Team 41

CA. No. 14-1248

IN THE

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

February Term, 2015

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and,

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants,

V.

MOON MOO FARM, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION
NO. 155-CV-2014, JUDGE ROMULUS N. REMUS

BRIEF FOR THE APPELLANT UNITED STATES OF AMERICA

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

United States Courts of Appeals Cases:

United States District Court Cases:

State Court Cases:

Constitutional and Statutory Provisions:

Federal Court Rules:

Law Reviews, Journals and Other Sources:

STATEMENT OF JURISDICTION

This case involves an appeal following the issuance of the Order of the United States District Court for New Union, granting Moon Moo Farm's motion for summary judgment and denying the United States of America and Deep Quod Riverwatcher Inc.'s motions for summary judgment. (R. at 12). The district court had proper subject matter jurisdiction to hear the case under 28 U.S.C. § 1331. This Court has proper subject matter jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE 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 and bed of the Canal by Moon Moo Farm.

2. Whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under Clean Water Act §§ 309(b), (d) and 505.

3. Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because it is a CAFO subject to NPDES permitting or, if it is not a CAFO, do 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 Moon Moo Farm's land application of fertilizer and soil amendment constitutes a solid waste subject to regulation and 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 an appeal following the issuance of a final order of the United States District Court for the District of New Union, granting Moon Moo Farm's motion for summary judgment and denying the United States of America, on behalf of the Environmental Protection Agency and Deep Quod Riverwatcher Inc.'s motions for summary judgment. (R. at 12). The United States brought a civil action under the Clean Water Act (CWA), 33 U.S.C. §§ 1311(a), 1319(c), (d), and 1342, seeking civil penalties and injunctive relief. (R. at 4). Deep Quod Riverwatcher

Inc. intervened as plaintiffs and brought a civil action under the CWA citizen suit provision, 33 U.S.C. § 1365 and the Resource Conservation and Recovery Act (RCRA) citizen suit provision, 42 U.S.C. § 6972, seeking injunctive relief. *Id*. Moon Moo Farm filed a counterclaim for common law trespass against Dean James and Deep Quod Riverwatcher Inc. *Id*.

After completing discovery, all parties moved for an order of summary judgment. (R. at 7). The district court held that (1) the Queechunk Canal was not subject to the Public Trust and Dean James was trespassing when he entered the canal, (2) the evidence collected by James was not admissible because of the trespass, (3) Moon Moo Farm was not a CAFO and the discharge was exempt from NPDES permitting under the agricultural stormwater exemption, and (4) the land application of a manure mixture was not a "solid waste" under RCRA and there was not an imminent and substantial endangerment to human health or the environment. (R. at 9, 11-12).

The United States of America filed a timely Notice of Appeal challenging the district court's holding that Moon Moo Farm is not a Concentrated Animal Feeding Operation (CAFO), that evidence that the discharge was obtained by trespass, and that the evidence was inadmissible in a civil enforcement proceeding. (R. at 1). Deep Quod Riverwatcher, Inc. filed a timely Notice of Appeal challenging all four holdings of the district court. (R. at 1-2).

STATEMENT OF THE FACTS

Moon Moo Farm operates a dairy farm housing 350 head of milk cows in the State of New Union. (R. at 4). The cows are located in a barn and are not pastured. *Id*. Moon Moo Farm has an outdoor lagoon to store, for fertilizer, the manure and liquid waste produced in the barn. (R. at 4-5). The manure is pumped from the lagoon into tank trailers in order to be spread on Moon Moo Farm's 150 acres of Bermuda grass fields. (R. at 5). Moon Moo Farm provides milk to the Chokos Greek Yogurt processing facility and since 2012 Moon Moo Farm has accepted

acid whey produced by Chokos. *Id*. The acid whey is added to the lagoon and mixed with the manure that is applied to the fields. *Id*.

Moon Moo Farm is located at a bend in the course of the Deep Quod River. *Id*. Moon Moo Farm's predecessor dredged a bypass canal known as Queechunk Canal in the Deep Quod River to alleviate flooding at the river bend. *Id*. A substantial portion of the Deep Quod River's flow is diverted to the Queechunk Canal. *Id*. The Queechunk Canal is fifty yards wide and three to four feet deep. *Id*. The Canal is navigable by canoe or other small boat despite featuring "No Trespassing" signs that are prominently posted. *Id*. The public commonly uses the Canal as a shortcut up and down the Deep Quod River. *Id*. The Deep Quod River flows year round and empties into the Mississippi River, which is a navigable water of the United States. *Id*. The city of Farmville, located ten miles downstream from Moon Moo Farm, uses the Deep Quod River as a drinking water source. (R. at 4-5).

