Team 26

C.A. No. 14-1248

In The United States Court Of Appeals
For The Twelfth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

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 THE DISTRICT OF NEW UNION

BRIEF FOR DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants

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JURISDICTIONAL STATEMENT

Appellant-Intervenor Deep Quod Riverwatcher, Inc., and Dean James (collectively "Riverwatcher") filed a complaint in the United States District Court for the District of New Union seeking review under 28 U.S.C.A. § 1331 because it arises under laws of the United States. On June 1, 2014, the district court granted Respondent Moon Moo Farm, Inc.'s motion for summary judgment. The district court's order is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C.A. § 1291. Riverwatcher timely filed a Notice of Appeal.

STATEMENT OF ISSUES

1) Whether the Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both side and the bottom of the canal by Moon Moo Farm.

2) If the canal is not a public trust navigable water, whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d) and 505.

3) Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because

> a. It is a CAFO subject to NPDES permitting by virtue of a discharge from its manure land application area. or
>
> b. If it is not a CAFO, excess nutrient discharges from its manure application fields remove it from the agricultural stormwater exemption and subject it to NPDES permitting liability.

4) Whether Moon Moo Farm is subject to a citizen suit under RCRA because

> a. Its land application of fertilizer and soil amendment (a mixture of manure and acid whey from a yogurt processing facility) constitutes a solid waste subject to regulation under RCRA Subtitle IV. and
>
> b. Plaintiffs can establish that the mixture constitutes an imminent and substantial endangerment to human health subject to redress under RCRA § 7002(a)(1)(B).

STATEMENT OF THE CASE

Plaintiff, the United States Environmental Protection Agency brought an action against Moon Moo Farm, Inc. for civil penalties and injunctive relief for violations of the permitting requirements of CWA, 33 U.S.C. § 1311(a), 1319(c), (d), 1342. Plaintiffs-Intervenors, an environmental protection organization, Deep Quod Riverwatcher, together with "Riverwatcher" Dean James, intervened as plaintiffs and asserted claims under CWA § 505 and RCRA § 7002 against Defendant Moon Moo Farm. The Farm counterclaimed for common law trespass.

All parties filed motions for summary judgment on all causes of action. The District Court for the District of New Union denied Plaintiffs' motion for summary judgment and granted Defendant's motions dismissing CWA and RCRA claims. The District Court ruled in favor the Farm's motion for summary judgment on the trespass counterclaim. Riverwatcher and EPA appeal the final judgment of the District Court of New Union.

STATEMENT OF THE FACTS

In the 1940's, a previous owner of Moon Moo Farm ("the Farm") built a bypass canal, the Queechunk Canal ("the Canal"), to alleviate flooding at the riverbend of the Deep Quod River ("the Deep Quod"). (R. 5). The Canal is fifty yards wide and three to four feet deep, and it diverts most of the flow of the Deep Quod through the Canal. Id. The Deep Quod is commonly traveled by small boats and travelers frequently use the Canal as a shortcut up and down the river, despite "No Trespassing" signs on the Canal. Id. The Deep Quod runs into the Mississippi River. Id. Deep Quod Riverwatcher is an environmental organization that protects and monitors the Deep Quod. The town of Farmville uses the Deep Quod as a drinking water source. Id.

The Farm owns 150 acres of fields and is located at the bend in the Deep Quod where the Canal was built. In 2010, the Farm increased its herd of milking cows from 170 to 350 to meet

the growing demand for milk for a nearby Greek yogurt processing facility - Chokos Greek Yogurt. (R. 5). All of the cows are housed in a barn and the manure and liquid waste is collected through drains that run to an outdoor lagoon. (R. 4-5). Since 2012, the Farm has accepted the acid whey byproduct from the Chokos plant and added the whey to its manure lagoons. (R. 5). The Farm sprays the manure/whey combination on fields where Bermuda grass is grown to be used as silage. Id.

In the early spring of 2013, Riverwatcher received complaints of the Deep Quod smelling of manure and being an unusually brown color. (R. 6). Around the same time, the Farmville Water Authority issued a warning to its residents that their drinking water supply had high nitrate levels that were unsafe for consumption by infants. Id. In response to complaints, on April 12, 2013, Riverwatcher member Dean James ("James") investigated the Deep Quod and the Canal in a small outboard boat. Id.

James observed the Farm spreading the manure/whey combination during a rain event that happened between April 11 and 12, 2013. (R. 6). Despite the Farm being classified as a "no-discharge" animal feeding operation, he observed brown water flowing from the fields to a drainage ditch that empties directly into the Canal and took water samples. (R. 5) When the water samples were tested, they showed high nitrate levels, fecal coliforms, and suspended solids. (R. 7).

Riverwatcher expert, Dr. Mae, determined that the manure/whey mixture had a pH level of 6.1, a weak acid. (R. 5). She also found that the increased acidity of the mixture, due to the addition of acid whey, rendered the Bermuda grass unable to take up the excess nutrients. (R. 6). As a result, the nitrates were then released into the environment by leaching into groundwater and through runoff during rain events. Id. Dr. Mae also stated that applying manure during a rain

event is poor management practice that will almost always result in excess runoff. Id. The Farm's expert agreed that the pH level was 6.1 and did not dispute that spreading manure was a poor management practice, and instead stated only that it was traditional. Id.

Despite evidence that the Farm discharges waste, the Farm is regulated as a "no discharge" facility operating under a Nutrient Management Plan ("NMP"). (R. 5). The NMP is submitted to the Farmville Regional Office of the State of New Union Department of Agriculture ("DOA"). Id. The NMP sets forth projected manure application as well as expected nutrient uptake. Id. The State of New Union does not ordinarily review NMPs and there is no provision for public comment. Id.

STANDARD OF REVIEW

The district court granted the Farm's motion for summary judgment. This Court reviews a district court's grant of summary judgment *de novo*. Lefevers v. GAF Fiberglass Corp., 667 F.3d 721, 723 (6th Cir. 2012). The Court must view all of the evidence and draw all reasonable inferences in favor of the nonmoving party. Id.

SUMMARY OF THE ARGUMENT

The District Court erred in granting the Farm's motion for summary judgment determining that James committed a civil trespass during his April 12, 2013 visit. (R. 12). The Canal is a public trust navigable water allowing for a public right of way. The Canal was only built for the benefit of the Farm to prevent flooding. It diverts most of the Deep Quod onto private land. The fact that the land adjacent to and even underneath the Canal is held in private title is irrelevant in determining its navigability as a public waterway. A private party cannot divert a public waterway onto private land for private benefit, and then claim trespass when the

public rightfully uses the waterway. The fact that the Canal is man-made is immaterial to determining whether it is a public trust navigable water.

Even if this Court determines that the Canal is not a public trust navigable water of the State of New Union, the evidence obtained by James can still legally be used to determine CWA and RCRA violations without impairing any privacy rights of the Farm. First, the Farm could not have had a reasonable expectation of privacy because the Canal was commonly used by the public. Second, the Canal is an open field, so the open field doctrine applies. Third, neither James nor Riverwatcher are government actors, so the Fourth Amendment does not protect the Farm from the scrutinous eye of environmental groups. The exclusionary rule cannot apply in this case.

