Team 11

No. 14-1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC. AND DEAN JAMES,

Plaintiffs-Intervenors-Appellants

v.

MOON MOO FARM, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION, THE HONORABLE ROMULUS N. REMUS PRESIDING

CASE NO. 155-CV-2014

BRIEF OF APPELLANT DEEP QUOD RIVERWATCHER, INC., AND DEAN JAMES

ORAL ARGUMENT REQUESTED

TEAM 11
Attorneys for Deep Quod Riverwatcher, Inc. and James Dean
Plaintiffs-Intervenors-Appellants

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The opinion of the United States District Court for the District of New Union is reported and contained in *U.S. v. Moon Moo Farm,* 155-CV-2014 (D.P. September 15, 2014) (hereinafter R).

STATEMENT OF JURISDICTION

The judgment of the United States District Court for the District of New Union was entered on April 21, 2014. R. at 1. A Notice of Appeal was filed on September 15, 2014. R. at 3. The jurisdiction of this Court is invoked under Title 28 of the Judicial and Judiciary Procedure, Section 1291. 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. James did not trespass onto the Farm because the Queechunk Canal is protected by the Public Trust Doctrine, and is therefore, reserved to the people of the states.

II. Even if the Queechunk Canal is not open to public access, the evidence that James obtained is admissible in a civil enforcement proceeding.

III. The Clean Water Act requires the Farm to obtain a National Pollutant Discharge Elimination System Permit because the Farm discharges pollutants into a navigable water from a point source.

IV. The Farm requires an National Pollution Discharge Elimination System permit because it does not qualify as a "no-discharge" Animal Feeding Operation and because its excess nutrient discharges remove it from the agricultural stormwater exemption.

V. The district court erred when it dismissed Riverwatcher's open dumping and imminent and substantial endangerment claims under Resource Conservation Recovery Act.

STANDARD OF REVIEW

A reviewing court exercises plenary review over a District Court's grant of summary judgment. *Koslow v. Pennsylvania*, 302 F.3d 161, 180 (3d Cir. 2002). A reviewing court must determine whether there were any disputes of material fact. *Polini v. Lucent Techs.*, 100 F. App'x. 112, 117 (3d Cir. 2004). In deciding whether a moving party is entitled to a grant of

summary judgment, the court reviews the evidence in a light most to favorable to the nonmoving party. Fed. R. Civ. P. 56(a); *Polini*, 100 F. App'x. at 117.

STATEMENT OF THE CASE

Deep Quod Riverwatcher, Inc. (Riverwatcher) sent a notice if intent to sue to Moon Moo Farm (Farm), the New Union Department of Environmental Quality (DEQ), and Environmental Protection Agency (EPA) under the Clean Water Act (CWA) § 505 and Resource Conservation and Recovery Act (RCRA) § 7002. EPA sued the Farm under CWA §§ 309(d), 309(b). Riverwatcher intervened as a plaintiff pursuant to CWA § 505(b)(1)(B) after the passage of the ninety day waiting period had passed and alleged causes of action under RCRA § 7002. The Farm asserted a counter claim seeking relief for trespass against Riverwatcher and Dean James (James), as agent of Riverwatcher. Both sides moved for summary judgment. The District Court for the District of New Union denied Riverwatcher and EPA's motions for summary judgment and granted summary judgment for Farm on all claims including the counter claim for trespass.

STATEMENT OF FACTS

In the late winter and early spring of 2013, Riverwatcher received complaints of manure smell and brown coloring in the Deep Quod River. R. at 6. At the same time, the Farmville Water Authority issued a "nitrate" advisory explaining that the nitrate levels in Farmville's drinking water were hazardous to infants less than two years old. *Id.* In response to the received complaints, James, an agent of Riverwatcher, made an investigatory patrol of the Deep Quod River in a small metal craft on April 12, 2013. *Id.* James proceeded along Queechunk Canal onto the Farm's property.

The Queechunk Canal was excavated in the 1940s to alleviate flooding in the river bend from the Deep Quod River. R. at 5. The Deep Quod River is itself navigable as is the canal

which is used as a short cut up and down the Deep Quod River. *Id.* The Deep Quod River flows into the Mississippi River which is used by the public for commercial navigation. *Id.* While on the farm, James observed and photographed the manure spreading operations on the Farm. R. at 6. He observed uncharacteristically brown water flowing into the canal from the operation fields. *Id.* James took samples of the water and had them testing by a laboratory, which revealed highly elevated levels of nitrates and fecal coliforms. *Id.*

The Farm houses 350 dairy cows in a barn and these cows are not pastured. R. at 4. The Farm also has 150 acres of fields that grow Bermuda grass. R. at 5. Manure from cows is collected in lagoons and is periodically pumped from the lagoons into tank trailers, which are then hauled by tractor and spread on 150 acres of fields that are part of the Farm's operation. *Id.*

The Farm does not hold an NPDES permit. R. at 5-6. The Farm discharges pollutants from its manure land application area/fields through a drainage ditch into the Queechunk Canal. R. at 6. The runoff from the Farm is discolored brown water that contained multiple pollutants in the form of nitrates and fecal coliforms. *Id.* Queechunk canal is man made. Deep Quod River is a "water of the United States." R. at 5.

The Farm applied manure generated by the cows to Bermuda grass fields; Bermuda grass is harvested each summer as silage. R. at 5. The Farm is regulated by the State of New Union as a "no-discharge" animal feeding operation – that is, as an animal feeding operation that does not normally have a direct discharge from its manure handling facilities to waters of the State in conditions up to and including the 25-year storm event. *Id.* As a "no-discharge" operation, the Farm must submit a "Nutrient Management Plan" (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). *Id.* According to records retained by the

Farm, it has applied manure to its fields at rates consistent with the NMP filed with the Farmville Field Office at all relevant times. *Id.*

James observed pollution discharges occurring during a very minor storm event. R. at 6. James made an investigatory patrol of the Deep Quod River in a small metal outboard craft known as a "jon boat" on April 12, 2013. *Id.* Between April 11 and April 12, 2013, two inches of rain fell in the Farmville Region – a significant storm event, but one far short of the 25 year storm (defined as 5 inches of rainfall in one 24 hour period). *Id.* James observed and photographed manure spreading operations taking place on the Farm's fields during the rain event. *Id.*

At no charge, the Farm accepts and disposes of acid whey from the Chokos plant into its manure lagoons and included in the mixture sprayed on its fields. R. at 5. Addition of the acid whey to the liquid manure lowered the pH of the soil and "prevented the Bermuda grass crop from effectively taking up the nutrients in the manure." *Id.* Dr. Ella Mae, an agronomist, opines that the lower pH (increased acidity) of the liquid manure resulting from adding acid whey from the Chokos plant lowered the pH of the soil. R. at 6.

