Team number: 36

C.A. No. 14-1248

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHERS, 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

Brief for DEEP QUOD RIVERWATCHERS, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants

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STATEMENT OF JURISDICTION

This case involves an appeal from a judgment of the United States District Court for the District of New Union. The parties below cross-alleged addition of pollutants to navigable waters of the United States in violation of section 301 of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(a), (d) and 505. The district court granted Moon Moo Farm's motion of summary judgment, however Appellant filed a timely notice of appeal. Fed. R. App. P. 4(a)(1)(4). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291 (2006).

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether the Queechunk Canal, a public trust navigable water of the State of New Union, allows for a public right of navigation despite private ownership of the banks on both sides and the bottom of the canal by Moon Moo Farm.

2. If the Queechunk 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 application area.
    b. If it is not a CAFO, excess nutrient discharge 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 soli amendment constitutes a solid waste subject to regulations under RCRA subtitle IV
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

This is a case involving manure discharge into the Queechunk Canal. The EPA commenced this civil enforcement action against Moon Moo Farm seeking civil penalties under CWA § 309(d) as well as injunctive relief under CWA § 309(b). At the conclusion of the ninety day RCRA waiting period, Deep Quad Riverwatcher ("Riverwatcher") intervened as plaintiff in the EPA action pursuant to CWA § 505(b)(1)(B), and alleged additional causes of action under the citizen suit provision of RCRA § 7002. Moon Moo Farm answered the complaint and asserted a counterclaim seeking damages and injunctive relief for trespass against Riverwatcher.

This is an appeal from a final order from the District Court of the District of New Union denying the motion for summary judgment to the plaintiffs on their CWA and RCRA claims. The District Court granted defendants motion for summary judgment, including the trespass counterclaim and awarded defendant $832,560 in damages.

Plaintiffs appeal from the granted motion for summary judgment because the District Court erred in finding that the Queechunk Canal was not a public trust navigable waterway, inadmissibility of evidence, Moon Moo Farm's field fell under the agriculture storm exception under the CWA, the dismissal of Riverwatcher's open dumping and imminent and substantial endangerment claims under RCRA, and the award of damages. This Court ordered additional briefing on the substantive merits of the case.

STATEMENT OF THE FACTS

Dean James is a concerned New Union citizen who runs a local nonprofit organization of environmentalists known as the Deep Quod Riverwatcher. The Riverwatcher intervened in the suit filed by the United States Environmental Protection Agency against Moon Moo Farm on the basis of the citizen suit provisions of the Clean Water Act and the Resources Conservation and Recovery Act.

The Moon Moo Farm has 350 cows in its dairy farming operation based near the City of Farmville, New Union. The cows are confined to a barn, where their liquid and solid wastes are funneled into a large outdoor lagoon. The cow manure is combined with acid whey from the nearby Chokos Greek Yogurt processing facility and spread periodically on 150 acres of Moon Moo Farm land dedicated to growing Bermuda grass. This operation sits just upstream from the City of Farmville at a bend in the Deep Quod River, a source of drinking water for the city. Running across Moon Moo Farm's property is the man-made Queechunk Canal, a small but navigable waterway which diverts some of the river's flow to prevent flooding.

Moon Moo Farm is regulated by the Clean Water Act as a "no-discharge," animal-feeding operation, meaning it is not to release any direct effluent in up to and including 25 year flood conditions. The Farm is required to submit season Nutrient Management Plans to the New Union Department of Agriculture, but does not have National Pollutant Discharge Elimination System permit.

In early 2013, Deep Quod Riverwatcher received multiple complaints that the river had taken on an unusual brownish hue and smelled strongly of manure. The Farmville Water Authority issued a warning to Farmville residents about the increased level of nitrates detected in the water, and recommended residents not allow infants to drink tap water supplied by the river.

Dean James decided to investigate these claims by taking a small metal "jon boat," into the Queechunk Canal on April 12th, 2013. Over the previous 24 hours, the region had received two inches of rain (substantially less than the 5-inch mark to be considered a 25 year storm event), causing substantial runoff to pour from a drainage ditch on the Farm directly into the Canal. James photographed this effluent and Moon Moo Farm's manure spreading operations, and then took water samples of the discharge. Later testing would show that the discharge had a substantial nitrate concentration and increased amounts of fecal coliform bacteria.

Expert affidavits by Riverwatcher's agronomist, Moon Moo's agronomist, and Riverwatcher's environmental health expert seem to generally agree that the acid whey introduced to the fertilizer brought the soil's pH down to about 6.1, reducing the ability of the Bermuda grass to take up nutrients from the fertilizer. This increased the amount of fertilizing compounds washed into the river by the rain. While spreading manure during the rain only exacerbates this problem, there is technically nothing within Moon Moo Farm's Nutrient Management Plan that forbids them from doing so. While Moon Moo Farm almost certainly contributed to the nitrate advisories in the Deep Quod watershed, the area is heavily farmed and experiences someone common nitrate advisories, so one but-for cause for any given event is extremely difficult.

Riverwatcher properly served Moon Moo Farm, the New Union Department of Environmental Quality, and the Environmental Protection Agency with their intent to sue under CWA § 505 and RCRA § 7002. The EPA then filed suit for injunctive relief under CWA § 309(b) and civil penalties under CWA § 309(d), to which Riverwatcher joined. Moon Moo Farm countersued, alleging trespass on the part of Riverwatcher and sought $832,560 in damages plus injunctive relief from suit.

The District Court granted Moon Moo Farm's motion for summary judgment on all issues on June 1st, 2014. Riverwatcher and the EPA both filed timely appeals. The Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

This case involves an appeal from the district court's grant of summary judgment. In order to attain a summary judgment, the moving party must prove the "absence of any genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 339, 106 S.Ct. 2548, 2561 (1986). This Court reviews a district court's grant of summary judgment de novo. *Lefevers v. GAG Fiberglass Corp.*, 667 F.3d 721, 723 (6th Cir. 2012) (*See also Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012).

SUMMARY OF THE ARGUMENT

The Deep Quod River is a navigable-in-fact interstate body. Queechuck Canal, an artificial shoreland excavated to create a continuous body of water extending from the natural waters of a coastal river into the man-made excavated adjacent uplands is simply an indentation in the natural shoreline. Further, the Canal meets the test for navigability. First, it is capable of supporting navigation, even if in fact it never has. Second, the Canal is susceptible to use as a "navigable highway," whether for commercial or some other business purpose. Third, the Canal is navigable for commerce in its "natural and ordinary condition," even though some difficulties or obstructions will not defeat a navigability claim. Fourth, the commercial navigation could occur in the Canal through a "customary mode of trade or travel."