The District Court erred in granting the Farm's summary judgment motion for CWA violations. The Farm is a point-source by virtue of its discharge of pollutants directly into a Water of the United States without an NPDES permit obtained from the EPA. That the Farm had a NMP permit is irrelevant because the NMP permit is invalid.

Finally, the District Court erred in granting the Farm's summary judgment motion for violations of RCRA. The Farm's land application procedures do not meet the agricultural manure fertilizer exception to RCRA because the excess nutrients are discharged into the environment, and applied in a manner that undermines any beneficial use of the manure as a fertilizer. It is undisputed that when manure is used as a beneficial fertilizer, it is exempt from regulation under RCRA. However, when manure is applied in such a way that it is harmful and no longer serving a beneficial use, it no longer falls within the exception.

ARGUMENT

I. THE QUEECHUNK CANAL IS A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION ALLOWING FOR A PUBLIC RIGHT OF NAVIGATION, IRRESPECTIVE OF PRIVATE TITLE.

The public trust doctrine, a tradition of British common law, has long been recognized in the United States to protect the public's right to use natural resources. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 434 (1983). It is established law that waters of the United States are held by the states in public trust for the benefit of the public and cannot be transferred into private ownership. As stated in the landmark Mono Lake case, "[...] The English common law evolved the concept of the public trust, under which the sovereign owns "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" Nat'l Audubon Soc'y, 33 Cal. 3d at 433-34 (citing Colberg, Inc. v. State of California ex rel. Dept. Pub. Works, 67 Cal.2d 408, 416 (1967)). A body of water held in the public trust becomes an easement for the public upon the land if the land underneath the water is held in private title. Bohn v. Albertson, 107 Cal. App. 2d 738, 741 (Cal. App. 1951). The public has a right to use the water for transportation, commerce, recreation, fishing, and other public trust uses.

In this case, Riverwatcher argues the Canal is a navigable body of water held in the public trust for public trust uses. Accordingly, the Farm's trespass claim fails as a matter of law. Riverwatcher first argues that the Canal is navigable in fact, and therefore navigable at law. The test for navigability is whether there is practical utility in using the water for travel or transport. Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 603 (1998).

The record indicates that the Canal is frequently used as a shortcut up and down the Deep Quod and it is frequently traveled by small boat or canoe. (R. 5). Second, no part of the navigability test relies on title. If title on the sides or below the water is privately held, the public

has an easement where the public trust navigable water flows. Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 601 (1998). The riparian owner's rights are subordinate to the public's right of navigation. Pierson v. Coffey, 706 S.W.2d 409, 411 (Ky. Ct. App. 1985). Finally, the District Court erroneously concluded that the Canal being man-made was dispositive of the question of navigability. (R. 9)

A. The Queechunk Canal Is Navigable In Fact, And Therefore Navigable At Law.

The most recent and commonly used test to determine whether a body of water is a public trust navigable water is whether it is navigable in fact. The Daniel Ball, 77 U.S. 557, 563 (1870); Fish House, Inc. v. Clarke, 204 N.C. App. 130, 133 (2010); Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 601 (1998). Navigability in fact is determined by the waters ability to be used for travel or transport. The Daniel Ball, 77 U.S. at 563. As eloquently stated in The Daniel Ball, waters are "[...] navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." Id. This test has been echoed in Fish House Inc. v. Clarke, Adirondack League Club, Inc. v. Sierra Club, and Bohn v. Albertson, and it is the most widely used navigability test in modern law.

Even the Supreme Court of the United States acknowledged this test again in Kaiser Aetna v. U.S., 444 U.S. 164, 177 (1979). The navigable-in-fact test is the test that must be used here not only because it is the most widely used, accepted, and applied, but also because it will ensure federal authority to maintain a navigational servitude upon private land.

1. The Canal is regularly navigated by small boat and used as a shortcut up and down the Deep Quod River.

The Canal is fifty yards wide and three to four feet deep, and regularly navigated by the public in small boats and canoes. (R. 5). The determination that the public has a right of way on a

body of water is determined by its navigational capacity. "The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce." Kaiser Aetna, 444 U.S. at 177.

In this case, it is undisputed that the public regularly uses the Canal as a shortcut up and down the Deep Quod, a substantial portion of which is diverted into the canal to alleviate flooding problems. (R. 6). James, the alleged trespasser, navigated the Canal by use of an outboard-motorized boat. (R. 6). It is clear that the Canal can be navigated for purposes of travel. The facts also indicate that the Canal, in its regular state, flows deep enough and wide enough to reasonably allow for navigation. (R. 6).

The Farm may argue that navigation by canoe or small outboard watercraft is not substantial enough travel for the Canal to be considered a public highway for the purpose of navigation. This argument would be unfounded. The Court of Appeals of New York held that navigation by two canoes and a kayak for recreational purposes could withstand a motion for summary judgment on the issue of navigability. Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d 591, 600 (1998). In the Adirondack League Club case, Sierra Club members canoed and kayaked a portion of a river purportedly privately owned by the Adirondack League Club, Inc. The court held that recreational navigation is consistent with the navigability test, which does not require commercial navigable capacity. Id. The Canal can be, and is in fact navigated by small boats and canoes for recreation and for travel up and down the Deep Quod rendering the Canal navigable in fact.

2. Courts have long rejected that a body of water must be used for commercial purposes; rather the test of navigability turns on travel and transport even if the purpose is purely recreational.

The value in the Nation's waterways evolves over time, and the tests to determine public trust rights of way evolve as well. Traditionally, the test for determining whether a waterway was subject to a public right of navigation was determined by its ability to be used to travel and transport for commercial purposes. The Daniel Ball, 77 U.S. at 563. This historic test was useful when the value of a river lied solely in its commercial value for fishing or transporting timber. Today, the value of our waterways is characterized by value in not only commerce and transportation, but also in recreation and conservation of natural resources. Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d at 603, *see also*, Diana Shooting Club v. Husting, 156 Wis. 261, 261 (1914).

For example, the court in Adirondack League Club, Inc. v. Sierra Club expressly rejected the argument by the Adirondack League Club that, "[...] navigability references only commercial utility," and that recreational uses "[...] would disrupt settled expectations regarding private property and would expand the common-law rule beyond its traditional foundation." Adirondack League Club, Inc. v. Sierra Club, 92 N.Y.2d at 601.

Other courts have likewise rejected the notion that commercial utility is the only metric in determining navigability and ruled in favor of recreational utility. In Bohn v. Albertson, a broken levee flooded a tract of land, creating somewhat of a lake that was used for pleasure boating and occasionally fishing. 107 Cal. App. 2d at 740. The private property owners of the tract of land below the lake brought an action to enjoin defendants from boating and fishing on their land. Id. The court held the following:

> "'But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit." Id. at 744.

It is well established that modern-day navigability can mean that a waterway is navigable even if only for recreational purposes. It is clear that the canal was navigable for recreational purposes, and therefore navigable in fact and at law.

3. The Canal is used as a public highway of navigation, as it is frequently used as a shortcut up and down the Deep Quod River, which is a public trust navigable water of the State of New Union.