While Moon Moo Farm does not hold a National Pollution Discharge Elimination System (NPDES) permit, Moon Moo Farm is required to submit a Nutrient Management Plan (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture. (R. at 5-6). The NMP specifies planned seasonal manure application rates and expected uptake of nutrients by crops grown on the fields where manure is applied. *Id*. Moon Moo Farm has applied its manure mixture to fields at rates consistent with the NMP. (R. at 6). Moon Moo Farm's expert, Dr. Emmet Green, found that the NMP contained no language prohibiting the application of the manure mixture during a rain event. (R. at 6-7). However, Riverwatcher's expert, Dr. Ella Mae, opined that it is poor management to apply the manure mixture during a rain event. (R. at 6).

In the late winter and early spring of 2013, Deep Quod Riverwatcher, Inc. (Riverwatcher) received complaints that the Deep Quod River smelled of manure and was a turbid brown color.

Id. Also, the Farmville Water Authority issued a "nitrate" advisory warning drinking water customers that the high level of nitrates in the Deep Quod River made the water unsafe for consumption by infants. *Id*. The nitrate levels, however, did not pose any health risk to persons over the age of two. *Id*.

After receiving these complaints, Dean James, a member of Riverwatcher, investigated. *Id*. James traveled on the Deep Quod River in a small "jon boat" on April 12, 2013. *Id*. When James reached the Queechunk Canal he ignored the "No Trespassing" signs and entered the Canal. *Id*. Once James reached Moon Moo Farm's property, he observed and photographed manure-spreading operations during a rain event. *Id*. Additionally, James observed and photographed discolored brown water flowing from the fields through a drainage ditch into the Queechunk Canal. *Id*. James took samples of this water and had the samples tested by a water-testing laboratory. *Id*. The test results indicated highly elevated levels of nitrates and fecal coliforms. *Id*.

STANDARD OF REVIEW

An appellate court's review of a grant of summary judgment is a question of law, reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). All facts are to be construed in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007); *see also* Fed. R. Civ. P. 56(c). Summary judgment is appropriate when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c).

SUMMARY OF THE ARGUMENT

The Queechunk Canal is subject to the Public Trust for two reasons. First, the Canal was created by diverting the Deep Quod River, a natural waterway, making the Canal subject to the Public Trust and navigation by the public. Second, the Canal has the characteristics and incidents of a natural watercourse, which makes it subject to the Public Trust.

The exclusionary rule does not apply to the water samples collected by Dean James for two reasons. First, the cost of excluding the samples outweighs the benefits because no future governmental conduct will be deterred. Additionally, the exclusion of the water samples would force the Court to close its eyes to ongoing violations of the CWA. Second, Dean James was not acting at the direction or on the behalf of government officials; rather, he was acting as a private citizen.

Moon Moo Farm is a CAFO because it houses the applicable number of cattle and the discharge from Moon Moo Farm's field is through a man-made ditch that connects to a water of the United States. However, the discharge from the fields is agricultural stormwater and is exempt from NPDES permitting for two reasons. First, the discharge resulted from a precipitation-related event. Second, Moon Moo Farm's land application of its manure mixture is in compliance with Moon Moo Farm's NMP.

Finally, Moon Moo Farm's manure mixture is not a solid waste for two reasons. First, Moon Moo Farm did not discard the mixture when Moon Moo Farm applied the mixture to the fields. Second, the mixture was being put to its beneficial use as fertilizer. However, the mixture presented an imminent and substantial endangerment. The endangerment is imminent because it poses a present harm and Moon Moo Farm has not taken any preventative action. The

endangerment is substantial because it poses a serious health risk to a portion of the Farmville population that is already vulnerable.

ARGUMENT

I. The District Court Erred when it Held that the Queechunk Canal is not Subject to the Public Trust Because the Canal was Created by Diverting a Natural Watercourse and the Canal has the Characteristics of a Natural Waterway.

The Queechunk Canal (Canal) is subject to the public trust and Moon Moo Farm cannot deny public access to and use of the Canal. The Canal is part of the public trust because Moon Moo's predecessor diverted the Deep Quod River to create the Canal. The Canal is also subject to the public trust because it has the characteristics and incidents of a natural watercourse, which would fall under the public trust.

A. The Queechunk Canal is Subject to the Public Trust, Even Though the Banks and Bed are Privately Owned, Because the Canal was Created by Diverting a Natural Watercourse.