There was no permit issued for the construction of the Queechunk Canal, a requirement for modifying, excavating, or building structures that in any manner alter or modify the course,

location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or in-closure within the limits of any breakwater, or of the channel of any navigable water of the United States," unless Congress or the Army Corps of Engineers ("Army Corps") approves such action in advance of the project. . In absence of any affirmative finding about the permit, the unilateral man-made water body cannot be held to be in private ownership and beyond the control of the federal authority. Because the canal is under federal authority it is held in public trust by the Federal government, and hence navigable by any member of the public. Since the tidewater land is capable of regulation by the federal authority, the Queechunk Canal cannot be exempted from public access or federal control merely because it is a man-made body. The existing statutory and case law does not declare the waters located in marinas, boat basins, canals or similar facilities created by excavating privately owned uplands and connected to navigable-in-fact waters of New Union to be private waters from which the public may be excluded. Therefore, in absence of any such pre-existing law, Queechunk Canal cannot be classified as a private property from which public may be excluded.

Even if the Queechunk Canal is not a public trust navigable water, the trespass of Dean James does not preclude the admissibility of the evidence he obtained. James and Riverwatcher are not agents of the state, and so the Fourth Amendment does not govern their actions. Therefore, the exclusionary rule is not an appropriate remedy in a civil case such as this one, and the evidence should be admitted despite being obtained by trespass.

Moon Moo Farm is a CAFO, subject to NPDES permitting because of the discharge of its manure into the Queechunk Canal. Moon Moo Farm falls under a "medium" CAFO because they have 350 diary cows on their farm. Since Moon Moo Farm is a "medium" CAFO, their discharge of manure through a drainage ditch into navigable water constitutes a point

source. CWA § 502(14) defines point source as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel from which pollutants are or may be discharged." Since Moon Moo Farm is a CAFO it is subject to NPDES permitting by virtue of a discharge of manure from its manure land application.

Furthermore, the District Court was incorrect when it determined that Moon Moo Farm manure discharge fell under the agricultural stormwater exemption. There are three factors that Courts have used to distinguish stormwater discharges. First, an agricultural stormwater discharge needs to be the result of a precipitation-related event. Second, distinguishing agricultural stormwater discharges the owner or operator must adopt specific conservation practices to control runoff from manure being applied to land application areas. Finally, manure must be applied following "site specific nutrient management practices that ensure the appropriate agricultural utilization of the nutrients." Moon Moo Farm manure discharge did not fall under the agricultural stormwater exemption.

The mixture of acid whey and manure constitutes a solid waste under the guidelines of the Resource Conservation and Recovery Act Subsection D, which provides Riverwatcher with a citizen cause of action. The runoff created by this waste has seeped into the Deep Quod River and poses an imminent and substantial endangerment to human health in the City of Farmville and the surrounding area, making Moon Moo Farm liable to suit.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT QUEECHUCK CANAL WAS NOT A PUBLIC NAVIGABLE WATER.

Art. 1, §8, cl. 3 of the United States Constitution grants power to regulate commerce between the states upon "all navigable waters of the United States" to assure that the same remain free and unobstructed public highways. The *Daniel Ball* established the test of navigability of rivers and streams which constituted "navigable waters of the United States" for purposes of admiralty jurisdiction and regulatory jurisdiction under various acts of Congress as those waterways which are, in their ordinary condition, navigable in fact and form part of a continuous navigable highway of commerce between the states. 77 U.S. (10 Wall.) 557, 563, 19 L.Ed. 999, 1001 (1870).

The *Daniel Ball* test applies to all inland waterways, not just rivers, and contains two main elements. *United States v. Oregon*, 295 U.S. 1, 17 (1935). First, it must be determined whether a waterway was "used" as a highway for commerce at the time a particular state was admitted to the Union. Second, in the alternative, it must be determined whether a waterway was "susceptible of being used" as a highway for commerce at the time a particular state was admitted to the Union. For both elements, an examining court must also determine both the "customary modes of trade and travel" and "ordinary condition" of the waterway at the time of statehood.

The *Daniel Ball's* test of navigability was modified in *The Montello,* 87 U.S. (20 Wall.) 430, 22 L.Ed. 391 (1874), holding a once navigable in fact river did not lose its navigable character by reason of artificial obstructions; in *Economy Light and Power Company v. United States,* 265 U.S. 113, 65 L.Ed. 847 (1921), holding that a water body remains navigable for regulatory purposes even though it subsequently may become non-navigable because of a change

in conditions or the presence of artificial constructions; and in *United States v. Appalachian Electric Power Co.,* 311 U.S. 377, 85 L.Ed. 243 (1940) holding an entire waterway navigable where non-navigable portions could be made available for commercial interstate navigation with "reasonable improvements".

The navigability test does not require waterways to be navigable by a particular size or type of watercraft. The Court has held that any watercraft "that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted," and that this is evidence of possible navigability. *Montello*, *Supra,* 87 U.S. (20 Wall.) 430.

The two-part test supports a finding of navigability even though particular segments of a waterway are difficult or even impossible to navigate by watercraft. *United States v. Utah*, 283 U.S. 64, 86 (1931). "[T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926). In short, navigable waters of the United States are those waters capable, in fact, of navigation in interstate travel or commerce, and distinctions between natural and man-made bodies of water are immaterial.

It is an accepted fact that the Deep Quod River is a navigable-in-fact interstate body. Queechunk Canal, an artificial shoreland excavated to create a continuous body of water extending from the natural waters of a coastal river into the man-made excavated adjacent uplands are simply an indentation in the natural shoreline. To the boating and fishing public, natural navigable-in-fact waters and man-made navigable-in-fact waters lying within an excavated portion of the shoreline are indistinguishable. Therefore Queechunk Canals, although man-made, should be treated the same as the area of natural navigable-in-fact waters.

Queechunk Canal is navigable in law if it is navigable in fact. The Canal is navigable in fact since it is "used, or [is] susceptible of being used, in [its] 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." *Oregon*, Supra, 295 U.S. 1, 17 (1935). Further, the Canal meets the test for navigability. First, it is capable of supporting navigation, even if in fact it never has. Second, the Canal is susceptible to use as a "navigable highway," whether for commercial or some other business purpose. Third, the Canal is navigable for commerce in its "natural and ordinary condition," even though some difficulties or obstructions will not defeat a navigability claim. Fourth, the commercial navigation could occur in the Canal through a "customary mode of trade or travel."