The Canal is a public highway of navigation because it is frequently used as a shortcut up and down the Deep Quod, a substantial portion of which is diverted into the Canal. (R. 5). The Canal was built by the prior owner of the farm facility in the 1940's to alleviate flooding at the river bend. Id. Today, a substantial portion of the Deep Quod is diverted into the Canal for the sole purpose of alleviating flooding – not for the purpose of diverting what would otherwise be an unquestionable public waterway into private hands. The Deep Quod is a public trust navigable body of water because it can be navigated by boat, it is in fact navigated by boat, and it connects to the Mississippi River which has for centuries been deems a public highway of navigation and commerce. Id. The Canal merely diverts the Deep Quod for a specific purpose, and reconnects to the Deep Quod at both ends. "When a canal is constructed to connect with a navigable river, the canal may be regarded as a part of the river." Hughes v. Nelson, 303 S.C. 102, 105 (S.C. Ct. App. 1990).

B. Title On Both Sides And The Bed Of The Canal Is Irrelevant To The Determination Of Navigable Waters Subject To A Right Of Public Navigation.

Title to the land on either side and underneath a body of water does not factor into determining the right of the public to navigate the water. Bohn v. Albertson, 107 Cal. App. 2d 738 (1951). In fact, the purpose of determining that a body of water is a public trust navigable water is to provide the public with an easement over the water for use of it. The public trust doctrine is meant to overcome private ownership of public resources. Once it is determined that a

body of water is navigable at law, the body of water is treated as an easement over the land – it is a servitude on privately held land. Id.

C. The Fact That The Canal Is Man-made Is Not Dispositive Of Its Navigability.

The District Court erroneously concluded that the fact that the Canal is man-made disposes of any claim that the Canal is a public trust navigable body of water. The District Court relied upon Kaiser Aetna in making this determination, ignoring not only the facts leading to the Supreme Court's holding, but also the issue decided. The Supreme Court had to decide whether or not, under the particular circumstances of the case, allowing a navigational easement for the public would amount to an unconstitutional taking. Kaiser Aetna, 444 U.S. at 165. The issue here is much simpler – whether there is a public right of navigation for the purposes of determining a trespass.

Trespass is a tort that is exclusively governed by state law. While there are no New Union cases on point, several other jurisdictions have determined that private, man-made canals and other waterways can be public trust navigable bodies of water. United States v. Saint Bernard Parish, 589 F. Supp. 617, 620 (E.D. La. 1984); Hughes v. Nelson, 303 S.C. at105; Fish House, Inc. v. Clarke, 204 N.C. App. 130, 134 (2010). While there are several tests of navigability, no test including the modern navigable in fact test, make a determination of navigability based on whether or not the waterway is man-made or natural. Furthermore, the majority opinion in Kaiser Aetna concedes the fact that the marina was by all definitions navigable in fact.

In Kaiser Aetna, the United States brought an action to determine whether or not the private owners of a marina where able to deny public access to the marina since the marina had become a navigable body of water. Kaiser Aetna, 444 U.S. at 165. It is necessary to delve into the facts of the Kaiser Aetna to understand how it is materially distinct from the case at bar. In

Kaiser Aetna, the respondents were the owners of Kuapa Pond in Oahu, Hawaii. Kaiser Aetna, 444 U.S. at 164. The pond was separated from Maunalua Bay by a naturally occurring sandy barrier. Id. The owners of the pond dredged the sand to open the pond to the bay and build a marina. Id. It was undisputed that prior to the dredging and excavation, the Kuapa Pond and other similar fishponds were considered privately owned under Hawaiian law. Id. The owners sought permission from the Army Corps of Engineers to dredge the sand to connect the pond to the bay and the Pacific Ocean, and build a marina. Id. The Army Corp acquiesced to the proposal. Id.

The Supreme Court determined that the new marina was a navigable body of water, but had serious concerns about allowing navigational easements to act as a blanket exception to the Takings Clause of the U.S. Constitution. Kaiser Aetna v. United States, 444 U.S. at 172. The Court was uncomfortable with forcing the owners to open the marina to the public. However, a salient and material distinction is that the Kuapa Pond was actually privately owned. In this case, the Deep Quod is not privately owned, and is itself a public trust navigable body of water. In the Kaiser Aetna case, private water was being opened into public water. Here, public water is being diverted onto private land for the sole purpose of flood control. Additionally, the owners in Kaiser Aetna never allowed the public access to the pond. The facts of this case indicate that the public regularly uses the canal to navigate up and down the Deep Quod. (R. 5).

It would be an absurdity to allow water to become privatized merely because it has been diverted from a public body of water to a private parcel. There are no facts on record to indicate that the Farm holds title to the water of the Deep Quod, and therefore has no right to exclude the public from its use by diverting it onto privately held land. The Canal was built for the purpose

of flood control, not for the purpose of excluding the public's right to navigate the Deep Quod, which is mostly diverted into the Canal.

II. THE DISTRICT COURT ERRED IN APPLYING THE EXCLUSIONARY RULE BECAUSE FOURTH AMENDMENT CONCERNS DID NOT EXIST AND THE SOCIAL COSTS OF EXCLUDING RELIABLE EVIDENCE OUTWEIGHED ANY DETERRENCE SUCH EXCLUSION MIGHT HAVE HAD.

In the underlying action, the District Court erroneously applied the Fourth Amendment exclusionary rule. (R. 9). The Fourth Amendment reads "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Supreme Court's central concern in its Fourth Amendment jurisprudence has been protecting citizens' reasonable expectation of privacy, especially with respect to the home. Katz v. United States, 389 U.S. 347, 360 (1967).

In order to enforce the Fourth Amendment the Supreme Court has developed the exclusionary rule, a judicially created doctrine meant to compel respect for the Amendment's restrictions. Davis v. United States, 131 S.Ct. 2419, 2426 (2011). The rule's sole purpose is to deter future Fourth Amendment violations. Id. So courts should use the exclusionary rule as their "last resort, not [their] first impulse." Hudson v. Michigan, 547 U.S. 586, 591 (2006); United States v. Leon, 468 U.S. 897 (1984). Excluding evidence extracts a high cost to society because reliable, highly probative evidence is lost. Davis, 131 S.Ct. at 2427. The Supreme Court has ruled that in civil cases the rule should only be used if the social benefits obtained through its use outweigh the inherent social costs. United States v. Janis, 428 U.S. 433 (1976); *see also* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984) (When "the likely social benefits of excluding unlawfully obtained evidence are weighed against the likely costs, the balance comes out against applying the exclusionary rule in civil deportation proceedings.").

Here, neither the purposes of the Fourth Amendment nor the purposes of the exclusionary rule apply. First, the Farm could not have had a reasonable expectation of privacy because the Canal was commonly used so the open fields doctrine should apply. (R. 5). Second, neither James nor Riverwatcher are government actors, so the Constitution does not apply to them. (R. 6). Third, excluding the evidence would allow the Farm to pollute with impunity without any future deterrence of Fourth Amendment violations. Finally, the District Court should have considered the good faith exception to the exclusionary rule.

A. Since The Canal Was An Open Field, The Farm Could Not Have Had A Reasonable Expectation Of Privacy So The Evidence Should Have Been Admitted.

The strictures of the Fourth Amendment should not apply to this case because the Farm did not have a reasonable expectation of privacy within the Canal. Since Katz, the touchstone of a Fourth Amendment analysis has been whether the complaining party had a "constitutionally protected reasonable expectation of privacy." Katz, 389 U.S. at 360. The Amendment only protects expectations of privacy "that society is prepared to recognized as reasonable." Id. at 361. No where is that expectation stronger and more reasonable than in the home. Payton v. New York, 445 U.S. 573, 585 (1980) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.")