It is a fundamental principle that "[o]wnership of submerged lands—which carries with it the power to control, navigation, fishing, and other public uses of water—is an essential attribute of sovereignty". *United States v. Alaska*, 521 U.S. 1, 5 (1997)(citing *Utah Div. of State Lands v. United States,* 482 U.S. 193, 195 (1987)). This principle can be stated in other terms by looking at *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842). The Supreme Court held "dominion and property in navigable waters, and in the lands under them, [were] held by the king as a public trust." *Id*. at 411. The Court further opined "[w]hen the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use." *Id*. at 410. Also, the Equal Footing Doctrine holds that new states "are admitted to the Union on an 'equal footing' with the original 13 Colonies and succeed to the United States' title to the beds of navigable

waters within their boundaries." *Alaska*, 521 U.S. at 5 (citing *Pollard v. Hagan*, 44 U.S. 212, 228-29 (1845)), *See also* 43 U.S.C. § 1311(a)(commonly known as the Submerged Lands Act).

The United States Supreme Court faced the question of whether navigability extended to channels built on private property with private funding and such channels ultimately connected with other navigable waterways in *Kaiser Aetna v. United States*, 444 U.S. 164, 168 (1979). On the same day, the Court also faced the question of whether notions of navigability extended to artificial waterways that are created by diverting or destroying pre-existing natural navigable waterways in *Vaughn v. Vermilion Corp.*, 444 U.S. 206, 208 (1979).

In *Kaiser Aetna*, the Court held that the navigational servitude did not extend to the privately created channels. *Kaiser Aetna*, 444 U.S. at 180. If the government attempted to impose the navigational servitude, it would constitute a "physical invasion" of the private property subject to the Fifth Amendment Takings Clause. *Id*. Conversely, in *Vaughn*, the Court remanded the case for a factual inquiry of whether the artificial waterway was created by diverting or destroying a natural and navigable waterway; if that was the case, there is no Fifth Amendment taking. *Vaughn*, 444 U.S. at 210. The Louisiana Supreme Court, after the remand, opined "[t]he [United States] Supreme Court's opinion indicates that [the public] would have a right under federal law to use [the artificial canals] as a substitute for any natural, navigable waterway substantially impaired or destroyed by construction of the artificial system." *Vermilion Corp. v. Vaughn*, 397 So. 2d 490, 492 (La. 1981). It must be kept in mind, however, that *Kaiser Aetna* and *Vaughn* address "the laws of the United States regarding the general public use of navigable waters in the context of interstate commerce . . . [not] the rights enjoyed . . . under the Public Trust Doctrine . . . ." *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 211 (N.C. App. 2010).

Even if this Court finds the rules of law established in *Kaiser Aetna* and *Vaughn* applicable, *Kaiser Aetna* is distinguishable and *Vaughn* is satisfied.

In *Kaiser Aetna*, the property at issue was a naturally occurring fishing pond, which has always been considered private property under Hawaiian law. *Kaiser Aetna*, 444 U.S. at 166. The pond was separated from the Maunalua Bay by a barrier beach except for an inlet controlled by sluice gates. *Id*. Kaiser Aetna purchased the property in 1961 for the creation of a subdivision, removed the sluice gates, and dredged a channel to allow pleasure boats from Kaiser's marina to enter and return from the Bay. *Id*. at 167. Kaiser charged residents of the subdivision fees for maintenance and patrol boats. *Id*. The United States brought suit claiming that Kaiser was required to allow public access to its marina and privately owned pond because it had become a "navigable water of the United States." *Id*. at 168.

The present case is distinguishable from *Kaiser Aetna* because the predecessor to Moon Moo Farm dredged a canal that bypassed the bend of the Deep Quod River to alleviate flooding. (R. at 5). The predecessor did not connect a previously existing private watercourse to the Deep Quod River. Rather, the predecessor created the canal in its entirety and connected it to a watercourse that was subject to the Public Trust and navigation.

In *Vaughn*, Vermilion Corporation leases property owned by Exxon, upon which Exxon's predecessor created a system of artificial canals. *Vaughn*, 444 U.S. at 297. The canals connect to other naturally navigable watercourses that ultimately connect to the Gulf of Mexico. *Id*. The canals are used for fishing, hunting, and oil and gas exploration. *Id*. In an attempt to control access to the canals and land, Vermilion posted "No Trespassing" signs and employed individuals to supervise the activities on the canals and on numerous instances prohibited strangers from using the canals. *Id*. Vaughn and other commercial fisherman and shrimpers

claimed a right under federal law and the navigational servitude to travel the canals and conduct their commercial operations. *Id*. at 208.

The present case falls in line with the facts of *Vaughn* and the determination for which the Supreme Court remanded. Most of the Deep Quod River is diverted into the Queechunk Canal. (R. at 5). The present case is in line with the Louisiana Supreme Court's statement in *Vermilion Corp.* that if an artificial watercourse substantially impairs a natural, navigable watercourse, the artificial course will be considered a viable substitute for use of navigation. The Deep Quod River has been substantially impaired by the creation of the Canal. This impairment is evidenced by the fact that most of the flow of the Deep Quod River is diverted into the Canal. (R. at 5).

