerce. *Earth Science* is not controlling precedent on this issue.

Without use as a channel in interstate commerce, jurisdiction over Reedy Creek rests on the fact that the Creek crosses state lines; but the extension of jurisdiction over any water that crosses state lines is an impermissible expansion of federal authority. In *United States v. Moses*, the Ninth Circuit held that an interstate creek was a water of the United States because the creek was a tributary to a navigable-in-fact water. 496 F.3d at 988. While in

this case, Reedy Creek is an interstate water, Reedy Creek is not a tributary to a navigable-in-fact water. This Court should not uphold EPA regulation that defines "waters of the United States" as "all interstate waters" because it is an abuse of Commerce Clause power. 40 C.F.R. 122.2 (2011).

Courts generally grant *Chevron* deference to an agency for legislative rules, such as EPA's definition of "waters of the United States." *Chevron v. Natural Resource Defense Council*, 467 U.S. 837 (1984). *Chevron* deference requires the courts to answer two questions: (1) Whether Congressional intent of a statute is clear; and (2) If the statute is ambiguous, whether the agency's interpretation was reasonable or permissible. *Id.* at 842-3. In this case, "navigable water," defined as "all waters of the United States, including the territorial seas" is unquestionably ambiguous. 33 U.S.C. § 1362(7). Therefore, this Court must move to the second question under *Chevron*: whether the agency's interpretation that "navigable water" means any interstate water is a reasonable interpretation of the Statute. This Court should find that EPA's interpretation is unreasonable. Non-navigable waters—even interstate waters—must have a connection to navigable-in-fact waters for federal jurisdiction to apply. Congress specifically limited the EPA and Army Corps of Engineer's jurisdictional power by limiting authority to navigable waters. *Id.*

To accept EPA interpretation of navigable water to include all interstate water, whether that water is isolated from navigable-in-fact water or not, would deprive "navigable" of all meaning. The Supreme Court has noted on numerous occasions that although the definition of navigable is expanded under the CWA, the term must be given some effect. *See United States v. Rapanos*, 547 U.S. 715, 776 (Kennedy, J. concurrence)*; Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers*, 531 U.S. 159, 172*; and United States v. Riverside Bayside Homes, Inc.* 474 U.S. 121, 133 (acknowledging that while "navigable" is of limited import, jurisdiction was based on significant nexus to navigable water).

In conclusion, Reedy Creek is neither navigable-in-fact nor connected to a navigable-in-fact water. Furthermore, jurisdiction over Reedy Creek cannot be established under the Commerce

Clause because Reedy Creek is not used as a channel of interstate commerce. Accordingly, this Court should find that Reedy Creek does not qualify as a navigable water or water of the United States under the CWA.

VI. SHOULD THIS COURT FIND THAT REEDY CREEK QUALIFIES AS A NAVIGABLE WATER, IT SHOULD THEN UPHOLD THE DISTRICT COURT'S RULING HOLDING BONHOMME LIABLE FOR DISCHARGING A POLLUTANT INTO A NAVIGABLE WATER UNDER 33 U.S.C. § 1311(A) BECAUSE BONHOMME IS THE OWNER-IN-FACT OF THE POLLUTANT'S POINT SOURCE.

Bonhomme owns a point source from which arsenic, a known pollutant, is discharged into Reedy Creek and if this Court establishes Reedy Creek as a navigable water, Bonhomme is in violation of the CWA for his culvert's release of contaminants into it. (R. at 5). To successfully establish a claim under this provision of the CWA a plaintiff must allege facts demonstrating that the opposing party discharged pollutants into a navigable water without a proper permit. 33 U.S.C. § 1311(a)(1). As previously established, the "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12). The Statute defines point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Bonhomme owns a culvert from which arsenic, a known pollutant, is discharged into Reedy Creek. R. at 5. Culverts are judicially recognized as point sources under the CWA. *Dague v. Burlington* 935 F.2d 1343, 1354-55 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992). It logically follows that if this Court establishes Reedy Creek as a navigable water Bonhomme is in violation of the CWA for his culvert's release of pollutants into Reedy Creek.

Bonhomme's attempt to escape liability owing to Maleau's alleged upstream discharge of arsenic via the waste piles on his Lincoln County property is unfounded. As the district court aptly notes after examining the plain language of the Statute, the CWA

definitions of "discharge" and "addition" do not include a causation element. (R. at 9). An examination of relevant case law reveals that courts likewise do not interpret it as such. The Supreme Court held that pollutant discharge includes point sources that themselves do not generate impurities. *S. Florida Water Mgt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004) ("Tellingly, the examples of 'point sources' listed by the [CWA] include pipes, ditches, tunnels, and conduits, objects that do not themselves generate pollutants but merely transport them".) Therefore, the fact that Bonhomme's culvert does not produce arsenic is irrelevant to establishing his liability under the CWA. The determinant factor is its discharge into Reedy Creek, provided this Court finds that Reedy Creek constitutes a navigable water under the Statute.

Sierra Club v. El Paso Gold Mines, Inc. similarly established that point source owners could be liable for the discharge of pollutants into navigable waters occurring on their land, whether or not their actions caused said discharge. 421 F.3d 1133, 1144 (10th Cir. 2005). In that case a property owner violated the CWA though the he did own or operate the business generating the pollution into the navigable stream. The court held that the Statute intended for successive owners of point sources to assume responsibility for activity on his or her property regardless of personal action. *Id.* In its decision, the Tenth Circuit established that "if you own the leaky faucet you are responsible for the drips." *Id.* at 1145. Further support for this interpretation is found in the regulations promulgated by EPA pursuant to the CWA, which define the phrase "addition of any pollutant" as "surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a . . . person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works." *Id.;* 40 C.F.R. § 122.2; *see also* EPA Notice, 55 Fed.Reg. 35248–01 (Aug. 28, 1990) (stating drainage from abandoned mines can be point source pollution where the owner can be identified; otherwise, it is nonpoint source pollution). As the Tenth Circuit notes, this regulation, though not a substitution for statutory language nevertheless bolsters the assertion that ownership of a point source triggers liability. *El Paso,* 421 F.3d at 1144.

Statutory language and relevant case law therefore support Maleau's assertion that, assuming Reedy Creek is deemed a navigable water by this Court, Bonhomme violates the CWA by discharging arsenic into it through the culvert on his property. The district court's ruling on this issue should therefore be upheld.

CONCLUSION

This Court should not entertain Bonhomme's citizen suit under the CWA, because Bonhomme is neither the real party in interest nor a citizen for the purposes of the Statute. Should this Court permit standing, Maleau should still not be held liable for arsenic discovered in Ditch C-1 and Reedy Creek. Maleau's waste piles do not constitute point sources for the purposes of the CWA and are thus not subject to CWA regulation. Further, neither Ditch C-1 nor Reedy Creek qualify as navigable waters or waters of the United States under the CWA. Consequently, Maleau cannot be held liable under a federal statute that does not grant federal jurisdiction over the waters in question. Finally, even if this Court expands federal jurisdiction over Reedy Creek, then Bonhomme is liable for the discharge of a pollutant from a point source into a navigable water. Accordingly, this Court should dismiss the actions against Maleau.