However, when officials entered an open field, instead of a home, the Supreme Court found the privacy concerns central to the Fourth Amendment did not apply. Hester v. United States, 265 U.S. 57 (1924). In Hester, the Supreme Court announced the Open Fields doctrine. The Court relied on the explicit language of the Amendment to hold that police could enter and search a field without a warrant. Id. at 59. The Court found "the special protection accorded by

the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to open fields."[1] Id.

In Oliver v. United States, the Supreme Court reaffirmed the validity of the Open Fields doctrine. 466 U.S. 170 (1983). The police, without a warrant, went around a locked gate, past "No Trespassing" signs, and walked about a mile from the landowner's home until they found a marijuana field. Id. at 173. The landowner argued the police's warrantless entry on the farm constituted an illegal search. Id. The Court held that "open fields do not provide the setting for the intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields." Id. at 178. Since no societal interest existed in keeping the activities that occur in open fields private, the petitioners' subjective expectation of privacy as evidenced by their "No Trespassing" signs was unreasonable and the police did not need a warrant to conduct their search. Id. at 180.

Here the Farm's subjective expectation of privacy, as evidenced by its "No Trespassing" signs, was just as unreasonable as the landowner's expectation of privacy in Oliver because the Canal is an open field. As the Supreme Court said, "It is clear...that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage." *See* Oliver, 466 U.S. at 180 n.11. The curtilage is the area immediately adjacent to and associated with the home. Id. at 180. The Supreme Court gave four factors for determining whether an area was part of the curtilage: (1) the proximity of the area to the home; (2) whether the area and the home are within the same enclosure; (3) what uses the area put to; and (4) what steps has the resident taken to protect the area from observation. United States v. Dunn, 480 U.S. 294, 301 (1987). However,

[1] The framers would have understood the term 'effects' to exclude real property. Oliver v. United States, 466 U.S. 170, 177 n. 7 (1983).

the most important factor to the curtilage inquiry is whether the area would be the site of the same intimate activities associated with sanctity and privacy of the home. *See* Id. at 300 ("the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protections").

Here, the area in question is a Canal that is polluted, 50 yards wide, and commonly used by the public. (R7. 5). These characteristics make intimate activities associated with the privacy of the home impossible. This is true no matter how close the house and Canal might be to each other. Furthermore, in describing the Farm, the District Court only mentioned the barn where the cows are housed. (R. 4). There is no mention of a private dwelling. If there is no house on the land at all, then the Canal is akin to the areas between industrial buildings. *See* Dow Chem. v. United States, 476 U.S. 227 (1986) (holding the EPA did not violate company's Fourth Amendment right by taking aerial photographs without a warrant because industrial areas of a plant are not analogous to curtilage of a dwelling).

It would be impossible for the home and the Canal to be within the same enclosure because the Canal is connected to the Deep Quod at both ends. And although the Farm's owners installed no trespassing signs, they have made little effort to enforce those signs. All the people who commonly use it as a shortcut have observed the Canal. (R. 5). So even if a privacy interest existed, it has been waived by lack of enforcement.

B. The Fourth Amendment Does Not Apply To James' Actions Because The Bill Of Rights Does Not Restrict The Actions Of Private Individuals or Entities.

The original intention of the Bill of Rights was to protect individuals from intrusion by the federal government. Barron v. Mayor and City Council of Baltimore, 7 Pet. 243 (1833). Most of Bill of Rights' provisions have since been expanded to the states through the incorporation doctrine. *See* Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment incorporated);

compare Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment incorporated) *with* Hurtado v. California, 110 U.S. 516 (1884) (right to a grand jury indictment in a criminal case not incorporated).

However, neither the Bill of Rights nor the Constitution generally apply to the actions of private individuals or entities. Civil Rights Cases, 109 U.S. 3, 11 (1883). A state must act for constitutional protections to apply. Id. This is called the state action doctrine. There are two exceptions to this doctrine. Individuals and private entities must comply with the Constitution when they perform a task that has traditionally and exclusively been performed by the government or when the government has authorized or made the unconstitutional conduct possible. Erwin Chemerinsky, Constitutional Law 552 (Wolters Kluwer Law & Business, 4th ed. 2013).

James' investigation does not trigger the exceptions to the state action doctrine. First, Congress' authorizing of citizen suits means investigating CWA violations cannot be an exclusive government function. 33 U.S.C. § 1365. Such suits would be impossible if only the government could investigate CWA violations. Second, there is no indication that the EPA knew of James' investigation so it could not have authorized or made his conduct possible. (R. 6). Riverwatcher received complaints from citizens of Farmville and James took reasonable action to investigate the problem. Id. James acted either as an individual or as an agent of Riverwatcher. Either way, James' actions are not covered by the protections of the Fourth Amendment because neither he nor Riverwatcher are government entities. *See* Burdeau v. McDowell, 256 U.S. 465 (1921) (holding that exclusionary rule did not apply when private individual gathered evidence). Although the District Court stated the EPA should not be able to avoid Fourth Amendment limits through Riverwatcher's work, he failed to explain how the EPA could possibly be held

responsible for those actions. (R. 9). If the EPA is not responsible for James actions and no exceptions to the state action doctrine applied, then the strictures of the Fourth Amendment do not apply to James. Therefore, the District Court incorrectly excluded the evidence and its decision should be reversed.

C. Excluding The Evidence Would Allow The Farm To Pollute Farmville's Drinking Water With Impunity, With No Future Deterrence Of Fourth Amendment Violations.

The Supreme Court has ruled that in civil cases the exclusionary rule should only be used if the social benefits obtained through its use outweigh the inherent social costs of excluding reliable evidence. United States v. Janis, 428 U.S. 433 (1976).

In this case, the societal costs of excluding evidence would be far greater than the social benefits. First, all the parties agree "the runoff from [the Farm's] land application fields contained pollutants in the form of nitrates, a chemical waste, and fecal coliforms, as well as suspended solids." (R. 7). Since the pollution comes from a point source, explained in other sections of this brief, excluding James' evidence would require this Court to close its eyes to ongoing violations of the law. *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1046 (1984) ("Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained").

Second, the polluted runoff flowed into the Deep Quod, which is a source of drinking water for the town of Farmville. (R. 5). The town had to issue a nitrate advisory, warning all its drinking water customers that the water would be hazardous to infants less than two years old. (R. 5). While it is impossible to state that the Farm's polluting discharges are the "but for" cause of the nitrate advisory, (R. 7), pumping large amounts of pollution into a drinking water source is surely a substantial factor in causing the nitrate advisory. If this Court excludes the evidence at

issue, CWA's basic purpose will be contravened and the Farm will be allowed to pollute with impunity.