A. Queechunk Canal continues to be regulated by the federal government through the Commerce Clause.

The Rivers and Harbors Act of 1899 states that one may not, "excavate," "fill," "build" structures upon, or "in any manner alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure [*sic*] within the limits of any breakwater, or of the channel of any navigable water of the United States," unless Congress or the Army Corps of Engineers ("Army Corps") approves such action in advance of the project. 33 U.S.C. § 403 (2006). The Army Corps defines navigable waters of the United States as "those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2010). The Army Corps makes jurisdictional determinations as part of the general permitting process that the public must follow when proposing obstructions that otherwise trigger criminal liability under the Rivers and Harbors Act. 33 U.S.C. § 403 (2006); 44 U.S.C. § 1505 (2006); 44 U.S.C. § 1507 (2006). The Army Corps makes its

determinations, if necessary, upon request from the public, and as part of a larger permitting procedure.

In *United States v. Sexton Cove Estates, Inc.,* 526 F.2d 1293 (5th Cir. 1976), the court held that side canals connected to navigable waters required a § 10 permit if their construction affected the bed, location, or currents of the navigable water. *See United States v. DeFelice*, 641 F.2d 1169 (5th Cir. 1981). The court characterized the connected canals as analogous to tributaries to navigable waters, which are subject to federal jurisdiction because they affect the navigable capacity of navigable waters.

The District Court erred in relying on evidentiary finding of any permits allowing the construction or formation of the Canal. In absence of any affirmative finding about the permit, the unilateral man-made water body cannot be held to be in private ownership and beyond the control of the federal authority. Because the canal is under federal authority it is held in public trust by the Federal government, and hence navigable by any member of the public.

B. Assuming *arguenda* that Queechunk Canal was not previously navigable, its construction made it a navigable water of the United States.

Assuming, but not conceding, that Queechunk Canal was not navigable before its transformation, it became navigable after it was constructed. It does not matter whether a navigable reach of the navigable waters of the United States is an "artificial" or a "natural" component. To permit such a distinction to determine public access would reintroduce the very evil that the navigational servitude is designed to avoid and would impose an intolerable burden on navigation. The navigable waters of the United States form a continuous highway of water. When a vessel is traveling in such an artificial man-made body, it is not always easy to tell whether it is natural or artificial or partly both. The public cannot be expected to know whether

the extension was once non-navigable or has always been a natural (open to the public), or is a stream rendered navigable through reasonable improvements (and therefore open to the public).

A parallel analogy can be drawn to the ownership of land under tide. The common-law doctrine as to the dominion, sovereignty, and ownership of lands under tide waters on the borders of the sea applies equally to the lands beneath the navigable waters of the Great Lakes; and ownership belongs to the states, respectively, within whose borders such lands are situated, subject always to the right of congress to control the navigation so far as may be necessary for the regulation of foreign and interstate commerce. *Public Lands Access Ass'n v. Board of County Com'rs of Madison County*, 146 U.S. 387, 13 S.Ct. 110 (1892). Since tidewater land is capable of regulation by the federal authority, the Queechunk Canal cannot be exempted from public access or federal control merely because it is a man-made body.

C. The trial court erred in relying on *Kaiser Atena v. United States*.

The Supreme Court in *Kaiser Aetna v. United States, 444 U.S. 164 (1979)* rejected the Corps' position. The Court held that connecting private waters to navigable waters of the United States does not convert those private waters to "navigable water[s] of the United States" and open them to public use. *Id.* In the Court's view the position of the government constituted an attempted unconstitutional taking of Kaiser-Aetna's private property rights. *Id.*

The key fact in the *Kaiser-Aetna* case is that Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system. Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land. Therein lies the distinction. The existing statutory and case law does not declare the

waters located in marinas, boat basins, canals or similar facilities created by excavating privately owned uplands and connected to navigable-in-fact waters of New Union to be private waters from which the public may be excluded. Therefore, in absence of any such pre-existing law, Queechunk Canal cannot be classified as a private property from which public may be excluded.

II. THE DISTRICT COURT ERRED IN EXCLUDING THE EVIDENCE PRODUCED BY THE APRIL 12TH TRIP TO THE QUEECHUCK CANAL.

In the event that the Queechunk Canal is not public trust navigable water and Dean James' presence in the canal on April 12th was trespassing, the evidence discovered still must be presented to the finder of fact. Riverwatcher brings citizen suit authorized by 33 U.S.C. §1365, joining the EPA's suit for equitable relief (33 U.S. Code § 1319(b)) and civil penalties (33 U.S. Code § 1319(d)). Neither of these actions enters the realm of Fourth Amendment protection against warrantless searches by Riverwatcher, and therefore the District Court improperly ruled that evidence discovered by a possible trespass to substantiate those claims should be excluded.

The District Court reached the conclusion that the exclusionary rule should apply to the Environmental Protection Agency and parties in privity with it, including Riverwatcher, in the context of this case. The court relies on *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334, (5th Cir.1986) to support the argument that "illegally obtained evidence must be excluded for purposes of 'punishing the crime,' i.e. the exclusionary rule should be applied for purposes of assessing penalties." *Id*. Riverwatcher contends that the facts of this case distinguish it from *Smith Steel*, and instead, this court should look to the Supreme Court's ruling in *United States v. Janis,* 428 U.S. 433, 96 S.Ct. 3021 (1976).

A. Public policy requires that plaintiffs be allowed to utilize evidence potentially obtained by trespass.

As a general rule, the exclusionary rule does not apply to civil cases, including many administrative enforcement actions. *See*, *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479 (1984). The exclusionary rule is a heavy-handed remedy to attempt "to deter future unlawful police conduct." *United States v. Calandra*, 414 U.S. 338, 347 (1974). The application of the exclusionary rule in this case would create a situation where "enforcement of admittedly valid laws would be hampered […] and, as is nearly always the case with the rule, concededly relevant and reliable evidence would be rendered unavailable." *Janis, supra,* at 447. The court must compare this cost against the deterrent value of the rule's application. Riverwatcher and the EPA are separate parties and are not in privity, the application of the exclusionary rule to the actions of the private citizens does not deter any state law enforcement action, and it is therefore outweighed by the costs of excluding this evidence. *Id.* at 454. As the *Janis* court declined to apply the exclusionary rule "where the officer has no responsibility or duty to, or agreement with, the sovereign seeking to use the evidence," the application of the exclusionary rule when the discovering party is not an officer of the law was clearly erroneous. *Id*. at 455.