According to Dr. Mae, these unprocessed nutrients were then released to the environment, including the Deep Quod River, by leaching into groundwater and through runoff during rain events. *Id.* Dr. Mae also opined that land application of manure during a rain event is a very poor management practice and will nearly always result in excess runoff of nutrients from fields. *Id.* The Farm's expert agronomist, Dr. Emmet Green, submitted an affidavit that did not dispute that the acid whey reduced soil pH and reduced nitrogen uptake by the Bermuda Grass. *Id.*

SUMMARY OF THE ARGUMENT

This case arises under the Federal Water Pollution Control Act, Clean Water Act (CWA) 33 U.S.C. § 505 and the Resource Conservation and Recovery Act (RCRA) § 7002. Appellant, Deep Quod Riverwatcher, Inc. and Dean James, brought a citizen suit against Appellee Moon Moo Farm because the pollutants discharged from the Farm are subject to the National Pollutant Discharge Elimination System (NPDES) permit program under the CWA, or alternatively the Farm engages in open dumping and substantial endangerment under RCRA. The district court dismissed the claims and granted Summary Judgment in favor of the appellees. Riverwatcher contends that the district court erred in all of its holdings below.

The district court dismissed Riverwatcher's Motion for Summary Judgment finding that the samples and photos taken as evidence presented was inadmissible to seek punitive penalties under CWA § 309(d). The court also dismissed Riverwatcher's open dumping claim under RCRA § 4005 finding that the manure and whey are agricultural wastes that are being returned to the soil as fertilizer and soil conditioners.

The district court improperly found that the Queechunk Canal is not protected by the Public Trust Doctrine and is not a navigable waterway of the United States. However, the Queechunk Canal is a tributary of the Deep Quod River that connects to the Mississippi River. Ownership of freshwater bodies are reserved to the states whether or not the waterway is navigable. The Queechunk Canal is, in fact, navigable and is used for passing up and down the Deep Quod River. States preserve public accessibility to waterways that connect to larger navigable waterways because those waterways are commonly used as shortcuts. Additionally, waterways caused by avulsion, or a sudden addition of water, remain in possession of the state. Finding that the Queechunk Canal is not protected as a public waterway would be counter to

public policy because the canal links to Farmville's main drinking water source (the Deep Quod River). Allowing private ownership of Queechunk Canal would be harmful to the public for two reasons. First, the public would not be able to use the canal for quickly passing up and down the Deep Quod River, as they have been accustomed to for years. Second, private ownership promotes use of the waterway in whatever way the Farm chooses and would lead to a contaminated drinking source from the Farm's manure discharges.

The district court also erred by following the exclusionary rule and excluding the water samples and photos that James took from the Queechunk Canal. The exclusionary rule is used to protect defendants from illegally obtained evidence in criminal proceedings. Riverwatcher's claims arise under the citizen suit provision of the CWA and RCRA. Additionally, there is a history of government regulation of environmental practices and it would be counter to the government agenda to preclude evidence obtained to further that goal. Also, the exclusionary rule has not been applied to government agency actions that seek to correct current violations of regulations. The cost of excluding the evidence in this case would run counter to the objectives of the CWA and public policy.

The district court also mistakenly held that the Farm is not a Concentrated Animal Feeding Operation (CAFO). The Farm confines several hundred dairy cows in a barn, does not pasture the cows and does not grow grass in the confinement area with the cows. The Farm also discharges pollutants via a drainage ditch. The Farm thus falls squarely within the CAFO definition. The Farm is a point source subject to National Pollutant Discharge Elimination System (NPDES) permitting requirements under the CWA because it is a CAFO and also because it discharges pollutants via a drainage ditch into a water way of the United States. However, the Farm has not applied for such a permit and is thus currently violating the CWA.

The district court also erred when it concluded that the discharges from the Farm are exempt as agricultural stormwater runoff. Since the Farm is a CAFO, NPDES requirements apply not just to discharges from the confinement area, but also to any wastewater generated by the production of the CAFO animals. The manure that is spread on the fields is generated by the CAFO animals and thus the runoff from those fields is subject to NPDES permitting requirements. Additionally, manure discharges from a CAFO are explicitly subject to NPDES requirements. The discharges in this case are not exempt as agricultural stormwater because the Farm is not a "no discharge" facility. Additionally, the Nutrient Management Plan (NMP) did not ensure appropriate agricultural utilization of the nutrients in the manure. NMPs are effluent limitations and thus, excess nutrient discharges from the manure application fields remove the Farm from the agricultural storm water exemption.

The trial court concluded that the Farm's land application of fertilizer and acid whey did not constitute the disposal of solid waste under RCRA. Further, it determined that there existed no imminent and substantial harm to public harm subject to redress under RCRA because the Farm's landscaping practices were not the but-for cause for Farmville's nitrate advisory. The court was wrong on both counts. The Farm applied fertilizer in excess of what the Bermuda Grass could absorb. The addition of acid whey to the manure lowered the pH of the soil, which meant that less nutrients could be absorbed by the Bermuda Grass. Therefore, the fertilizer was no longer returned to the soil. Rather, the fertilizer leaked from its applied area into Queechunk Canal, which flowed into Deep Quad River and into the drinking water of Farmville. Under current case law, this excess application of fertilizer is solid waste subject to regulation under RCRA. The fertilizer's infiltration into the Farmville drinking water poses a substantial and imminent threat of harm and is subject to a citizen suit. Because the court misinterpreted the

nature of the landscaping practices of the Farm and the proper test for imminent and substantial harm, it follows that its findings are flawed. In light of the lower court's incorrect conclusions, Appellant Riverwatcher requests this Court reverse the grant of summary judgment and remand the case for further proceedings.