The District Court failed to apply the principles the Supreme Court outlined in Janis when it excludeed the evidence. (R. 9). Instead, the court cited two OSHA cases for the principle that the exclusionary rule should apply when the proceedings involve civil penalties for past violations. Smith Steel Casting Co. v. Brock, 800 F.2d 1329 (5th Cir. 1986); Trinity Industries, Inc. v. Occupational Safety and Health Review Commission, 16 F.3d 1455 (6th Cir.1994). However, in those cases the actor was a government agency. Here, the actor is an individual, who, at most was an agent of a private environmental group. James could not have been an agent of the EPA since there is no evidence he coordinated with the agency. As the Supreme Court has said, "[i]t is well established... that the exclusionary rule, as a deterrent sanction, is not applicable where a private party...commits the offending act." Janis, 428 U.S. at 455 n. 31 (1976) (citing Burdeau v. McDowell, 256 U.S. 465 (1921)). Additionally, courts cannot expect individuals and private groups to know the intricacies of Fourth Amendment jurisprudence because the Constitution does not restrict individuals like it does government. Civil Rights Cases, 109 U.S. 3, 11 (1883). The lower court failed to conduct this analysis and, therefore, the court's decision to exclude the evidence was fundamentally flawed and should be overturned.

D. Because The Canal Is A Public Trust Navigable Water Of The State Of New Union, James Was There In Good Faith And The Good Faith Exception Should Apply.

Even if there were some deterrent value in applying the Fourth Amendment to individuals in a civil proceeding, the evidence gathered by James should still be admitted under the good faith exception. The good faith exception developed when the Court recognized that "the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue." Davis, 131 S.Ct. at 2427. When police act with an objectively reasonable good-faith belief that their

conduct is lawful the exclusionary rule should not apply. United States v. Leon, 468 U.S. 897, 909 (1984). Analogously, when OSHA inspectors gathered evidence under a warrant they believed to cover multiple types of searches, but the court later found more limited, the court declined to use the exclusionary rule. Trinity Industries, 16 F.3d at 1462.

Although James did not have a warrant here, it was objectively reasonable for him to believe he could perform his investigation. First, members of the public commonly use the Canal, (R. 5), so it would have been reasonable for him to believe the Canal was subject to the public trust doctrine. Second, he is an individual who cannot even apply for a warrant. The restrictions directed to government agencies cannot apply directly to him so he would not have thought he had to apply for a permit to investigate. Since it is reasonable for him to believe he acted within the law when he collected the evidence, the trial court erred when it failed to consider the good faith exception to the exclusionary rule.

III. THE FARM MUST APPLY FOR A PERMIT UNDER THE CLEAN WATER ACT NPDES PERMITTING PROGRAM BECAUSE IT DISCHARGED POLLUTANTS FROM A POINT SOURCE.

In the underlying action, which alleged the Farm violated CWA's NPDES requirements, plaintiffs needed to demonstrate the Farm had "(1) discharged or 'added' (2) a pollutant (3) to navigable waters (4) from a point source (5) without a permit." Comm. to Save Mokelumne River v. East Bay Util., 13 F.3d 305, 308 (9th Cir. 1993). The parties agree the Farm discharged pollutants into the Canal (R. 7) without a permit. (R. 5). They also agree the Deep Quad is a "water of the United States" and, thus, navigable. (R. 7); *see* 33 U.S.C. § 1362(7). The only remaining issue at trial was whether the discharge emanated from a point source. (R. 7).

Riverwatcher asserts the trial court improperly granted summary judgment because adequate evidence existed that the discharge emanated from a point source. First, the Farm is a medium-sized CAFO that oversaturated its fields, so the agricultural stormwater exemption ("the

exemption") cannot apply. Alternatively, even if the Farm were not a CAFO, its land application practices caused pollutants to be discharged from a ditch (R. 7) which is itself a point source. 33 U.S.C. § 1362(14). The Farm tries to claim exemption because it submitted a Nutrient Management Plan ("NMP") to the State of New Union's Department of Agriculture ("DOA"). (R. 5). However, the Farm's NMP is invalid because the DOA's permitting process is illegal under CWA.

A. The Farm Is A Medium CAFO Because The Pollutants Were Discharged Through A Man-Made Ditch and a Man-Made Canal Into A Water Of The United States..

The Farm fits the definition of a medium CAFO. EPA regulations define a Medium CAFO as an animal feeding operation that confines "200 to 699 mature dairy cows, whether milked or dry," 40 C.F.R. § 122.23(b)(6)(i)(A), and which discharges pollutants into the waters of the United States "through a man-made ditch, flushing system, or similar man-made device." 40 C.F.R. § 122.23(b)(6)(ii)(A). The Farm has 350 head of milk cow. Although, it is unknown whether all the cows are all mature, the Farm's herd would likely be at least 200 mature cattle because otherwise it would be unable to supply the Yogurt processing facility with the needed milk and its expansion would have been pointless. (R. 4-5). Thus, the Farm has the requisite number of mature cows to satisfy the first part of the regulation.

The Farm satisfies the second part of the regulation because it discharged pollutants from its land application fields via a man-made ditch. 40 C.F.R. § 122.23(b)(6)(ii)(A). As the record states, "discolored brown water flow[ed] from the fields through a drainage ditch into [the Canal]." (R. 6). This polluted water then flowed into the Deep Quod. (R. 5) These facts make the Farm a CAFO for two reasons. First, the Canal is a water of the United States for purposes of CWA. 40 C.F.R. § 122.2. Second, the Canal's construction make it part of the same waterway as

the River. (R. 5). Finally, the Canal satisfies the requirement for a man-made device because the Canal and the drainage ditch are part of the same point source.

1. The Canal is a water of the United States because it is navigable and a tributary of a water of the United States.

"Congress intended to give the term "navigable waters," as defined in the Act as "waters of the United States," the broadest possible constitutional interpretation." United States v. Saint Bernard Parish, 589 F. Supp. 617, 619 (E.D. La. 1984) (citing United States v. Byrd, 609 F.2d 1204 (7th Cir.1979); Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir.1978)). In response to Congress, the EPA has promulgated a broad definition of "waters of the United States," which includes any waters that are or could be used by interstate travelers for recreational use and any of those waters tributaries. 40 C.F.R. § 122.2. First, the Canal is navigable in fact and commonly used for recreation. (R. 5). Since it is connected to the Deep Quod and that waterway is connected to the Mississippi, it is possible interstate travelers could use the Canal for recreational purposes. Second, the Canal is a tributary of the Deep Quod, which the parties already recognize as a water of the United States. (R. 7). CWA extends protections to tributaries regardless of their navigability because Congress intended to control discharges that might flow into a body of water in which the public had an interest. Saint Bernard Parish, 589 F. Supp. at 620.

The Farm might argue that the Canal cannot be a tributary because it is a man-made structure. This argument holds no water. In Saint Bernard Parish, the EPA sued the Parish under CWA for depositing raw sewage into a man-made canal that was connected to a wetland. Id. at 618-19. The Parish argued the canal was not navigable, so not a water of the United States. Id. at 618. The court not only held the canal was navigable, but also held that it was a tributary of the adjacent wetlands because the public had an interest in preventing sewage from entering the wetlands, bayous, and the Mississippi. Id. at 620. The public in New Union has the same interest

in keeping pollution from the Deep Quod and the Mississippi that the public in Louisiana had in Saint Bernard Parish. Therefore, this Court should find the Canal is a water of the United States either because it is navigable and a tributary of another water of the United States. Therefore, the Farm discharged from a drainage ditch directly into a water of the United States. (R. 6).