B. <u>The civil penalties sought by the EPA through § 1319(d) are not to punish past CWA violations, but to prevent continued utilization of the hazardous fertilizer.</u>

The District Court relied on the reasoning of *Trinity Indus. v. OSHRC* to assert when the "object in introducing the evidence […] was to assess penalties […] for past violations, the exclusionary rule does have potential application in this case." F.3d 1455, 1462 (6th Cir. 1994). The key contrast between *Trinity Indus* and *Lopez-Mendoza* is that in the latter, the civil action was undertaken to prevent continued lawlessness rather that merely punishing past violations of the law. *Lopez-Mendoza*, *supra*, at 1042. This action by the EPA is similarly an attempt to prevent continued Clean Water Act violations created by the hazardous runoff leaking into the

Queechunk Canal rather than an attempt to capitalize on past violations. With that distinction in mind, neither suit against Moon Moo Farms should be considered a penalty to trigger Fourth Amendment protection that would warrant exclusion of the evidence. The evidence was improperly excluded by the District Court, and therefore summary judgment in favor of the defendant-appellee was improper.

III. MOON MOO FARM IS A CAFO, WHICH SUBJECTS IT TO NPDES PERMITTING BECAUSE OF THE DISCHARGE OF MANURE INTO THE QUEECHUNK CANAL

The Clean Water Act (the "CWA") is the foundation of the federal effort to protect the environment. The CWA is "designed to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters. *See No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602, 604 (2nd Cir. 2003)(quoting 33 U.S.C. § 1251(a)). The CWA is the principle legislative source of the EPA's authority to abate and control water pollution. See 33 U.S.C. §§ 1311(a), 1342, 1362. The CWA formally prohibits the "discharge of a pollutant by any person from any point source to navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System ("NPDES"). *See Waterkeeper Alliance v. USEPA*, 399 F.3d 486 (2nd Cir.2005) (quoting 33 U.S.C. §§ 1311(a), 1342). According to 33 U.S.C. § 1251(a)(1), the CWA's purpose is to not only reduce pollution, but also eliminate it. This is done through NPDES permits, which place an important restriction on the quality and character of that illicit pollution.

Moon Moo Farm argues that it is not required to obtain a NPDES permit because it is not a Concentrated Animal Feeding Operation ("CAFO"). However, the District Court was correct when it determined that Moon Moo Farm is in fact a CAFO. As described below, Deep Quad Riverwatcher ("Riverwatcher"), alleged sufficient facts, taken as true, to make a plausible showing that Moon Moo Farm is a CAFO.

Since Moon Moo Farm is a CAFO, the next determination is whether the CAFO constitutes a point source. The CWA bans "any addition of any *pollutant* to navigable *water* from a *point source*. 33 U.S.C. §§ 1362 12 (a) (emphasis added to three main elements). All parties agree that the runoff from Moon Moo Farm land application contained pollutants in the "form of nitrates, a chemical waste, and fecal coliforms, as well as suspended solids." Additionally, all parties agree that Deep Quad River is a "water of the United States," which subjects it to CWA permitting jurisdiction. 33 U.S.C. § 502(7). The issue is whether the pollutants are "from a point source" as defined in the CWA. As discussed in more detail below, since Moon Moo Farm is a CAFO, it falls under the definition of a point source. 33 U.S.C. § 502(14).

Accordingly, this Court should uphold the District Court's determination that Moon Moo Farm is a CAFO. However, the Court should rule that since Moon Moo Farm is a CAFO and a CAFO is a point source, Moon Moo Farm should have applied for a NPDES permit. The Court should uphold in part and reverse in part for proceedings consistent with applicable law for three reasons. First, Moon Moo Farm is a CAFO because it falls within the definition of a medium Animal Feeding Operation ("AFO"). 40 C.F.R. § 122.23(b)(6). Second, since Moon Moo Farm is a CAFO, the manure collected and spread through pipes constitutes a point source. Finally, since Moon Moo Farm is a CAFO with a point source, Moon Moo Farm is in violation for not applying for a NPDES permit. 40 C.F.R. § 122.42(e)(1).

A. Moon Moo farm is a CAFO.

Agricultural pollution has become a serious problem in the United States. Nearly forty percent of rivers and streams in the United States are impaired from a wide range of pollution sources. *See National Pollutant Discharge Elimination System Permit Regulation and Effluent*

Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 C.F.R. 7176 (Feb. 12, 2003). A dairy cow produces twenty-three times the waste of a human. In total, animals in CAFO's generate 220 billion gallons of waste each year, and between 500 million to 910 million tons of manure. [1] Owners of CAFO's use the manure as fertilizer to agricultural fields. *See Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114, 116 (2d Cir. 1994). However, as in the case at issue here, the manure may contaminate local rivers, streams, or lakes. The CWA sought to prevent this type of pollution when it defined a CAFO and the requirements that each CAFO has to follow. 40 C.F.R. § 122.23(b)(6).

The first step in determining whether or not Moon Moo Farm is a CAFO is to first determine whether it is an AFO. An AFO is "an area where animals are stabled or confined for a total of 45 days or more during any 12-month period and where no crops, vegetation, or crop residue is sustained during the normal growing season within any portion of the lot itself." 40 C.F.R. § 122.23(b)(1) (2003). Moon Moo Farm has been around since 1940, and increased their production in 2010, which was four years ago, thus satisfying the 45-day confinement requirement. Moon Moo Farms uses the farm exclusively for cattle.

An AFO is considered to be a CAFO if it meets one of the following three requirements as set forth in 40 C.F.R. § 122.23(b)(2). First, the operation confines a designated number of animal units. A Medium AFO includes the type and number of animals that fall within any of the ranges listed in paragraph 40 C.F.R. § 122.23 (b)(6)(i). Since Moon Moo Farm operates a dairy farm the relevant information is the number of cows housed on its farm. The number of cows needed on a farm to be labeled a Medium CAFO is between 200 to 699 mature dairy cows, whether milked or dry. 40 C.F.R. § 122.23 (b)(6)(i). The District Court was correct when it

[1] Poultry Farmers: Canaries in a Gold Mine, 4 Farm Aid News & Views 5, (July 1996), available at http:// www.ibiblio.org/london/agriculture/forums/sustainable-agriculture/msg00358.html. See

determined that Moon Moo Farm does indeed fall within this range. The District Court stated "with 350 head of dairy cattle, Moon Moo Farm falls within the definition of a "Medium" AFO under the EPA regulations." 40 C.F.R. § 122.23(b)(6).