ARGUMENT

I. James did not trespass onto the Farm because the Queechunk Canal is protected by the Public Trust Doctrine, and is therefore, reserved to the people of the states.

Waterways affected by the ebb and flow of the tide are subject to the Public Trust Doctrine. *See Arnold v. Mundy*, 6 N.J. 1, 21-22 (1821). The Public Trust Doctrine reserves public access of these waterways to the people of the states. *Id.* Navigable rivers, tidelands, and inland waters that are used for passing, navigation, fishing, and fowling are common property to all people. *See Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371-72 (1977); *Barney v. Keokuk*, 94 U.S. 324, 338 (1877); *Arnold*, 6 N.J. at 21-22. The purpose of the Doctrine is to preserve the water's natural habitat, and thus, courts extended public trust protection to tributaries of waterways. *See Nat'l Audubon Society v. Super. Ct.*, 658 P.2d 709, 719 (Cal. 1983). Courts recognize that the Public Trust must preserve rights for the people and step in to prevent people from using water in a harmful way, such as diverting a river to secure a private property right. *See Light v. State Water Res. Control Bd.*, 173 Cal. Rptr. 3d 200, 217-18 (2014).

The *Arnold* court found that a plaintiff's exclusive property right does not extend to the water along his or her land. *Arnold*, 6 N.J. at 21. To support an action of trespass, a plaintiff must show title of the waterways in fee simple or possession accompanied by right. *Id*. at 17. The plaintiff in *Arnold* claimed exclusive possession by right because he fished in certain waters for

many years. *Id.* at 18. The court found that where a navigable river ebbs and flows, a land grant extends to the edge of the water only. *Id.*

Since 1821, courts extended the reach of public trust and public ownership to inland waters not purely affected by the tides. *Id.* The Queechunk Canal is an inland waterway and James' investigation on the Farm was not a trespass because the canal is subject to public ownership.

A. The Public Trust Doctrine extends to inland, freshwater bodies because they are commonly used for navigation.

In *Propeller Genesee Chief,* the Supreme Court reserved ownership of freshwater bodies (Great Lakes) to the states as navigable waters. *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 453-54 (1851). Additionally, the equal foot doctrine provides state sovereignty to freshwater bodies when states join the union. *See Oregon*, 429 U.S. at 371. The Mississippi River is included within the freshwater body framework for Public Trust purposes because it has historically been used for navigation under the Commerce Clause. *See Barney*, 94 U.S. at 336. The court extended navigability to branches of the Mississippi river. *Id*.

The Deep Quod River is a principal branch of the Mississippi River. R. at 5. The Queechunk Canal is additionally a sub-principal branch of the Mississippi River because it diverts from the Deep Quod River. *Id.* Therefore, the State of New Union has priority over any private claims of ownership to Queechunk Canal because the canal flows into a freshwater body recognized to belong to the state.

B. The Public Trust Doctrine applies to tributaries of a larger body of water even if the tributary itself is not primarily used for navigation.

The public trust applies to tributaries that connect to a navigable waterway, even if the tributaries are not themselves navigable. *See Nat'l Audubon*, 658 P.2d at 709. While the test for

navigability is not the sole determination for public versus private rights, the fact that a river is navigable lends it to public accessibility. *See Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979). Navigability is not limited to large commercial vessels though; as long as the water can be traversed it is navigable. *See id. Barney* explained that street alleys are open for public passage as necessary in cities, which is similar to canals that can be used to divert flooding and as a means of passing. *Barney*, 94 U.S. at 339.

The Queechunk Canal is navigable by a canoe or other small boat. R. at 5. Additionally, the canal is commonly used as a short cut for traversing up and down the Deep Quod River. *Id.* The Deep Quod River flows into the canal all year round, providing it with enough water to ensure that it is a navigable waterway. *Id.* Additionally, the water from the Deep Quod River is the water source for the community of Farmville. *Id.* Like the city in *Barney* that preserved public accessibility of the alleys connecting to a street, James may assert public ownership of the Queechunk Canal because it connects and feeds to a navigable river. *Id.*

C. Despite the fact that Queechunk Canal is man-made, it is a public trust water way because public ownership attaches to lands affected by avulsion and it would be counter to public policy to allow the Farm to retain private ownership of a canal used for passing.

Courts determine that private title attaches to land accretions affected by the gradual movement of water. *See Oregon*, 429 U.S. at 366; *Barney*, 94 U.S. at 337. However, where avulsion causes a change in a channel of water, the ownership belongs to the state. *Id.* An avulsion is a sudden loss or addition to land resulting from action of water. *See Oregon*, 429 U.S. at 369. Submerged lands, either by effect of the tide or human action, are subject to the Public Trust because avulsion can create a sudden change in tideland. *See City of Berkeley v. Super. Ct.*, 606 P.2d 362, 373 (Cal. 1980). When the United States Supreme Court extended the Public Trust to freshwater bodies, the floor of navigable lakes and rivers became publicly accessible, just as

the ocean floor is publicly accessible. *See Oregon*, 429 U.S. at 366; *Barney*, 94 U.S. at 336.

The Public Trust prevents a party from acquiring a right in a harmful way. *See Light*, 173 Cal. Rptr. 3d at 217-18. The state has a duty to protect the public trust whenever feasible. *See id.* at 218. Excluding the public from using a waterway for passage is harmful. *Id.* Additionally, damaging a waterway connected to a publicly used waterway is also protected under the Public Trust. *Id.*

Queechunk Canal was made to divert flooding from Deep Quod River. R. at 5. Queechunk Canal is the result of an avulsion. The canal diverts flooding from the Deep Quod River. As a diversion, the canal fills up quickly rather than slowly adding water. The Deep Quod River, as a branch of the Mississippi, belongs to the state. *Id.* Because Queechunk diverts water from Deep Quod River, the canal is also owned by the state. *Id.* While the land on both sides of the canal belongs to the Farm, the water does not. The Farm did not acquire title to the water when it acquired title to the land. The Farm also did not acquire title to the submerged lands because title remains with the state due to the avulsion that created Queechunk Canal. By exerting private ownership over the canal, the Farm seeks to prevent the public from using the canal as a bypass to travel up and down Deep Quod River. Prohibiting access to the bypass canal is harmful to the public. Additionally, because the Farm has an animal feeding operation that discharges waste into the canal, preventing the state from seizing ownership of the canal endangers the public health. Issue III, *infra*.