2. Alternatively, the Canal and the Deep Quod are part of the same waterway.

Alternatively, this Court should find the Canal and the Deep Quod are the same waterway, which means the Farm discharged directly into the Deep Quod via a drainage ditch. When faced with deciding if two seemingly separate waterways are actually one, the Supreme Court has opined, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." South Florida Water Management District v Miccosukee Tribe of Indians, 541 U.S. 95, 110 (2004) (quoting Castskill Mountains Chapter of Trout Unlimited, Inc. v. New York, 273 F.3d 481, 492 (2d Cir. 2001)) (quotation marks removed). In Miccosukee Tribe, a canal collected groundwater and rainwater from 104-square mile developed area. 541 U.S. at 100. A pump at western edge of the canal transferred the water into a large undeveloped wetland. Id. The defendants argued the canal and wetland were not distinct bodies of water because without the pump the developed area would flood and become part of the wetland again. Id. at 109. The Supreme Court ruled that the wetland and canal might be part of the same body of water and, therefore, the trial court incorrectly granted summary judgment. Id. at 110.

Similarly, in this case a previous owner of the Farm constructed the Canal in the 1940s to alleviate flooding, diverting most of the flow of the Deep Quod in the process. (R. 5). Just like the pump in Miccosukee Tribe, the Canal diverts a substantial amount of water for the sake of preventing flooding. If the Canal were closed, the Deep Quod would likely flood the area that currently includes the Canal. Consequently, just as the wetland and the canal in Miccosukee

Tribe were possibly the same body of water, the Canal and the Deep Quod are essentially the same waterway. Thus, if the Canal and the Deep Quod are legally the same body of water, then the Farm directly discharged pollutants into the a water of the United States from the drainage ditch.

3. The Canal satisfies the requirement for a man-made device because the Canal and the drainage ditch are part of the same point source.

Finally, the Canal and the drainage ditch are part of the same point source. Courts have found that to ensure CWA's purpose, a point source should be given "the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979). When pollutants have passed through more than one conveyance, courts have still found a point source existed. Concerned Residents for the Env't v. Southview Farm, 34 F.3d 114 (2nd Cir. 1994). In Southview Farm, plaintiffs sued a dairy farm claiming that the farm's land application of liquid manure violated CWA. Id. at 115. The court found that a "swale coupled with the pipe under the stonewall leading into the ditch that [led] into the stream was in and of itself a point source." Id. at 119.

Here, the parties agree that the Farm discharged pollutants from a drainage ditch, into the Canal that flows into the Deep Quod River. (R. 7). Just as the Southview Farm court found the swale, pipe, and ditch were part of the same point source, this court should find the drainage ditch and the Canal to be part of the same point source. Since the ditch and the Canal are part of the same point source, this Court should find the Farm discharged pollutants through the Canal, a man-made device, directly into the Deep Quod River. (R. 5). Thus, the Farm qualifies as a CAFO under EPA regulations because the pollutants were discharged into waters of the United States through a man-made ditch or man-made device. 40 C.F.R. § 122.23(b)(6)(ii).

B. The Agricultural Stormwater Exemption Does Not Apply Because The Farm Oversaturated Its Fields With A Mixture The Soil Could Not Absorb.

CWA defines a "point source" as "any discernible, confined and discrete conveyance, including but not limited to...concentrated animal feeding operation... from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). CWA defines a CAFO to be a point source and at the same time excludes agricultural stormwater discharges without saying whether CAFO discharges can ever qualify under the exemption. Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 507 (2d Cir. 2005).

The Waterkeeper Court found that whether or not a discharge was subject to regulation, turned on the primary cause of the discharge. Id. at 508. The exemption only applies if a discharge is primarily caused by nature. Id. On the other hand, if a discharge is due to the oversaturation of fields rather than rain, then the exemption does not apply. Id. at 508 (citing Concerned Residents for the Env't v. Southview Farm, 34 F.3d 114, 121 (2nd Cir. 1994)); *see also* Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1059 (5th Cir. 1991) (finding CAFO discharged into navigable waters from its wastewater disposal system during heavy rains that were not 25 year storm event) *and* Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., 2001 WL 1715730, at *5 (E.D.N.C. Sept. 20, 2001) (finding that sprayfields could be point sources because an integral part of the operation of a CAFO). In Southview Farm, the CAFO utilized a wastewater system similar to the one at issue in this case. Southview Farm, 34 F.3d at 119. The court found that not only did the liquid spreading operations fall under the definition of a point source, Id. at 118, but so did the manure spreading vehicles. Id. at 119. Finally, the exemption did not apply because the jury had a reasonable basis to find the discharges were not the result of rain, but just occurred on days that rain. Id. at 121. This reasonable basis came from witness testimony establishing that manure flowed from the farm's property into the stream. Id. at 118.

Southview Farm's bad management practices are analogous to the Farm's bad management practices in this case because both were the principal cause of their respective discharges. Just as the exemption did not apply in Southview Farm, it should not apply here. First, the Farm applied a mixture of manure and acid whey to its fields, which had a pH of 6.1, or weak acid. (R. 6). Plaintiffs' expert, Dr. Ella Mae, testified that this acidity reduced the Bermuda grass crop's ability to absorb the nutrients in the mixture, which led to unprocessed nutrients being released into the Deep Quod. (R. 6). The Farm's expert, Dr. Emmet Green, did not dispute Dr. Mae's findings about the crop's reduced ability to absorb nutrients because of the mixture. (R. 6). Instead, Dr. Green argued that land application of whey had been a traditional practice in New Union since the 1940s and that Bermuda grass tolerates various pH conditions. (R. 6). His testimony is irrelevant because the Farm has applied a mixture of whey and manure, not just whey. Additionally, while Bermuda grass may be a crop that tolerates a wide range of pH conditions generally, this Court should be concerned about whether Bermuda grass could tolerate a pH of 6.1, the amount of acid at issue here. Dr. Green never testified to that issue and therefore his testimony is unhelpful and should be ignored.

Second, the Farm applied the manure/whey mixture to its spreading fields during the April rain event, which is at best bad management practice. (R. 6). The State of New Union regulates the Farm as a no-discharge animal feeding operation.[2] The Farm applied the mixture during "a significant storm event, but one far short of [a] 25 year storm," and then discharged in violation of its Nutrient Management Plan ("NMP"). (R. 6). Dr. Mae testified that land application during a rain event is "very poor management practice and will nearly always result in excess runoff of

[2] This means the Farm's wastewater disposal system should have only discharged pollutants during a 25-year storm, which is defined as 5 inches of rainfall in one 24-hour period. (R. 5).

nutrients from fields." (R. 6).[3] Based on this evidence, it was the Farm's bad management practices that caused the discharge, not the rain. This is analogous to the Southview Farm Court's finding the jury had a reasonable basis for deciding CWA violations occurred.

C. Even If The Farm Is Not A CAFO, The Ditch Is Still A Point Source Because The Farm Discharged Excess Nutrients And Its NMP Violates CWA And EPA Regulations, So The Agricultural Stormwater Exemption Cannot Apply.

Even if the Farm is not a CAFO, its manure application practices created excess nutrient discharges that drained into the Canal through a ditch. (R. 7). The polluted runoff included nitrates, fecal coliforms, and suspended solids. Id. CWA specifically defines a point source as including a ditch. 33 U.S.C. § 1362(14). It does not matter whether the drainage ditch, the Canal, or both are considered to be the requisite ditch, the Farm discharged from a ditch into navigable water. Consequently, the Farm must obtain an NPDES permit even if it is not a CAFO.