Because the Queechunk Canal was created by diverting the Deep Quod River, which is subject to the Public Trust, the Canal in turn is also subject to the Public Trust and Moon Moo Farm cannot prevent public access to or use of the Canal. Therefore this Court should reverse the district court's holding to the contrary.

B. The Queechunk Canal is Subject to the Public Trust Because the Canal has the Characteristics of a Natural Waterway.

Even though the Queechunk Canal is an artificially created canal, it has been recognized that such artificial waterways may be considered naturally occurring. An artificial waterway may be considered to be natural if it has characteristics and incidents of a natural waterway and is treated as if it was of a natural origin. There are three factors used to determine if a waterway is natural or artificial: (1) is the waterway temporary or permanent; (2) under what circumstances was it created; and (3) how it has been used and enjoyed. *United States v. 1,629.6 Acres of Land, More or Less, in Sussex County, State of Del.*, 335 F.Supp. 255, 272 (D. Del. 1971) *supplemented,* 360 F.Supp. 147 (D. Del. 1973) and *aff'd in part, rev'd in part sub nom. United*

States v. 1,629.6 Acres of Land, More or Less, in Sussex Cnty., State of Delaware, 503 F.2d 764 (3d Cir. 1974); *see also*, *Beck v. Missouri Valley Drainage Dist. of Holt Cnty., Mo*, 46 F.2d 632, 638 (8th Cir. 1931); 78 Am. Jur. 2d Waters § 262 (2014). Additionally, "if an artificial channel is substituted for a natural one it maintains the characteristics of the natural channel." *1,629.6 Acres of Land*, 335 F.Supp. at 272.

When the above factors are applied to the present case, the Queechunk should be considered as a natural waterway subject to the Public Trust. The Queechunk Canal is a permanent, rather than temporary, waterway. This permanence is evidenced by the fact that Moon Moo Farm's predecessor dredged the canal in the 1940s. (R. at 5). The canal is still in operation today and most of the flow of the river is diverted into the canal. *Id*. The Queechunk Canal is a bypass canal that was created to alleviate flooding at the river bend and still serves that purpose today. *Id*. This is evidenced by the fact that most of the river flow is diverted into the 50 yard wide and three to four foot deep canal. *Id*. The canal has been used for flood abatement since its creation, but it is also used by the public as a shortcut on the Deep Quod River despite the "No Trespassing" signs being posted. *Id*. Because the Queechunk Canal is permanent, it is designed to alleviate flooding which lead to the diversion of a substantial portion of the river and the public commonly uses it as a shortcut while navigating the river. The canal should be treated as a natural waterway subject to the public trust.

Because the Queechunk Canal has the incidents and characteristics of a natural waterway the Public Trust Doctrine is applicable. Therefore this Court should reverse the district court's opinion finding that the Public Trust Doctrine is not applicable.

II. The District Court Erred When It Excluded the Evidence Collected by Dean James from the Queechunk Canal Because the Costs of Exclusion Outweigh the Benefits and Dean James was a Private Actor.

While the exclusionary rule has been applied in civil enforcement proceedings, it is inapplicable in the present case for two reasons. First, the costs of implementing the rule outweigh the benefits of excluding the water samples. Second, invoking the exclusionary rule would not deter any official misconduct.

A. The Evidence Collected by Dean James is Admissible Because the Costs of Exclusion Outweigh the Benefits Under the Framework Established by *United States v. Janis*.

Section 309(b) of the Clean Water Act (CWA) states "[t]he Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order . . . ." 33 U.S.C. § 1319(b). Section 309(d) establishes a "civil penalty not to exceed $25,000 per day for each violation" of the CWA. 33 U.S.C. § 1319(d). Section 505 of the Act is known as the "citizen-suit provision," which provides:

> any citizen may commence a civil action on his own behalf – (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation . . . or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator.

33 U.S.C. § 1365(a)(1), (2).

The Supreme Court established the framework for deciding if and when the criminal exclusionary rule may be appropriately applied in civil enforcement proceedings in *United States v. Janis*, 428 U.S. 433 (1976). In determining applicability the courts must "weigh the likely social benefits of excluding unlawfully seized evidence against the likely costs." *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984)(citing *Janis*, 428 U.S. at 446). The benefit of the

exclusionary rule, if not the only purpose, is "to deter future unlawful *police* conduct." *Lopez-Mendoza*, 468 U.S. at 1041 (quoting *Janis*, 428 U.S. at 446)(emphasis added). The cost that weighs against the application of the rule is "the loss of often probative evidence and all of the secondary costs that flow from the less accurate or more cumbersome adjudication that therefore occurs." *Lopez-Mendoza*, 468 U.S. at 1041.

Justice O'Connor, in *Lopez-Mendoza*, made a poignant and apt observation: "[a]pplying the exclusionary rule in proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law." *Id*. at 1046. Justice O'Connor's opinion went on to state "[p]resumably 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 . . . ." *Id*.