The District Court correctly determined that in order for a "Medium" AFO to be a CAFO, one of two conditions set forth in section 122.23(b)(6)(ii) must be met. The first 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)(6)(ii)(A). The second condition is "pollutants are discharged directly into waters of the United States, which originate outside of and pass over, across, or through the facility, or otherwise come into direct contact with animal confined in the operation." 40 C.F.R. § 122.23(b)(6)(ii)(B). This does not apply in this case.

Moon Moo Farm "pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device." *Id*. In *Care v. Southview Farm*, a dairy farm accumulated manure through a system of storage lagoons. 34 F.3d 114, 123 (2nd Cir. 1994). *Southview Farm* installed a separator, which "pumps the cow manure over a mechanical device, which drains off the liquid and passes the solids out through a compressing process." *Id.* at 114. *Southview* also used "conventional manure spreading equipment including spreaders pulled by tractors and self-propelled vehicles. *Id*. *Southview Farm's* manure spreading record reflects application of millions of gallons of manure from their 1,290 mature cattle. The Second Circuit held that the Soutview Farm is indeed a CAFO under the requirements presented above. *Id*. Southview Farm discharged pollutants into the waters of the United States through a "man-made ditch, flushing system, or other similar man-made device." C.F.R. § 122.23(b)(6)(ii)(A).

In another case, a farm had 5,000 cattle, which produced a large amount of manure. *See Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002). The farm stored the manure in lagoons, which was pumped through man-made system to their fields. *Id.* at 955. The Ninth Circuit determined that based on the number of cattle and the man-made system to discharge pollutants to a body of water, the farm was a CAFO. *Id*.

Similar to the above cases, Moon Moo Farm discharged pollutants into waters of the United States through a "man-made ditch, flushing system, or other similar man-made device." 122.23(b)(6)(ii)(A). Moon Moo Farm collected the manure through a series of drains and pipes from the cow barn that run to an outdoor lagoon where it is stored and used as fertilizer. After the manure is stored, it is pumped from the lagoon into tank trailers and hauled by tractor and spread over the 150-acre field. Furthermore, Moon Moo Farm has a drainage ditch, which flows from their fields to the Queecheck Canal. It is clear based on the requirements set forth in 122.23(b)(6)(ii)(A) that Moon Moo Farm satisfies the requirement that the drainage system is a "man-made ditch, flushing system, or other similar man-made device," which discharges pollutants into the Queecheck Canal. Moon Moo Farm also has an adequate number of cows to be considered a Medium AFO. Thus, Moon Moo Farm is a CAFO.

B. A CAFO, Moon Moo Farm's discharge of manure through a drainage ditch into navigable water constitutes a point source.

Land application is predominately the mean by which CAFO's dispose of animal waste, such as manure. *See Waterkeeper Alliance v. USEPA*, 399 F.3d 486 (2nd Cir.2005). Properly land-applied manure can be very beneficially to a CAFO. *Id.* at 486. However, when waste is excessively or improperly land-applied, the nutrients contained in the waste become pollutants that can and often do run off into adjacent waterways or leach into soil and ground water. *Id*.

Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with CWA permits. 33 U.S.C. § 1311(a). The term "pollutant" means dredged spoil, solid waste, agricultural waste that is discharged into water. 33 U.S.C. § 502 (6). Under CWA § 502(12), the discharge of a pollutant is defined as the addition of a pollutant from a point source to navigable water. 33 U.S.C. § 1362(12). Furthermore, CWA § 502(14) defines point source as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel from which pollutants are or may be discharged." 33 U.S.C. § 1362(14)(*emphasis added*). The definition of a "point source" under the CWA is to be broadly interpreted and embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States. See 33 U.S.C § 1362(14) (*see also Peconic Baykeeper, Inc. v. Suffolk County*, 600 F.3d 180, 70 (2d. Cir. 2010)). On the contrary, the CWA does not prohibit the addition of pollutant from nonpoint sources. Therefore, the issue is whether Moon Moo Farm, as a CAFO, constitutes a point source.

In *Care v. Southview Farm,* the Second Circuit was called upon to determine whether the spraying of liquid manure from a "center pivot irrigation system" was a point source. 34 F.3d 114, 123 (2nd Cir. 1994). *Southview Farm* used plastic hoses and tractors to spread the fertilizer across the farm. *Id*. The Second Circuit concluded that the act of spreading the manure on a CAFO, which eventually drained into a nearby river constituted a point source. *Id*.

In *Bosma Dairy*, the Ninth Circuit determined that the point source definition should be broadly interpreted. *See Cmty. Ass'n for Restoration of the En't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002). *Bosma Dairy* was applying manure to their fields in such high quantities that it was later observed running off into drains, which led to a river. *Id*. The Ninth

Circuit stated, "the very nature of a CAFO and the amount of animal wastes generated constitute a large threat to the quality of the waters of the nation." *Id*. Therefore, the Ninth Circuit concluded that the EPA was empowered to regulate CAFO's as point sources. *Id*. The Ninth Circuit held, "defining a CAFO to include any manure spreading vehicles, as well as manure storing fields, and ditches used to store or transfer the waste serves the purpose of the CWA to control the disposal of pollutants in order to restore and maintain the waters of the United States. *Id*.

In *Waterkeeper Alliance*, Farm Petitioners claim, "runoff from land application areas, unless 'collected' or 'channelized' at the land application area itself, does not constitute a point source discharge." *See Waterkeeper Alliance v. USEPA*, 399 F.3d 486 (2nd Cir.2005). The Second Circuit said, "given that the Act expressly defines 'point source' to include concentrated animal feeding operations, the Farm Petitioners can prevail on their challenge only if we find that the Act prohibits classifying a land application discharge as a discharge 'from' a CAFO. *Id*. The Second Circuit concluded that the CWA "not only permits, but demands, that land application discharges be construed as discharges 'from' a CAFO to the extent that they are not otherwise agricultural stormwater." Id. (see also *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2d. Cir. 2011)(stating that the term point source refers to "the proximate source from which the pollutant is directly introduced to destination water body"). The Second Circuit went on to conclude that in this case the CAFO are "unquestionably 'the proximate source' of any discharge of pollutants from land application areas under their control to the surface waters." The Second Circuit additionally held, "but for the application of manure by the CAFO to the land, there could never be a discharge of pollutants from the land to

the surface waters." Thus, any "land application discharge that is not agricultural stormwater is, definitionally a discharge 'from' a CAFO that can be regulated as a point source discharge." *Id*.