Since the Queechunk Canal is navigable under the Public Trust Doctrine, James did not trespass onto private property.

II. Even if the Queechunk Canal is not open to public access, the evidence that James obtained is admissible in a civil enforcement proceeding.

The Clean Water Act (CWA) authorizes "any citizen [to] commence a civil action . . .

against any person . . . who is alleged to be in violation of an effluent standard or limitation under this Act . . . " 33 U.S.C. § 505(a). As a citizen, James has the authority under Section 505 to bring civil action against the Farm. The Farm is in violation of the CWA because it discharges pollutants from a point source and does not have a valid NPDES permit. *See* Issue III, *infra*.

A. The exclusionary rule does not apply to civil actions and does not prevent James from using his evidence in a citizen suit against the Farm.

The exclusionary rule states that evidence collected in violation of a defendant's constitutional rights is inadmissible for a criminal prosecution. However, the exclusionary rule does not apply to purely civil actions. *See Sims v. Collection Div. of Utah State Comm'n*, 841 P.2d 6, 11 (Utah 1992). The Supreme Court has extended the exclusionary rule to apply to quasi-criminal proceedings, but not to exclusively civil proceedings. *Id.*

Where there is a history of regulation of certain industries and broad authority for Congress to fashion standards of reasonableness within a statute, searches may be conducted without a warrant. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 313 (1978); *Collonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970). Also, where a statute specifically authorizes inspections, the inspection may proceed without a warrant. *See United States v. Biswell*, 406 U.S. 311 (1972).

In *I.N.S. v. Lopez-Mendoza*, the Supreme Court found that the costs of excluding unlawfully seized evidence in civil litigation outweighed social benefits so the exclusionary rule need not apply. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Additionally, courts ruled that the exclusionary rule does not extend to Occupational Safety and Health Administration (OSHA) enforcement actions for purposes of correcting violations. *See Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1331 (5th Cir. 1986); *Trinity Indus. v. OSHRC*, 16 F.3d 1455, 1462 (6th Cir. 1994).

The CWA citizen suit allegations are categorized as civil actions. 33 U.S.C. § 505(a). The

water samples that James acquired while traversing the Queechunk Canal should be allowed as evidence in this proceeding because James acquired the samples in pursuit of a civil action. R. at 6. Since there are no criminal components of the citizen suit, the exclusionary rule would not apply to bar James' evidence.

Furthermore, the EPA has a history of regulating industries that release pollutants into the air and water. Since the formation of the CWA in 1948, the EPA has undertaken the basic structure for regulating pollutant discharges into the waters. Because the EPA has a history of undertaking this sort of regulation, evidence presented in relation to this authority is admissible a civil proceeding. Therefore, James' photographs and water samples are admissible regardless of whether he trespassed.

Like OSHA, the EPA seeks to correct violations that are continuous or current. In this instance, James photographed and took samples of water that revealed high levels of nitrate and fecal coliforms that show a clear, current violation under the CWA. The cost of excluding the evidence in this action would undermine the purpose of the CWA, which is to secure clean drinking water and punish those actors that discharged pollutants into the navigable waterways. The authority given to EPA to implement pollution control programs by Congress emphasizes the public policy interest to protect water over private exclusory property rights. The Farm does not have an adequate basis to collect damages for a trespass because the publics need to regulate the discharge of nitrate and fecal matter into the Queechunk Canal, and later flowing into the Deep Quod River, is more compelling.

James has admissible evidence to establish that the Farm is discharging pollutants into Queechunk Canal and summary judgment in favor of the Farm is not appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (holding that an entry of summary judgment is only

appropriate if a party fails to make a showing of sufficient evidence to establish the existence of an essential element of that party's claim). This court should reverse the lower court's grant of summary judgment and allow the photos and samples James took at the canal into evidence for this enforcement proceeding.

III. The Clean Water Act requires the Farm to obtain a National Pollutant Discharge Elimination System Permit because the Farm discharges pollutants into a navigable water from a point source.

The CWA prohibits "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C.A. § 1362(12)(A) (emphasis added). In order to lawfully discharge a pollutant from a point source into a water of the United States, a party must first obtain a National Pollutant Discharge Elimination System (NPDES) permit. CWA §§ 301(a), 402. "[I]f a facility requests a permit, it can discharge within certain parameters called effluent limitations and will be deemed a point source." 33 U.S.C. §§ 1342, 1362(14); *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701, 706 (N.D.W. Va. 2013), *appeal dismissed (Oct. 2, 2014)*. Once a facility has a permit, "the point source will be regulated pursuant to the NPDES permit issued by the EPA or one of 46 States authorized to issue permits." *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 743 (5th Cir. 2011).

The Farm has not applied for a NPDES permit. R. at 5-6. The parties here agree that the runoff from the Farm contained multiple pollutants. R. at 7. It is also undisputed that Deep Quod River is a "water of the United States" and therefore subject to Clean Water Act permitting jurisdiction. CWA § 502(7); R. at 7. Queechunk Canal flows into Deep Quod River and is also a public trust navigable waterway. Issue I, *supra*. Because the Farm discharged pollutants into navigable waters from a point source, it requires an NPDES permit.

A. Under the CWA, the point source definition includes both concentrated animal feeding operations and ditches from which pollutants are discharged.

The CWA specifically designates concentrated animal feeding operations (CAFOs) as point sources. 40 C.F.R. § 122.23. *See also* 33 U.S.C.A. § 1362 (West) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch . . . [or] concentrated animal feeding operation . . . from which pollutants are or may be discharged.") The EPA deliberately included CAFOs to account for industry generation of "millions of tons of manure every year" and improperly managed manure can pose substantial risks to the environment as well as to public health. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 494 (2d Cir. 2005) (quoting National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 FR 7176-01).