The District Court in the present case found that the exclusionary rule has been applied in civil enforcement proceedings in the Occupational Safety and Health Act (OSHA) by the Fifth and Sixth Circuits in *Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455 (6th Cir. 1994) and *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986). However, the District Court did not recognize that the *Smith Steel* Court held "the exclusionary rule does not extend to OSHA enforcement actions for purposes of correcting violations of occupational safety and health standards." *Smith Steel*, 800 F.2d at 1334. The *Trinity Industries* Court quoted this language and stated "[w]e find this conclusion to be well-reasoned and persuasive, and adopt it as this Circuit's rule regarding the applicability of the exclusionary rule to OSHA proceedings."

In the present case, the costs of excluding the water samples collected by Dean James outweigh the benefits and make the exclusionary rule inapplicable. The costs of exclusion are the loss of the probative water samples and unnecessary waste of judicial resources that would result from inaccurate adjudication. There also would be no benefit to excluding the water samples because it would not deter future unlawful government conduct. There is no deterrence effect because the water samples were collected by Dean James, a private citizen, rather than by a government agent. Additionally, if the exclusionary rule is applied in this case, the government would be forced to close its eyes to continuing CWA violations. Furthermore, the present case is an attempt to correct on-going violations of the CWA, rather than, punish past transgressions.

Because the costs of excluding the water samples outweigh the benefits and the exclusion would force the Environmental Protection Agency (EPA) to close its eyes to ongoing violations, the samples should be deemed admissible. Therefore, this Court should reverse the district court's order to the contrary.

B. The Exclusionary Rule Does Not Apply Because Dean James Is a Private Actor and Government Officials Did Not Direct James to Act on Their Behalf.

The Supreme Court has restricted the protections against unreasonable searches and seizures by construing the Fourth Amendment as "proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984)(quoting *Walter v. United States*, 447 U.S. 649, 662 (1980)(Blackmun, J., dissenting)). In *Jacobson*, an employee of a private freight carrier saw a white powder in a damaged package that was cut open pursuant to company policy about insurance claims and the employee alerted federal law

enforcement. *Jacobson*, 466 U.S. at 111. Justice Stevens, writing for the Court, stated "[t]he initial invasions of respondents' package were occasioned by private action . . . . Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable they did not violate the Fourth Amendment because of their private character." *Id*. at 115.

Additionally, the purpose of the exclusionary rule is "to deter official misconduct. Thus, evidence seized by private parties and then turned over to the police is not barred because to do so would not deter official misconduct." *United States v. Sindona*, 636 F.2d 792, 804-05 (2d Cir. 1980)(citing *Mapp v. Ohio*, 367 U.S. 643 (1961)); *see United States v. Calandra*, 414 U.S. 338, 347-48 (1974); *United States v. Peltier*, 422 U.S. 531, 538-39 (1975); *Janis*, 428 U.S. 446.

Here, Dean James was not acting as an agent of the government or under the direction of the government when he entered Queechunk Canal and collected the water samples. Also, excluding the evidence would deter no official misconduct. There is no official misconduct to deter because the actions were taken solely by Dean James, a private party. The collection of the samples is analogous to the cutting of the package in *Jacobson* and there is not a violation of privacy that requires the application of the exclusionary rule.

Because the exclusion of the water samples collected would not deter future official misconduct on the part of the EPA, the samples should be deemed admissible. Therefore, this Court should reverse the district court's order excluding the samples.

III. The District Court Erred When It Held that Moon Moo Farm is not a CAFO, However, The District Court Correctly Held that the Discharge Fell Under the Agricultural Stormwater Exemption.

Moon Moo Farms qualifies as a Concentrated Animal Feeding Operation (CAFO) because of the number of cows housed on the farm and the manner in which pollutants are discharged from the area. If, however, Moon Moo Farm is not considered a CAFO, Moon Moo

Farm is exempt from NPDES permitting requirements because the alleged discharge falls under the agricultural stormwater exemption.

A. Moon Moo Farm Qualifies as a CAFO Because of the Number of Cows Housed at the Farm and the Manner in Which Pollutants are Discharged.

In an effort to protect the environment, the CWA was created "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 490 (2d Cir. 2005)(internal quotations omitted). The CWA was a response to the observed environmental degradation of rivers, lakes, and streams. *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701, 706 (N.D.W. Va. 2013), *appeal dismissed (Oct. 2, 2014)*. The CWA tasks the EPA with the responsibility to decrease and control water pollution. *Waterkeeper Alliance, Inc.*, 399 F.3d at 491. The CWA accomplishes this end through a series of permitting requirements. *Id*.