The Farm tries to argue the discharge from its land application program was the result of agricultural activity and rain and, therefore, cannot be a point source. (R. 8). The trial court cited Alt v. U.S. E.P.A., 979 F. Supp. 2d 701 (N.D. W. Va. 2013) to side with the Farm, but in the process greatly expanded the exemption so that it contravenes the purposes of CWA. (R. 9). In Alt, the farmer kept her chickens and their waste under roofs. Alt, 979 F. Supp. 2d at 704. Dust composed of manure, litter and feathers was either tracked into the farmyard or blown there by the ventilation fans. Id. Rainfall then caused this dust to be carried from the farmyard into a water of the United States. Id. The court found that the farmyard was outside of the production area and that the exemption still applied even though the litter came from what would otherwise

[3] Dr. Green's responded to this testimony by pointing out the Farm's NMP did not prohibit land application during a rain event. (R. 7). This only serves to show the inadequacies of the Farm's NMP since the Farm was supposedly regulated as a no-discharge operation. These inadequacies will be discussed in the next section.

have been a point source. Id. at 714 (quoting Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 507 (2d Cir. 2005)). The court went on to say,

> the agricultural stormwater exemption is inapplicable to runoff from within a confinement area, manure storage area, and similar features deemed to be the CAFO 'production area.' ...it is for this reason that [farmers] not only keep their animals under roof, but also maintain covered structures for manure storage, composting, and similar activities. Id. at 714.

Nowhere did the Alt court overrule the Waterkeeper court's finding that the discharge must be primarily caused by a natural event. In fact, the farmer in Alt did everything she could to keep the dust within the production area. Id. at 704. In contrast, the Farm employed bad management practices that led to the discharge. (R. 6). If the District Court's reliance on Alt is allowed to stand, it will expand the exemption to farms utilize bad management practices that lead to pollution, contravening the entire purpose of CWA. This result would contravene the basic purpose of CWA to clean the Nation's waters.

This Court should look to the EPA's regulations for guidance on whether there is enough evidence to hold the Farm responsible for its discharge. The 2003 EPA regulations ("the Rule") hold CAFOs responsible for their land application discharges unless they are using a site-specific NMPs that ensures appropriate utilization of the nutrients being applied to the soil. 40 C.F.R. § 122.23(e); National Pork Producers Council v. U.S. E.P.A., 635 F.3d 738, 742 (5th Cir. 2011). If a valid NMP exists, then CAFOs would not be held responsible for precipitation-related discharges. 40 C.F.R. § 122.23(e). This, of course, requires the NMP to be valid. Here, the DOA's permitting process violates CWA so it is irrelevant that the Farm has been spreading its manure in accordance with a state approved NMP. Without a valid NMP, the Farm cannot claim

the exemption. Furthermore, the state of New Union regulated the Farm as a "no-discharge" AFO and, yet, the Farm's NMP[4] failed to prevent the Farm from discharging.

In 2005, environmentalists challenged the Rule because it did not require permitting agencies to review the submitted NMPs, nor did it allow the public a chance to review the NMPs. Waterkeeper Alliance, 399 F.3d at 498, 503. The court stated, "[t]he Clean Water Act demands regulation in fact, not only in principal." Id. at 498. The court found the lack of review would not ensure discharges would stay within proper effluent limitations, which plainly violated CWA. Id. at 498-99. The rule also violated CWA's public participation requirement because it did not allow the public to review the NMPs. Id. at 503.

The DOA's permitting process is analogous to the Rule because both failed to provide for meaningful review. The DOA has the authority to reject NMPs that are insufficient. (R. 5). However, it does not ordinarily review NMPs submitted by 'no-discharge' AFOs, like the Farm. Id. Additionally, there is no way for the public to comment on NMPs filed by no-discharge AFOs. (R. 5). In the same way the Rule violated CWA because it did not make provisions for public comment, so too does the DOA's process violate CWA's public participation requirement. Thus, the Farm's land application program and its reliance on the exemption rest on a process that violates CWA. This means the Farm's NMP cannot be valid. With only an invalid NMP in its possession, the Farm cannot claim the agricultural stormwater exemption.

The Farm also cannot claim the exemption because it discharged during a normal rain event when its NMP was supposed to prevent such discharges. *See* Waterkeeper Alliance, 399 F.3d at 502 ("[T]he requirement to develop a nutrient management plan constitutes a restriction on land

[4] The Farm's NMP is an effluent limitation because CWA defines that term to mean "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters…" 33 U.S.C. § 1362(11).

application discharges only to the extent that the nutrient management plan actually imposes restrictions on land application discharges."). New Union regulated the Farm as a "no-discharge" AFO, which means the Farm's NMP should prevent discharges up to and including a 25-year storm event. (R. 5) The Farm's NMP should have had detailed manure application rates that correlated with the expected uptake of nutrients by the Bermuda grass crop. Id. However, since New Union failed to review the Farm's NMP the Farm was free to develop an NMP that did not require it to follow best management practices, such as prohibiting land application during a rain event. Since the NMP failed to prevent the Farm from discharging pollutants into a water of the United States, the Farm should not be able to use it to claim the exemption.

IV. MOON MOO FARM IS SUBJECT TO A CITIZEN SUIT UNDER RCRA BECAUSE ITS LAND APPLICATION OF MANURE AND ACID WHEY CONSTITUTE A SOLID WASTE BY VIRTUE OF THE EXCESS NUTRIENT DISCHARGE DISPERSED INTO THE SOIL AND DISCHARGED THROUGH THE DITCH.

The Farm is subject to a citizen suit under RCRA because it is discarding manure and acid whey beyond any beneficial use, and returning those byproducts to the environment in a way that poses an imminent and substantial danger to human health. The purpose of RCRA is to regulate the disposal of waste: "Congress enacted RCRA to 'eliminate[ ] the last remaining loophole in environmental law" by regulating the "disposal of discarded materials and hazardous wastes.'" H.R.Rep. No. 94–1491(I), at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241. Riverwatcher acknowledges that in certain circumstances, manure used as a fertilizer for a beneficial or marketable use is *not* a solid waste within the meaning of RCRA. However, there is no blanket exception to the regulation of manure and acid whey under RCRA if the manure and acid whey is applied in a manner that undermines the intended purpose of fertilizing the soil. Furthermore, the acid whey byproduct of Greek yogurt is itself a solid waste under RCRA and brings the manure and acid whey combination outside the scope of any recognized exception.

A. The Manure and Acid Whey are a Solid Waste Because the Land Application is Used to Discard the Manure and Whey Beyond Any Beneficial Use.

The Farm is subject to a citizen suit under RCRA because the manure and acid whey is over-applied to the land thereby removing the land-application from the fertilizer exception. RCRA exempts manure that is being recycled and used as fertilizer but only insofar as it is serving a beneficial or useful purpose. Cmty. Ass'n for Restoration of the Env't, Inc. v. D & A Dairy, No. 13-CV-3018-TOR, 2013 WL 3188846, at 4 (E.D. Wash. June 21, 2013). There is no blanket exception that excludes animal waste from the RCRA. Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., No. 4:01-CV-27-H(3), 2001 WL 1715730, at 4 (E.D.N.C. Sept. 20, 2001). Rather, whether animal waste and acid whey qualify as a solid waste is a function inquiry based upon whether or not the land-application is being used as a beneficial fertilizer.