For the reasons listed above, Moon Moo Farm discharging pollutants into the Queechunk Canal constitute a point source. Given that CAFO are specifically referenced in the point source definition and the Circuit Courts holding that a point source should be given broad interpretation, this Court should rule that since Moon Moo Farm is a CAFO, its draining ditch going into the Queechunk Canal is a point source.

C. Since Moon Moo Farm is a CAFO it is subject to NPDES permitting by virtue of a discharge from its manure land application area.

Since the adoption of the 1972 Federal Water Pollution Control Act Amendments, commonly known as the CWA, the United States has had significant success in decreasing water pollution. *See Nat'l Wildlife Fed'n, et. al. v. Gorsuch*, 530 F.Supp. 1291, 1296 (D.D.C.1982) (citing A Legislative History of the Water Pollution Control Act Amendments of 1972 (Leg.Hist.) at 1254, 1271, 1280 and 1303), rev'd on other grounds, 693 F.2d 156 (D.C.Cir.1982). The CWA works by regulating all discharges of pollutants into waters of the United States through a mandated and supervised National Pollutant Discharge Elimination System ("NPDES"). *See* 33 U.S.C. § 1311. NPDES permits "impose limitations on the discharge of pollutants, and establish related monitoring requirements." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 174 (2000). All discharges of pollutants into the Nation's waters are regulated by the NPDES permit program. *See* 33 U.S.C. § 1342. NPDES permits are issued either by the EPA, or by the states in a federally approved permitting system. *See* 33 U.S.C. § 1342. Every NPDES permit set forth must contain "effluent limitations, which contain restrictions on the quantities, rates, and concentrations of chemical, physical, biological, and other constitutes which are discharged from point sources into navigable waters." *See*

Waterkeeper Alliance, Inc. v. U.S. E.P.A., 399 F.3d 486, 491 (2d Cir. 2005)(see also *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S.Ct. 1537, 1541, 158 L.Ed.2d 264 (2004) ("Generally speaking, the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters.").

Under Section 122.23 (d)(1), "the owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge." 40 C.F.R. §122.23(d)(1). A CAFO "proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur." *Id*. Under Section C.F.R. § 122.23(e), land application discharges from a CAFO are subject to NPDES requirements. 40 C.F.R. § 122.23(e). The discharge of manure by the CAFO to land areas under its control is a discharge subject to NPDES permits requirements. *Id*.

There is an exception to the requirement of CAFO to obtain a NPDES permit. Under Section 122.23(d)(2), an owner or operator of a CAFO need "not seek coverage under an NPDES permit if the owner or operator secures a determination from the director of the relevant permitting authority that the CAFO has 'no potential to discharge' manure, littler, or process wastewater." *See* 40 C.F.R. § 122.23(d)(2); see also *id*. at § 122.23(f) (describing the process by which a Large CAFO may secure a determination that it has "no potential to discharge"). Moon Moo will argue that even if the Court rules that they are a CAFO, they did not need to obtain an NPDES permit because the Farmville Regional Office of the State of New Union Department of Agriculture (DOA) declared that they were a "no-discharge" operation. However, this is not correct. Under Section 301(a) of the CWA, only those CAFO discharges authorized by an NPDES permit, regardless of the volume or duration of the discharge, are allowed. Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is

authorized by the terms of a permit or is agricultural stormwater. *Id.* State of New Union has indicated that Moon Moo Farm is a "no-discharge" animal feeding operation. This means that Moon Mo Farm "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." However, Moon Moo Farm's manure infected the Queechunk Canal with only two inches of rain, "a significant storm, but one far short of the 25 year storm." It is well established that "discharge" is not limited to continuous discharge of pollutants from a point source to waters of the United States, but also include intermittent and sporadic discharges. *See Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 890 F.2d 690, 693 (4th Cir. 1989)(stating "intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition.").

For the above reasons, the Court should rule that Moon Moo Farm is a CAFO, making it subject to NPDES permitting by virtue of a discharge from its manure land application area.

IV. EVEN IF THE COURT FINDS THAT MOON MOO FARM IS NOT A CAFO, EXCESS NUTRIENT DISCHARGES FROM ITS MANURE APPLICATION FIELDS DO NOT REMOVE IT FROM THE AGRICULTURAL STORMWATER EXEMPTION AND SUBJEC IT TO NPDES PERMITTING LIABILITY.

The discharge of manure from a CAFO to land areas under its control is a discharge and subject it to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). 40 C.F.R. § 122.23(e). However, CAFO's are not the only point source that the agricultural exemption applies. CWA § 502 (14). The term "point source" means any "discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete, fissure, container, rolling stock, CAFO, or vessel or other floating craft, from which pollutants are or may be discharged." Id.

The CWA bans "any addition of any pollutant to navigable waters from a point source." 33 U.S.C. § 1362(12)(A). Although the District Court determined otherwise, Moon Moo Farm's unpermitted discharge of manure into Queechunk Canal is unlawful under the CWA because they originate from a discernible point source. Accordingly, this Court should reverse the District Court's holding and rule that since the manure came from a discernible point source it is subject to NPDES permitting. The agricultural stormwater exemption does not apply because Moon Moo Farm's manure was not applied in accordance with site specific NMP that ensure appropriate agricultural utilization of the nutrients in the manure. 40 C.F.R. § 122.42(e)(1)(vi).

A. Even if the court finds that Moon Moo Farm is not a CAFO, Moon Moo Farm is still discharging manure from a point source.

Under CWA § 502(12), the discharge of a pollutant is defined as the addition of a pollutant from a point source to navigable waters. 33 U.S.C. § 1362(12). Furthermore, CWA § 502(14) defines point source as "any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The definition of a "point source" under the CWA is to be broadly interpreted and embraces the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States. See 33 U.S.C § 1362(14)(See also *Sierra Club v. Abston Constr. Co.,* 620 F.2d 41, 45-46 (5th Cir.1980) (defendants were engaged in strip mining operations and placed their overburden in highly erodible piles which were then carried away by rain water through naturally created ditches). In Sierra Club, the Fifth Circuit held that a defendant is not relieved from liability because it does not actually construct the conveyances "so long as they are reasonably likely to be the means by which the pollutants are ultimately deposited into a navigable body of water." See Sierra Club,

620 F.2d at 45; see also *United States v. Oxford Royal Mushroom Prods., Inc.*, 487 852, 854 (E.D.Pa.1980) (discharge resulting from spraying overabundance of water onto surface of an irrigation field which, in turn, ran off into a nearby stream through a break in a beam around the field may constitute discharge from a point source).