As point sources, CAFOS are subject to NPDES permitting requirements under the CWA. 33 U.S.C. § 1342 (2012); *See also Nat'l Pork*, 635 F.3d at 751 ("a discharging CAFO has a duty to apply for a permit."). The point source definition also includes the term "ditch" "from which pollutants are or may be discharged." 33 U.S.C.A. § 1362.

The Farm is subject to NPDES permitting requirements for two reasons. First, the Farm is a point source by virtue of its CAFO status. Issue III(B), *infra*. Second, although the district court erroneously excluded the evidence, it is undisputed that the Farm discharged pollutants from its manure land application area through a drainage ditch. R. at 5-6; Issue II, *supra.* Like CAFOs, ditches are also specified as point sources under the pertinent regulation and definition. 33 U.S.C.A. § 1362; R. at 5-6. Thus, even assuming *arguendo* that the Farm is *not* a CAFO, it would still be subject to NPDES permitting requirements because the drainage ditch that the Farm discharged from is itself a point source.

B. The Farm is a point source because of its designation as a medium concentrated animal feeding operation.

An animal feeding operation (AFO) is defined under the Code of Federal Regulations as a lot or facility that satisfies two specified conditions. The first condition is that animals are "stabled or confined and fed or maintained for a total of 45 days or more in any 12–month period." 40 C.F.R. § 122.23(1)(i). The Farm houses dairy cows in a barn and these cows are not pastured. R. at 4. Therefore, the Farm confines and maintains animals for the required time period under the regulation. Thus, the Farm satisfies the first part of the AFO definition.

The second condition that must be satisfied for a facility to qualify as an AFO is: "Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(1)(ii). Although the Farm in its entirety includes 150 acres of fields that grow Bermuda grass, these fields do not disqualify the Farm from AFO status. R. at 5. The EPA clarifies the regulation on its website by stating that: an operation is an AFO if animals are confined for at least 45 days in a 12-month period, and "[t]here's no grass or other vegetation *in the confinement area* during the normal growing season." Region 7 Concentrated Animal Feeding Operations (CAFOs), U.S. Environmental Protection Agency, http://www.epa.gov/region07/water/cafo/ (last updated Nov. 13, 2014) (emphasis added).

Thus, the fact that Bermuda grass is grown elsewhere on the property does not disqualify the Farm from AFO status under the regulation because the Bermuda grass is not grown *in the confinement area* with the dairy cows. R. at. 5. Therefore, the Farm is an Animal Feeding Operation as defined by 40 C.F.R. § 122.23.

To qualify as a "concentrated animal feeding operation," (CAFO) the AFO must be either a Large AFO or a Medium AFO. 40 C.F.R. § 122.23(2). Medium AFOs include any animal

feeding operation that house between 200 and 699 dairy cows. 40 C.F.R. § 122.23(6)(a). As the District Court correctly concluded, the Farm falls squarely within the definition of a "Medium" Animal Feeding Operation under the EPA regulation because the Farm houses 350 dairy cows. 40 C.F.R. § 122.23(b)(6); R. at. 5.

In order to be a CAFO, the AFO must satisfy at least one of the two conditions set forth in section 122.23(b)(6). One of these conditions is: "Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device." 40 C.F.R. § 122.23(b)(ii). The Farm illegally discharged "discolored brown water flowing from the fields *through a drainage ditch* into the Queechunk Canal." R. at 6. It is undisputed that this discolored brown water contained pollutants in the form of nitrates and fecal coliforms. R. at 6. Furthermore, the pollutants were discharged into the Queechunk Canal, a water of the United States, via a drainage ditch. Issue I, *supra*; R. at 7. Thus, the Farm is a CAFO because it is a Medium AFO that discharged pollutants into waters of the United States through a man-made device.

Even assuming *arguendo* that Queechunk Canal is *not* a waterway of the United States, the Farm still satisfies the condition set forth in section 122.23(b)(6). This is because Queechunk Canal *itself* is a man-made channel and flushing device. R. at 2 and 5. Thus, even if Queechunk Canal is not a waterway of the United States, the Farm still discharged pollutants via a man-made device (Queechunk Canal) into an undisputed waterway of the United States (Deep Quod River). Therefore, because the Farm qualifies as a Medium AFO and discharged pollutants into a water of the United States, it is a CAFO as defined in the EPA regulations. In conclusion, the Farm is a CAFO and thus also a point source as defined by the Clean Water Act.

C. The Farm requires an NPDES permit for discharges from the manure land application area because it is a CAFO discharge and is not exempt as agricultural stormwater.

"Once an animal feeding operation is defined as a CAFO . . . . the NPDES requirements for CAFOs apply with respect to *all* . . . *manure,* litter, and process wastewater *generated by those animals or the production of those animals*. . . ." 40 C.F.R. § 122.23(a) (emphasis added). Thus, NPDES requirements apply to the pollutant discharge from the Farm's Bermuda grass fields for two reasons: 1) The Farm is a CAFO and the manure that was spread over the Bermuda grass fields was generated by the CAFO animals and; 2) the Bermuda grass is a part of *the production* of the CAFO animals.

Although the record is silent on the issue, the Bermuda grass is presumably grown to feed the dairy cattle. It is undisputed that the Bermuda grass grown on the Farm is dried and harvested each summer as silage. R. at 5. Silage is defined by the Merriam Webster dictionary as "food for farm animals that is stored inside a silo. Merriam Webster, http://www.merriam-webster.com/dictionary/silage (last visited Dec. 1, 2014). Since the Bermuda grass is a part of the production of the CAFO animals, the NPDES requirements apply to any discharges from the fields. This argument is supported by relevant case law.

In *Alt v. U.S. E.P.A.*, the court concluded that the term "facility" includes any CAFO and the land appurtenant thereto. 40 C.F.R. § 122.23; *Alt*, 979 F. Supp. 2d at 713 (explaining that the term "facility" includes "any 'point source,' 'including land or appurtenances thereto'"). Plaintiffs in *Alt* argued that the farmyard area that discharges were coming from was not a part of the CAFO. *Alt* at 713. The Court rejected this argument and held instead that "[t]he areas of grass and weeds between the poultry houses are part of the Alt poultry *production facility*." *Id.* (emphasis added). Thus, this court should conclude that because the Bermuda grass fields are a part of the "production facility" and are on the land appurtenant to the barn, that the discharges

from the Bermuda grass fields are CAFO discharges.