One of the permits granted under the CWA is a permit issued under the National Pollutant Discharge Elimination System (NPDES). *Id*. A NPDES permit allows the "discharge of a pollutant[1] by any person from any point source to navigable waters." *Id*. This practice is normally prohibited by the CWA. *Id*. NPDES permits are issued either by the EPA or individual states. *Id.*

After the issuance of a NPDES permit, a facility that discharges within the limitations of the permit is considered a "point source." *Alt*, 979 F. Supp. 2d at 706. Originally, the term "point

[1] "Animal waste includes a number of potentially harmful pollutants. According to the EPA, the pollutants associated with CAFO waste principally include: (1) nutrients such as nitrogen and phosphorus; (2) organic matter; (3) solids, including the manure itself and other elements mixed with it such as spilled feed, bedding and litter materials, hair, feathers and animal corpses; (4) pathogens (disease-causing organisms such as bacteria and viruses); (5) salts; (6) trace elements such as arsenic; (7) odorous/volatile compounds such as carbon dioxide, methane, hydrogen sulfide, and ammonia; (8) antibiotics; and (9) pesticides and hormones." *Waterkeeper Alliance*, 399 F.3d at 494.

source" was defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, *ditch*, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged." *Id*. at 707 (emphasis added).

Regulations for point sources have evolved throughout the years defining what constitutes a CAFO as well as exempting certain types of discharges. *Id*. Since agricultural practices are one of the principal sources of pollution, the CWA contains provisions specifically addressing this problem. While certain agricultural practices are deemed "nonpoint sources" and are not regulated under the CWA, other agricultural activities qualify as a CAFO, meeting the definition of "point source." *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 121-22 (2d Cir. 1994). If an agricultural operation qualifies as a CAFO, such an operation is subject to NPDES permitting requirements. 40 C.F.R § 122.23(a).

To qualify as a CAFO, certain criteria must be met. According to EPA regulations, a medium concentrated animal feeding operation qualifies as a CAFO if it stables or confines "200 to 699 mature dairy cows, whether milked or dry," and one of the following conditions are met:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
>
> (B) 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 the animals confined in the operation.

40 C.F.R. § 122.23(b)(6)(ii). Subsection A is the regulation at issue here because there is no allegation that any waters of the United States pass over, across, or through Moon Moo Farm's milk production area. (R. at 8).

In *Concerned Area Residents for Environment v. Southview Farm*, the Second Circuit held that the liquid manure spreading operations on a dairy farm were a point source within the

meaning of the CWA. *Southview Farm*, 34 F.3d at 115. The defendant, Southview Farm, is a dairy farm housing 1,290 mature cows and 900 young cattle. *Id*. at 116. Southview Farm does not pasture the cows, rather, the cows remain in a barn except during milking. *Id*. As a result, the manure operations at Southview Farms are performed using manure storage lagoons and liquid manure. *Id*. Manure travels from one storage lagoon to the next by way of bins for transport as well as a pipe that connects several lagoons. *Id*. According to the court, the farm fell within the definition of a CAFO and was therefore exposed to NPDES permitting requirements.

Similarly, in *Community Association for Restoration of the Environment v. Henry Bosma Dairy*, the Ninth Circuit held that the defendant was a CAFO under the CWA. *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002). In *Henry Bosma Dairy*, the defendant dairy farm was deemed a CAFO and in violation of the CWA. Id. at 947. Witnesses present at the farm testified that they saw animal waste spilling into a canal near the farm. *Id*. at 954. The defendant was cited for discharging manure waste into a drainage ditch that flows into the Sunnyside Valley Irrigation Canal and then into the Yakima River, a water of the United States. *Id*. at 947.

Like the defendant in *Southview Farms*, Moon Moo Farm's cattle quantity meets the first requirement of a CAFO subject to regulation. Specifically, Moon Moo Farm houses 350 head of milk cows, meeting the statutory requirement. (R. at 4). Moon Moo Farm qualifies as a medium CAFO because of the number of cattle housed on the property. *Id*. Additionally, Moon Moo Farm falls under the CWA regulation of a CAFO because it is discharging into a water of the United States by way of a man-made drainage ditch. (R. at 6). Like the defendant in *Henry Bosma Dairy*, a witness observed Moon Moo Farm discharging animal waste into a water of the United States. *Id*.

Because of the quantity of cattle housed at Moon Moo Farm as well as the discharge of pollutants into a water of the United States through a man-made drainage ditch, Moon Moo Farm is subject to regulation. Therefore, this Court should find that Moon Moo Farm qualifies as a CAFO and may be appropriately regulated under the CWA.

B. Moon Moo Farm's Discharge Is Exempt as Agricultural Stormwater Because the Discharge was Precipitation-Related and Moon Moo Farm Complied With Its Nutrient Management Plan.