Courts have concluded that manure-spreading vehicles are point sources. Under 33 U.S.C. § 1362(14), a point source definition includes a "container" or "rolling stock." A number of Courts have determined that vehicles are within the definition of point sources. See, e.g., *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir.1983) (bulldozers and backhoes constitute point sources under the CWA); *United States v. Tull*, 615 F.Supp. 610, 622 (E.D.Va.1983) (bulldozers and dump trucks), aff'd, 769 F.2d 182 (4th Cir.1985), rev'd on other grounds, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987); *United States v. Weisman*, 489 F.Supp. 1331, 1337 (M.D.Fla.1980) (bulldozers and dump trucks). In *Southview*, a farm was pumping manure from various lagoons into manure spreading tankers before discharging the liquid manure on to its various fields. Petitioners urged that by pumping the liquid manure from Southview's various lagoons into manure spreading tankers and other vehicles before discharging the liquid manure on to its various fields, *Southview* has "collected by human effort" the pollutant discharged into the navigable waters. *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 116 (2nd Cir. 1994). The Second Circuit held that not only was Southview a CAFO, but also the tankers used to spread the manure onto the fields were point sources. *Id*. at 116.

Similar to the above case, Moon Moo Farm collects manure and liquid waste from the cows through a series of drains and pipes that run to an outdoor lagoon. The manure is periodically pumped from the lagoon into tank trailers, which is then hauled by tractor and

spread on 150 acres of fields. Furthermore, Moon Moo Farm has a drainage ditch that goes directly into the Queechunk Canal. All of these conveyances are point sources.

B. Since Moon Moo Farm discharge of manure constitutes a point source, it is subject to NPDES permitting.

As discussed above, the CWA requires an owner or operator to "obtain an NPDES permit before discharging pollutants from any 'point source' into navigable waters of the United States. 33 U.S.C § 1323(a). Every NPDES permit set forth must contain "effluent limitations, which contain restrictions on the quantities, rates, and concentrations of chemical, physical, biological, and other constitutes which are discharged from point sources into navigable waters. See *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 491 (2nd Cir. 2005). Point sources may not discharge pollutants to surface waters without a permit from the NPDES. CWA 402(5). Therefore, since Moon Moo Farm has several point sources, it may not discharge pollutants without a permit.

C. The excess nutrient discharge from Moon Moo Farm's manure application do not remove it from the agricultural stormwater exemption.

The CWA defines the term "point source" so that it "does not include agricultural stormwater discharges and return flows from irrigated agricultural. 33 U.S.C. § 1362(14). The CWA provides that when manure has been applied in accordance with site specific NMP that ensure appropriate agricultural utilization, then precipitation-related discharge of manure from land areas under the control of a CAFO is an agricultural stormwater discharge. 40 C.F.R. § 122.23(e). Although the District Court determined otherwise, Moon Moo Farm's unpermitted discharge of manure is unlawful because it was not exempted under the agricultural stormwater exemption. As described below, there are four factors for distinguishing agricultural stormwater discharges, which Moon Moo Farm was not exempted from. C.F.R. § 122.42(e)(i)-(ix).

Accordingly, this Court should reverse the district court and remand for proceedings consistent with the applicable law.

There are four factors for distinguishing agricultural stormwater discharges. Id[2]. First, an agricultural stormwater discharge needs to be the result of a precipitation-related event. 122.42(e)(vi). In a Second Circuit case, any discharge due to something other than precipitation is not an agricultural stormwater discharge. *See Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994). The manure application was too close to a stream that the pollutants entered the water without precipitation. *Id*. at 121(stating that oversaturated fields are not covered under the agricultural stormwater exemption). In a Ninth Circuit case, the Court found that a producer who "overapplies or misapplies manure may incur liability for unpermitted discharge. *See Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954 (9th Cir. 2002). Moon Moo Farm's manure discharge was not discharged solely by a precipitation-related event. Moon Moo Farm's manure lagoon is designed to contain all manure produced by the diary operation without overflowing during a 25-year rainfall. On April 11, 2013 to April 13, 2013, a significant rainstorm occurred in the Farmville region. However, the rainstorm was far short of a 25-year storm event. It only rained two inches, whereas a 25-year storm is defined as five inches of rain in one 24-hour period. This shows that the manure discharge was not the result of precipitation related events, but rather an oversaturated of Moon Moo Farm's fields.

The second factor for distinguishing agricultural stormwater discharges is the owner or operator must adopt specific conservation practices to control runoff from manure being applied to land application areas. 40 C.F.R. § 122.23(e), 40 C.F.R. § 122.42(e)(vii). Although Moon

[2] The forth factor does not apply in this case. Moon Moo Farm appears to have kept all relevant records.

Moo Farm has applied manure to its fields consistent with the NMP filed with the Farmville Field Office, Dr. Ella Mae stated that the liquid manure from the acid whey lowered the pH of the soil. Dr. Mae discovered that the pH of the mixture was 6.1, which is a weak acid. This prevented the Bermuda grass crop from effectively taking up the nutrients in the manure, which caused these unprocessed nutrients to be released during rain events. Dr. Mae also stated that land application of manure during a rain event is a "very poor management practices and will nearly always result in excess runoff of nutrients from fields."

Third, manure must be applied following "site specific nutrient management practices that ensure the appropriate agricultural utilization of the nutrients." *Id*. at viii. However, two additional issues are important to "ensure the appropriate agricultural utilization of the nutrients. Id. First, what oversight must a permitting agency provide with respect to NMP. Second, is the public entitled to participate in the process? The Second Circuit found that the NMP and NPDES permits needed to be reviewed by the permitting agency prior to issuing a permit. See *Waterkeeper,* 399 F.3d at 499. The Second Circuit continued by stating that "if NMP were not reviewed, there was no way to ascertain whether the plans would allow the application of nutrients to achieve realistic production goals while minimizing nitrogen and phosphorus movement to surface waters." Id. Similarly, the Sierra Club claimed that Michigan's NPDES provisions were up to the same standards as federal regulations. See *Sierra Club*, 747 N.W. 2d at 323. The Michigan permitting agency was authorizing discharges of pollutants without review of any NMP. *Id*. at 333. The Court held that since the agency did not review dischargers "effluent limitations," then their NPDES/NMP was inadequate under federal law. *Id*. at 335. The New Union DOA "does not ordinarily review submitted NMP's." State programs should monitor the size of AFO's, the amount of manure, on-site inspection, and a number of other

factors. See 40 C.F.R. § 122.23(c)(2)(3). Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of C.F.R. §122.44(e). Any permit issued to a CAFO must include a requirement to implement a NMP that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 C.F.R. § 412. *Id*.