"The discharge of pollutants from a CAFO requires an NPDES permit *unless* that discharge is an 'agricultural stormwater discharge.'" *Id.* at 710. The *Alt* court concluded that runoff from the farmyard outside of the animal confinement area constituted agricultural stormwater runoff and not CAFO discharge. *Alt*, 979 F. Supp. 2d at 713; R. at. 9. The discharges were thus excluded from NPDES permitting requirements. However, this case is factually distinguishable from *Alt* because that case did not pertain to landspreading of manure.

"The discharge of manure . . . to waters of the United States from a CAFO as a result of the application of that manure . . . by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements. . . ." 40 C.F.R. § 122.23(e). The district court erroneously concluded that this regulation did not pertain to the Farm because the Farm allegedly applied manure in accordance with a Nutrient Management Plan. The Farm argues that because it applied manure in accordance with the plan that discharges from the fields are exempt as agricultural stormwater. This argument fails because the Farm should not be operating as a "no discharge" facility and because excess nutrient discharges remove it from the agricultural stormwater exemption.

IV. The Farm requires an National Pollution Discharge Elimination System permit because it does not qualify as a "no-discharge" Animal Feeding Operation and because its excess nutrient discharges remove it from the agricultural stormwater exemption.

"[A] discharge from an area under the control of a CAFO can be considered *either* a CAFO discharge that is subject to regulation *or* an agricultural stormwater discharge that is not subject to regulation." *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 508 (2d Cir. 2005). Discharges from a CAFO that result from landspreading of manure are CAFO discharges subject to NPDES requirements. 40 C.F.R. § 122.23(e); *See also Concerned Area Residents for Env't v.*

Southview Farm, 34 F.3d 114, 115 (2d Cir. 1994) *(*the liquid manure spreading operations are a point source within the meaning of CWA section 1362(14) because the Farm itself falls within the definition of a concentrated animal feeding operation (CAFO) and is not subject to the agricultural exemption.). The District Court erroneously concluded that this regulation is inapplicable in the present case because the landspreading allegedly took place in compliance with a Nutrient Management Plan (NMP), and the discharges were thus exempt as agricultural stormwater. R. at 9. However, this argument fails for two reasons. First, the Farm is not a "no discharge" facility and thus should not even be operating under a NMP in the first place. Second, the NMP is not an appropriate site specific NMP and thus excess nutrient discharges from its manure application fields remove it from the agricultural storm water exemption.

A. The Farm is improperly classified as a "no-discharge" AFO.

"The Clean Water Act demands regulation in fact, not only in principle." *Waterkeeper Alliance*, 399 F.3d at 498. The State of New Union is delegated authority under the Clean Water Act by the Environmental Protection Agency, and regulates the Farm as a "no-discharge" AFO pursuant to this authority. R. at 5. This designation means that the Farm is not expected to discharge from its manure handling facilities to waters of the State in conditions up to and including a storm event so severe that it is not expected to occur more than once every twenty-five years. R. at 5. James observed pollution discharges occurring during a very minor storm event. *Id.* Therefore, the Farm is improperly regulated as a **"**no-discharge" AFO. The Farm thus requires an NPDES permit because it is a CAFO that discharged pollutants during an insignificant rain event. Furthermore, these discharges are not agricultural stormwater.

B. The Farm was not in compliance with an appropriate nutrient management plan because it disposed of hazardous materials in the liquid manure and did not utilize best management practices to ensure appropriate agricultural utilization of manure nutrients.

A discharge is *only* exempt as agricultural stormwater if the manure is "applied in accordance with site specific nutrient management practices that *ensure appropriate agricultural utilization of the nutrients* in the manure. . . as specified in § 122.42(e)(1)(vi)-(ix)." 40 C.F.R. § 122.23(e) (emphasis added). The Farm's NMP does not satisfy this requirement. 40 C.F.R. § 122.42(e) also specifies that a NMP, "at a minimum, contains best management practices necessary to meet the requirements of this paragraph." 40 C.F.R. § 122.42. The Farm's did not meet the requirements of 40 C.F.R. § 122.42 because it unlawfully disposed of contaminants in the liquid manure and because it did not use best management practices to ensure optimal agricultural utilization of the nutrients in the manure. Therefore, excessive nutrient discharges as a result of an improper NMP remove the Farm from the agricultural stormwater exemption.

One requirement of the Nutrient Management Plan paragraph is to "[e]nsure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants . . ."40 C.F.R. § 122.42. The Farm accepts and disposes of acid whey from the Chokos plant into its manure lagoons. R. at 5. Acid whey is a by-product of Greek yogurt production that is generally difficult to dispose of and can pollute waterways. Mark Astley, Greek yogurt waste 'acid whey' a concern for USDA: Jones Laffin, DairyReporter.com (Jan. 30, 2014), http://www.dairyreporter.com/Processing-Packaging/Greek-yogurt-waste-acid-whey-a-concern-for-USDA-Jones-Laffin. If acid whey gets into waterways, it can result in massive fish kills. *Id.*; *See also* Mandy Oaklander, Greek Yogurt's Dark Side, Prevention (June 2013), http://www.prevention.com/food/smart-shopping/greek-yogurts-

dark-side-acid-whey. ("Acid whey is toxic to the environment and kills off aquatic life, so it can't be dumped"). Acid whey is thus a contaminant that the Farm is handling on site. R. at 5. Not only is the Farm handling the acid whey on site, but the Farm is illegally disposing of the acid whey into the manure. The regulations explicitly require that contaminants such as acid whey are not disposed of into manure. Not only should the Farm be precluded from adding acid whey into the manure lagoons to begin with, but the addition of the acid whey also prevents "appropriate agricultural utilization of the nutrients in the manure." 40 C.F.R. § 122.42 as the NMP regulation requires.