Riverwatcher contends that this specific liquid manure/whey fertilizer is not being reused for a beneficial or useful purpose, and is simply a means of discarding the waste. There are three factors for determining whether a substance qualifies as a solid waste or whether it is being still being used: (1) Whether the material is destined for beneficial use or recycling; (2) Whether materials are actively used or simply have potential reuse; and (3) Whether materials are being reused by the original owner or by a salvager. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1045 (9th Cir. 2004). It is undisputed that the manure/whey product is actually being used so the second factor is not at issue. The first and third factors are discussed below.

1. The manure/whey land-application, as applied, is not serving a useful or beneficial purpose, but is merely being discarded.

The first factor in determining whether a substance is a solid waste is whether it is being used for a beneficial purpose. In this case, the manure was destined for beneficial use, but the addition of the whey increased the pH of the liquid substance to 6.1, a weak acid. (R. 6). According to expert witness, Dr. Ella Mae, this pH level is beyond what the Bermuda grass can

absorb. Id. The unprocessed nutrients then leached into the ground water. Id. The addition of the whey changed the chemical composition of the liquid manure in such a way that was no longer useful to the Bermuda grass that resulted in groundwater contamination.

The manure/whey combination was applied to the land in a manner inconsistent with beneficial use of fertilizer. It is undisputed that applying fertilizer during a significant rain event will lead to the fertilizer running off the land. This is not a beneficial use of the manure/whey since the fertilizer running off the land and into a ditch does not serve any useful purpose for the soil or the Bermuda grass. If the Farm paid for fertilizer, surely they would not apply it during a rain event because it would be uneconomical to apply a substance of value only to have it run off into a ditch.

The intent of the manure exception to RCRA's definition of solid waste was to allow agriculture to put manure to good use. The purpose was not to allow farms to use poor agricultural practices that result in discharging harmful substances into groundwater and drinking water supplies. As aptly stated in Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., "As plaintiffs point out, however, no blanket animal waste exemption excludes animal waste from the "solid waste" definition. Instead, the determination of whether defendants "return" animal waste to the soil as organic fertilizer is a functional inquiry focusing on defendants' use of the animal waste products rather than the agriculture waste definition." No. 4:01-CV-27-H(3), 2001 WL 1715730, at 4 (E.D.N.C. Sept. 20, 2001).

2. The acid whey is the substance that is causing the most harm, and it is also the substance that is discarded by its original owner.

The third factor in determining whether a substance is considered a solid waste is whether the original owner or a salvager is using it. The original owner – the Farm, is using the manure from the cows but it is acting as a salvager and taking a harmful byproduct off the hands of

Chokos. Chokos is discarding the whey, and it is not selling it to the Farm at all. It is just trying to get rid of it. This is precisely the type of waste RCRA seeks to regulate. The addition of the acid whey to the manure is the substance that is contaminating the soil and drinking water, and it is also the substance that is truly being discarded without beneficial use.

Acid whey is a discarded substance that falls squarely within the definition of a "solid waste." It is the type of substance that RCRA intended to regulate its disposal. Even if the manure falls within an exception to "solid waste" under RCRA, the addition of the acid whey to the land-application brings the mixture outside of the exception. Acid whey, the byproduct of Greek yogurt production, is not manure or animal waste that is beneficial or useful as a fertilizer.

B. The Discharge Of Manure And Acid Whey Into The Deep Quod Watershed Presents An Imminent and Substantial Endangerment To Human Health Or The Environment.

In order to state a claim under RCRA for dumping solid wastes, Riverwatcher must show that the violation poses an imminent and substantial endangerment to human health or the environment. 42 U.S.C. § 6973(a)(1)(B). A site's compliance or noncompliance with federal or state standards is determinate of assessing the possibility of imminent and substantial endangerment. Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 188 F. Supp. 2d 486, 503 (D.N.J. 2002). Riverwatcher argues that the Farm violated RCRA by applying manure and acid whey to a flood plain, 40 C.F.R. § 257.3-1, applying solid waste in a manner that contaminated groundwater, 40 C.F.R. § 257.3-4, and applying solid waste with a pH below 6.5 to food chain crop areas, 40 C.F.R. § 257.3-5. Since the Farm violated several federal standards, Riverwatcher argues that the court erroneously granted the Farm's motion for summary judgment. Violations of federal standards is dispositive of whether or not there is an imminent and substantial endangerment to human health or the environment. Interfaith Cmty. Org., 188 F. Supp. 2d at 503.

1. Showing a substantial and imminent harm requires only a showing that there is a current risk of harm or a risk of harm may occur in the future, and does not require a showing of actual harm.

The purpose of the Resource Conservation Recovery Act was to close the final loophole in environmental regulation by regulating the open dumping of solid and hazardous wastes. Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991) rev'd in part, 505 U.S. 557 (1992). This purpose is accomplished through the broad language of the statute that authorizes citizens to sue an owner or operator of a disposal facility which has contributed or is contributing 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. § 6972(a)(1)(B) (emphasis added). There is no requirement that a party suing under RCRA must make a showing of actual harm. Id. The statute is designed to prevent improper disposals that may present harm in the future.

Riverwatcher has met its burden of showing that there is an imminent and substantial endangerment to human health because the nitrate levels of the drinking water are unsafe for human consumption, albeit, infant humans. Riverwatcher fails to comprehend why protecting the health of infants is not significant enough to warrant regulation under RCRA. Furthermore, "imminent" does not require an emergency only a present risk of harm. Town & Country Co-Op, Inc. v. Akron Products Co., No. 1:11 CV 2578, 2012 WL 1668154, at 5 (N.D. Ohio May 11, 2012). It is clear that there is a current risk of harm since Farmville's water supply is unsafe for drinking by infants. "Endangerment" means that someone or something will be harmed if remedial action is not taken. Interfaith Cmty. Org.399 F.3d at 259. Here, infants will be harmed if some remedial action (drinking bottled water) is not taken. (R. 6).

The District Court cites Davies v. Nat'l Co-op Refinery Ass'n, 963 F. Supp. 990, 999 (D. Kan, 1997) to support its holding that there is not imminent and substantial endangerment.

Davies is easily distinguishable from this case because in Davies, the groundwater contamination would not reach the city of McPherson's water supply for over 100 years. Id. In this case, contamination to Farmville's water supply has already occurred and will continue to occur and compound if the Farm is not enjoined from its practices.

2. Although not the "but for" cause of contamination Moon Moo Farm contributes to contamination, which is all that a RCRA suit must establish.

The District Court erroneously concluded that since the Farm is not the "but for" cause of the nitrate advisories in Farmville, Riverwatcher's claim fails. (R. 11). In so holding, the District Court ignores the plain language of the statute which states that, a private party may bring suit under RCRA "against any person ... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present any imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). RCRA makes no requirement that a polluting party must be the "but for" cause of imminent and substantial endangerment. The fact that the Farm is actively contributing to groundwater contamination through its manure application practices is enough to bring suit against a party.

CONCLUSION

For the foregoing reasons, Deep Quod Riverwatcher requests that this Court reverse the District Court, and grant Riverwatcher's motion for summary judgment.

Respectfully Submitted

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Counsel for Deep Quod Riverwatcher, Inc. and Dean James