Furthermore, New Union DOA has not allowed, "any provisions for public comment on the NMP's" of Moon Moo Farm. The CWA provides that there be an "opportunity for public hearing" before an NPDES permit issues. See *Sierra Club Mackinac Chapter v. Dep't of Envtl. Quality*, 277 Mich. App. 531, 553-54 (2008)(see also 33 U.S.C. 1342(a)(1)). A copy of "each permit application and each permit issued under 33 U.S.C. 1342 shall be available to the public." 33 U.S.C. 1342(j). Under 33 U.S.C. § 1251(e) would "nevertheless apply to comprehensive nutrient management plans because they certainly are a 'plan' that is subject to public participation." 33 U.S.C. § 1251(e). State of New Union failed to allow the public to comment on Moon Moo Farm's NMP.

In *Alt v. EPA*, 979 F. Supp. 2d 701(N.D. W. Va. 2013), the Court held that the discharge from Ms. Alt's farm fell under the agricultural stormwater exemption. The District Court incorrectly relied on this case because although Moon Moo Farm filed an NMP, the DOA did not perform the required duties. In conclusion, based on the above discussion, Moon Moo Farm manure discharge does not fall under the agricultural stormwater exemption.

V. THE DISTRICT COURT ERRED IN FINDING MOON MOO FARM IMMUNE TO CITIZEN SUIT UNDER RCRA'S GUIDELINES FOR DISPOSAL OF SOLID WASTE ENDANGERING HUMAN HEALTH.

The District Court incorrectly found that the landspread utilized by Moon Moo Farms was not a solid waste as defined by the Resource Conservation and Recovery Act . The District

Court further erred in finding that the mixture did not pose an immediate threat to human health which would give rise to a cause of action under the RCRA, should the waste in question not be exclusively regulated by the Clean Water Act.

A. The landspread mixture used by moon moo farms was not properly considered to be solid waste regulated by RCRA Subtitle D.

Solid waste is defined by statute as including "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations." 42 U.S.C.S. § 6903 (27). The mixture of whey and manure created by Moon Moo Farms is certainly derived from agricultural operations. The question is whether or not it is a "discarded material."

The Congressional Record does support the intent to emphasize discarding as a necessary element to be considered waste. *See*, H.R. Rep. No. 198, 98th Cong., 1st Sess. 40. While the District Court cites two cases, *Oklahoma v. Tyson Foods, Inc*., 2010 WL 653032 at 10 (N.D. Okla. Feb. 17, 2010) and *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004), to support the idea that waste that is still being processed for use has not been "discarded," within the meaning of the RCRA definition. However, a more careful reading of the RCRA would make it hard to believe that the legislative intent was to keep the large swath of potential waste mismanagement that is intermediate waste storage outside the regulation of the statute. For example, § 6924(r)(2) provides for a narrow exception for waste that "applies only to wastes generated on-site in the refining process itself." H.R. No. 198, 98th Cong., 2d Sess. at 43 (1984). Because of the detail with which the statute was written, it is not reasonable to read it to suggest that the manure and whey mixture was not intended to be within regulatory purview because it had yet to be finally abandoned. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

Having established that the mixture of whey and manure should be considered solid waste by the meaning of the RCRA, its application on Moon Moo Farms' land constitutes a violation of 40 C.F.R. § 257.3-1 (application of solid wastes to floodplains), 40 C.F.R. § 257.3-4 (application of solid wastes in a manner that may contaminate groundwater), and 40 C.F.R. § 257.3-5 (application of solid waste with a pH below 6.5 to food chain crop areas). Because this mixture violated federal regulations by leaking into a drainage ditch and not just when properly applied to the land as a fertilizer, the District Court's contention that 40 C.F.R. § 257.1(c)(1) absolves the defendant of liability is incorrect.

B. The landspread mixture represents an imminent threat to human health and is redressable by RCRA § 7002(a)(1)(b).

Riverwatcher asserts again that the mixture of whey and manure is a form of solid waste. 7002(a)(1)(B) provides a cause of action to Riverwatcher "against any person, including the United States and any other governmental instrumentality or agency, […]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 an imminent and substantial endangerment to health or the environment."

While Moon Moo Farms cannot necessarily be found to be the but-for cause of the increased level of nitrates in the river, but should the testing of the water by Dean James be allowed to be considered by a jury, it is beyond dispute that Moon Moo Farms is actively increasing the nitrate content of the river. Further, this case involves an entire city being forced to give bottled water to infant children, who still face some risk by the very nature of being children. This stands in stark contrast in scope and seriousness to the case cited by the District Court, *Davies v. Nat'l Co-op. Refinery Ass'n*, 963 F. Supp. 990, 999 (D. Kan. 1997), where a radio station was unable to utilize a well. Here, the potential harm to children in New Union is

clear. Furthermore, the increased presence of fecal coliforms additionally raises the potential risks of bacterial infection to New Union residents of all ages who are exposed to the river's water. The additional fecal coliforms and increased nitrate concentration in the water due to Moon Moo Farms' operations clearly pose a substantial risk of harm to the people of New Union, and entitle Riverwatcher to sue under the RCRA.

CONCLUSION

This court should hold that the Queechunk Canal is a public trust navigable water of the State of New Union since it is regulated by the federal government and it being a man-made water body will not change its status. The evidence of pollution collected by the Riverwatcher is admissible because the Riverwatcher is not a federal or a state agency and thus not governed by the Fourth Amendment. Therefore, the use of the exclusionary rule in this civil suit context would be inappropriate, and this Court should admit the evidence of the pollution irrespective of James' trespass. Furthermore, Moon Moo Farm is a CAFO, which subject it to NPDES permitting pursuant to 33 U.S.C. § 1342. The agricultural stormwater exemption does not apply because Moon Moo Farm is discharging manure from a point source, which requires a NPDES permit. Riverwatcher is entitled to file a citizen's suit against Moon Moo Farm since it presents a risk to human health.