Nutrient management plans must also establish protocols to apply land manure "in accordance with site specific nutrient management practices that *ensure appropriate agricultural utilization of the nutrients in the manure*." 40 C.F.R. § 122.42. The addition of the acid whey to the liquid manure lowered the pH of the soil and "prevented the Bermuda grass crop from effectively taking up the nutrients in the manure." R. at 6. Even The Farm's expert "did not dispute that the acid whey reduced soil pH and reduced nitrogen uptake by the Bermuda Grass." R. at 6. Thus, because the Farm is not in compliance with Nutrient Management Plan regulations, the wastewater generated from the fields is not exempt under the agricultural storm water exemption, despite the fact that the farm applied manure to the fields at rates consistent with the NMP. R. at 6.

C. The Farm is subject to NPDES permitting liability because violation of the nutrient management plan regulations is a violation of a Clean Water Act affluent limitation.

"The requirement to develop and implement a nutrient management plan *is* an effluent limitation." *Waterkeeper Alliance*, 399 F.3d at 501 (quoting 33 U.S.C. § 1342(b)). The Court in *Waterkeeper* struck down a CAFO rule that did not ensure compliance with Nutrient

Management Plan statutory requirements. *See id* at 498. This court should find that because the NMP is itself an effluent limitation, that the Farm is subject to NPDES permitting liability for violation of the NMP regulations. In conclusion, the Farm is subject to NPDES permitting liability because the NMP is not in compliance with the relevant regulations and excess nutrient discharges from its manure application fields remove it from the agricultural storm water exemption.

V. In the alternative, the district court erred when it dismissed Riverwatcher's open dumping and imminent and substantial endangerment claims under Resource Conservation Recovery Act.

The Farm improperly discarded solid waste when it applied excess fertilizer to the Bermuda Grass, which resulted in nitrate contamination of Quad River. The Resource Conservation and Recovery Act (RCRA) created federal guidelines for the management of hazardous and solid waste, including federal regulations for solid waste disposal. 40 C.F.R. § 270.1. The citizen suit provision of RCRA allows any person to bring suit against another person "alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order." 42 U.S.C. § 6972(a)(1)(A). Courts broadly construe the requirements for standing under the provision. *See e.g.*, *Nat'l Recycling Coal., Inc. v. Browner*, 984 F.2d 1243, 1248 (D.C. Cir. 1993) (holding the plaintiff has standing because it is "within the zone of interests section 6972(a) protects.").

The district court wrongly rejected Riverkeeper's citizen suit under RCRA because the Farm improperly disposed of solid waste that created an imminent and substantial harm to public health.

A. The Farm violated RCRA's prohibition on the open dumping of solid waste because it applied fertilizer and soil amendment in excess of what the Bermuda Grass could effectively absorb.

RCRA prohibits the open dumping of solid waste. 42 U.S.C. § 6945(a). Open dumping occurs at "any facility or site where solid waste is disposed of which is not a sanitary landfill." 42 U.S.C. § 6903(14). Solid waste is further defined under RCRA to include discarded material from agricultural operations. 42 U.S.C. § 6903(27). Although Congress did not define "discarded materials" in the statute, courts interpreted discarded by its plain meaning. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) ("We note that the verb discard is defined by dictionary and usage as to 'cast aside; reject; abandon; give up.'").

Material is discarded under RCRA when it is "disposed of, thrown away or abandoned." *Am. Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 55-56 (D.C. Cir. 2012). *See also California Dept. of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 298 F.Supp.2d 930, 976 (E.D. Cal. 2003) ("Courts have interpreted "discarded" to include material which is "recovered" and put to another use in another industry"). The Legislative history of RCRA clarifies that "[a]griculture wastes which are returned to the soil as fertilizer or soil conditioners are not considered discarded material in the sense of this legislation." H. Rep. No. 94-1491 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240.

However, determining whether animal waste is returned to the soil as fertilizer is a functional inquiry focusing on the use of the waste product rather than the strict definition of agriculture waste. *Waterkeeper Alliance, Inc. v. Smithfield Foods, Inc.*, 4:01–CV–27–H(3), 2001 WL 1715730, at *4 (E.D.N.C. September 20, 2001). Valuable agricultural material is not discarded under RCRA when applied as fertilizer because it is put to beneficial use and not

simply thrown away. *Oklahoma v. Tyson Foods, Inc.*, 2010 WL 653032 at *11 (N.D. Okla, Feb. 17, 2010).

Agricultural material is not discarded when it is reused. *Meyer*, 373 F.3d at 1047. At issue in *Meyer* was the practice of a group of Kentucky bluegrass farmers, who engaged in the open air burning of the residue of the grass after harvest. *Id.* at 1037. Plaintiff alleged this practice violated RCRA because it constituted the improper disposal of solid waste. *Id.* at 1040. However, the court held that the burned grass residue did not amount to solid waste under RCRA because it was not discarded. *Id.* at 1045. Rather, the residue provided nutrients and fertilizers back to the soil, which contributed to creating optimal conditions for the next years harvest. *Id.* at 1044-45. Though, the dissent noted that the benefits were largely secondary to removing the old grass from the field in order to plant the next harvest. *Id.*

A useful product becomes discarded if it leaks outside of its applied area. *Zands v. Nelson*, 779 F. Supp. 1254, 1262 (S.D. Cal. 1991). In *Zands*, a company held oil in underground tanks. *Id.* at 1257. An oil tank leaked and contaminated the surrounding groundwater. *Id.* The court held that although the stored oil had not been discarded under RCRA, the leaked oil was discarded because it was no longer a useful product as it could no longer be reused or recycled. *Id.* at 1262.