Certain situations exist exempting a property owner from NPDES permitting requirements. Specifically, in 1987, Congress amended the statutory definition of point source, stating that "[t]his term does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Alt,* 979 F. Supp. 2d at 707. According to regulation, "a discharge from [a] CAFO [is] subject to NPDES permit requirements, except where it is an agricultural stormwater discharge." 40 C.F.R. § 122.23(e). According to EPA regulation,

> [W]here the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater … a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

Id. Since agricultural stormwater discharges are not considered to be point sources, a property owner is not required to have a NPDES permit for such discharges. *Alt*, 979 F. Supp. 2d at 707-08.

The agricultural stormwater discharge exemption has gone through further expansion through the years. *Id*. According to the 2003 Rule promulgated by the EPA, the definition of exempt agricultural stormwater discharge was expanded to include land application discharge. *Id*. This land application discharge, however, was required to comport with site-specific nutrient management practices. *Id*.

In *Alt v. U.S. E.P.A.*, the court determined that precipitation-caused runoff was agricultural stormwater discharge, exempt from the CWA's permit requirement. *Id*. at 701. The plaintiff, Alt, operated a CAFO, raising poultry. *Id*. at 704. On the CAFO, there were confinement houses for poultry, a storage shed, compost shed, feeding bins, manure and litter storage, and raw material storage. *Id*. Particles of manure and litter were blown outside of the confinement houses where the particles settled on the ground. *Id*. Precipitation fell on the area, contacted the particles, and carried the particles across a neighboring grassy pasture. *Id*. The farm also contained several man-made ditches and culverts that helped facilitate stormwater runoff toward Mudlick Run, a water of the United States. *Alt v. U.S. E.P.A.*, No. 2:12-CV-42, 2013 WL 4520030, at *1 (N.D.W. Va. Apr. 22, 2013). The court highlighted the fact that agricultural stormwater discharges are exempt from regulation, "even when those discharges came from what would otherwise be point sources." *Alt*, 979 F. Supp. 2d at 714.

Similarly, in *Fishermen Against Destruction of Environment, Inc. v. Closter Farms, Inc*., the Eleventh Circuit found that Closter Farms' discharges qualified as agricultural stormwater. *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc*., 300 F.3d 1294, 1297 (11th Cir. 2002). Closter Farms is a sugar cane farming operation located adjacent to Lake Okeechobee in Florida. *Id*. at 1296. Excess water from this operation flows through irrigation canals and is ultimately pumped into Lake Okeechobee. *Id*. The court found that these discharges qualified as agricultural stormwater even though they were pumped directly into the lake. *Id*. at 1297. The court highlighted the fact that the discharges do not need to flow in a natural form; rather, the discharges can be pumped into the lake and still qualify as agricultural stormwater. *Id*.

Here, Moon Moo Farm's discharge is analogous to those found in *Alt* and *Fishermen Against Destruction*. Moon Moo Farm spread the manure mixture onto their fields during a rain

event. (R. at 6). Like *Alt*, that rain carried the mixture from the field to the man-made ditch and ultimately emptied into a water of the United States. *Id*. The application of the mixture was in compliance with Moon Moo Farm's nutrient management plan on file with the New Union Department of Agriculture. *Id*. Specifically, the plan authorized the land application of the mixture during a rain event despite Riverwatcher's expert's opinion that such an application is a poor practice. (R. at 7). Furthermore, as stated in *Fishermen Against Destruction*, the form of conveyance of the discharge is not dispositive.

Because the runoff from Moon Moo Farm's field meets the requirements of the agricultural stormwater exemption, Moon Moo Farm is not subject to NPDES permitting liability. Therefore, this Court should affirm the district court's application of the exemption.

IV. The District Court Correctly Held Moon Moo Farm's Manure Mixture is not "Solid Waste," However, The Court Erred when It Held the Discharge Did Not Present an Imminent and Substantial Endangerment to Human Health or the Environment.

This Court should find that Moon Moo did not discard the manure mixture when it applied that mixture to Moon Moo Farm's fields. Because this mixture was not discarded, it is not a "solid waste" under the Resource Conservation and Recovery Act (RCRA). However, the mixture presents an imminent and substantial endangerment to human health and the environment under the citizen suit provision of the RCRA and therefore Moon Moo Farm is subject to litigation.

A. The Manure Mixture is not "Solid Waste" Because Moon Moo Farm Did Not Discard the Mixture Upon Application to the Fields, Rather, the Mixture Was Being Put to Its Beneficial Use.

RCRA is a statute intended to protect public health. The statute states that the "objectives of [RCRA] are to promote the protection of health and the environment." 42 U.S.C. § 6902(a). Courts have consistently held environmental statutes that protect public health should be broadly

construed. *See*, *e.g.*, *United States v. Aceto Agr. Chemicals Corp.*, 872 F.2d 1373, 1383 (8th Cir. 1989)(stating RCRA is a remedial statute which should be liberally construed."); *accord*; *Lindsey v. Tacoma-Pierce Cnty. Health Dep't*, 8 F.Supp.2d 1213, 1219 (W.D. Wash. 1997) ("public health statutes... are liberally construed because protecting and preserving the health of its citizens from disease is an important governmental function.").