Agricultural fertilizers applied in amounts beyond what is necessary to fertilize crops may be solid waste. *Cmty Ass'n for Restoration of the Env't, Inc. v. R & M Haak, LLC*, No. 13–CV–3026–TOR, 2013 WL 3188855, at *5 (E.D. Wash. June 21, 2013) (hereinafter CARE). In *CARE*, a dairy farm applied agricultural manure to its fields as fertilizer and stored liquid fertilizer in ponds on the property. *Id.* at *1. Plaintiffs alleged that the farm over applied the fertilizer causing it to leach into the groundwater, resulting in nitrate contamination. *Id.* The

court held that the application of manure itself did not constitute solid waste under RCRA, because enriching the soil was the product's intended use. *Id.* at *5. However, applying fertilizer in quantities greater than a crop could absorb did result in disposal and could be solid waste under RCRA. *Id.*

In this case, the excess fertilizer is solid waste under RCRA Subtitle IV because the Farm applied it in amounts beyond what was necessary to provide nourishment to the Bermuda Grass. At trial, Dr. Ella Moore testified that the Farm applied acid whey to its fields in excess quantities of what the crop could absorb. R. at 6. The application of a fertilizer containing acid whey lowered the PH of the soil, resulting in the Bermuda Grass absorbing fewer nitrates from the manure. R. at 6. These unprocessed nitrates then leached into the groundwater and ran off the fields, contaminating Quad River and Farmville's drinking water. R. at 6.

The lower court held that EPA regulations specifically excluded land application of agricultural fertilizers from regulation. R. at 11. However, that exclusion is limited to those agricultural wastes that are "returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1). The regulation does not apply to situations where fertilizer is applied in amounts that exceed what the soil and plants can absorb. *See Zands*, 779 F. Supp. at 1262.

Like the leaked oil in *Zands*, the useful fertilizer became discarded when it seeped from its applied area into the groundwater and river. When fertilizer leaks outside its applied area, the Farm can no longer claim that it is using the leached fertilizer for its intended purpose. The excess fertilizer no longer improves the condition of the Bermuda Grass, cannot be reused to fertilize other plants, and cannot be recycled. The leached fertilizer no longer has any value. *See Oklahoma v. Tyson Foods, Inc.*, 2010 WL 653032 at *11 (N.D. Okla, Feb. 17, 2010).

Therefore, the fertilizer at issue here is unlike the grass residue in *Meyer*. In *Meyer*, burning the grass residue helped ameliorate the condition of the soil. *Meyer*, 373 F.3d at 1047. Whereas here, the excess fertilizer here does nothing to improve the condition of the soil or the Berumda Grass but rather is a means for the Farm to discard unwanted material.

The Farm allows the fertilizer to leach into the groundwater and runoff into Quad River. It engaged in the open dumping of discarded waste and violated RCRA Subtitle IV by over applying fertilizer to the Bermuda Grass.

B. The Farm's improper solid waste disposal creates an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B).

Under RCRA, a citizen may bring an action "against any . . . past or present owner or operation of a . . . disposal facility, who has contributed . . . to the past or present . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a)(1)(B).

A finding that an activity may present an imminent and substantial harm does not require a determination of actual harm. *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994). Rather, courts hold that endangerment refers to a potential or threat of harm. *See Ethyl Corp. v. U.S. EPA,* 541 F.2d 1, 13 (D.C. Cir. 1976) (en banc) ("[c]ase law and dictionary definition agree that endanger means something less than actual harm"). RCRA requires that the threat of harm be present, even if the impact may not be felt until later. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 480 (1996).

A court does not need to determine that the threat will occur immediately so long as the risk of harm is present. *Price*, 39 F.3d at 1019. Imminence refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *United States v.*

Price, 688 F.2d 204, 213 (3d Cir. 1982) (quoting H.R. Committee Print No. 96–IFC 31, 96th Cong., 1st Sess. at 32 (1979)).

To bring a claim under RCRA, Riverkeeper need only show that nitrates are present in the water and that these elevated nitrate levels pose a substantial risk of harm to public health. *Kara Holding Corp. v. Getty Petroleum Mktg, Inc.*, 67 F. Supp. 2d 302, 311 (S.D.N.Y. 1999). In *Kara*, a landowner brought a RCRA action against the owner and operator of a gas station following a petroleum spill at the station. *Id.* at 304. The court held that plaintiff would prevail under Sec. 7002(a)(1)(B) if it could demonstrate that the previously spilled petroleum had not been satisfactorily removed, and that the remaining petroleum in the environment may pose an imminent and substantial endangerment. *Id.* at 311.

In this case, the Farm's current agricultural practices may present an imminent and substantial endangerment to health. The Farm's over application of fertilizer resulted in nitrate contamination of the groundwater and Quad River. R. at 6. At trial, evidence indicated that high levels of nitrates and fecal coliform were flowing from the Farm. R. at 6. The contaminated water then flows downriver towards Farmville. R. at 4. The nitrates from Quad River directly contributed to the April 2013 nitrate advisory. R. at 6. The nitrate level discovered in the Farmville drinking water was high enough to be hazardous to infants less than two years old. R. at 6.

The Farm's over application of fertilizer increase the level of nitrates in Quad River, which flow downstream. Thus, its practices may pose a substantial risk to Farmville residents who rely on the Deep Quod River for drinking water. R. at 7. The Farm's fertilization practices have and will continue to pose health risks to people in this community. Under the *Kara* test, the Farm's actions violate RCRA 7002(a)(1)(B) by engaging in actions that may present an

imminent and substantial endangerment to public health. *Kara*, 67 F. Supp. 2d at 311. Therefore, their actions are subject to redress under RCRA.

CONCLUSION

For the foregoing reasons, Riverwatcher asks this Court to overturn the district court's grant of summary judgment in favor of Moon Moo Farm. The district court erred on all six issues: the Queechunk Canal is a publicly navigable waterway; the evidence obtained by Dean James is admissible because this is a civil enforcement proceeding; Moon Moo Farm is a CAFO subject to NPDES permitting by virtue of its discharge from its manure land application area; excess nutrient discharges from its manure application field remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability; the Farm is subject to a citizen suit under RCRA because the land spread manure mixture constitutes a solid waste and the Farm is not exempt from RCRA Subtitle IV regulation; and there is an imminent and substantial endangerment to human health subject to redress under RCRA.

These issues require expansive legal analysis and fact-specific inquiries that the lower court failed to address, making the district court's grant of Moon Moo Farm's motion for summary judgment inappropriate. This court should reverse and remand for further proceedings consistent with the applicable law outlined above.