RCRA authorizes the EPA to regulate "solid wastes." *Am. Petroleum Inst. v. U.S. E.P.A.*, 216 F.3d 50. 54 (D.C. Cir. 2000), *as amended (Aug. 18, 2000).* The definition of "solid waste" is broad. The statute states:

> The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and *agricultural operations*....

RCRA § 1004(5), 42 U.S.C. § 6903(27) (emphasis added). "Solid wastes" are governed by Subtitle D of RCRA. *Am. Petroleum Inst.*, 216 F.3d at 54: *see Ashoff v. City of Ukiah*, 130 F.3d 409, 410 (9th Cir. 1997).

Recently, the Ninth Circuit analyzed legislative history and further concluded "[t]he key to whether a manufactured product is a 'solid waste,' then, is whether that product 'has served its intended purpose and is no longer wanted by the consumer.'" *Ecological Rights Found. v. Pac. Gas and Elec. Co.,* 713 F.3d 502, 515 (9th Cir. 2013) (*citing* H.R. REP. No. 94–1491(I) at 2 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6240); *see also No Spray Coal., Inc. v. City of New York,* 252 F.3d 148, 150 (2d Cir. 2001).

Interpreting the definition of "discarded" as it is used in RCRA, the court in *Safe Air for Everyone v. Meyer* applied the principles of statutory construction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004). "[C]anons of statutory construction help give

meaning to a statute's words, beginning with the language of the statute." *Id. See Wilderness Soc'y v. U.S. Fish & Wildlife Serv.,* 353 F.3d 1051, 1060 (9th Cir. 2003) *amended on reh'g en banc in part sub nom. Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 360 F.3d 1374 (9th Cir. 2004). RCRA does not define the term "discarded material." However, the court in *Safe Air* noted that the verb "discard" is defined by dictionary and usage as to "cast aside; reject; abandon; give up." *Safe Air*, 373 F.3d at 1041 (quoting The New Shorter Oxford English Dictionary 684 (4th ed.1993)). Additionally, the court in *Oklahoma v. Tyson Foods* defined "discarded" as where a material "is disposed of, thrown away, or abandoned." *Oklahoma v. Tyson Foods, Inc*., No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010)(*citing Am. Petroleum Inst.*, 216 F.3d at 55-6).

A material is not discarded when it is applied as a beneficial product or to exploit a beneficial use. To determine whether a material is a beneficial product or a solid waste, "courts have examined whether the material has market value, and whether the party intended to throw the material away or put it to beneficial use." *Tyson Foods*, 2010 WL 653032 at *11. Also, a material does not become a solid waste "when it is applied to the normal beneficial usage [it] was intended merely because some aspect of the product was not fully utilized." *Id*. at *10.

In *Oklahoma v. Tyson Foods*, the court found that land application of poultry litter did not constitute a discard of "solid waste" under RCRA. *Tyson Foods, Inc.*, 2010 WL 653032, at *11. In *Tyson Foods* a mixture of poultry feces and bedding was used as fertilizer applied to parcels of property. *Id*. at *2-3. Judge Frizzell highlighted that sufficient evidence must be presented that shows the sole purpose of applying the poultry litter to the land was to discard the litter for RCRA to apply. Id. at *9. Since poultry litter was found to have a beneficial use as

fertilizer and soil amendment it was not "discarded" within the context of RCRA when applied to exploit the beneficial use. Id. at *8.

In *No Spray Coalition, Inc. v. City of New York*, New York City implemented an insecticide-spraying program to control the West Nile Virus. *No Spray Coal., Inc.*, 252 F.3d at 149. The plaintiffs argued that when the pesticides were sprayed, they became discarded solid wastes within the meaning of RCRA. *Id*. at 150. However, the Circuit Court agreed with the district court that "the pesticides are not being discarded when sprayed into the air with the design of effecting their intended purpose: reaching and killing mosquitoes and their larvae." *Id*.

Here, just as in *Tyson Foods*, the manure mixture was applied to Moon Moo Farm's fields as a fertilizer. (R. at 5). The mixture was being applied to exploit its beneficial use. Since Moon Moo Farms utilizes a manure mixture developed on-site, Moon Moo Farm has no need to purchase fertilizer from a third party. This shows the mixture has a market value[2] because it allows Moon Moo Farm to decrease production costs. Additionally, Moon Moo Farm did not intend to discard the mixture; rather, Moon Moo Farm intended to put the mixture to its beneficial use. Moon Moo Farm did so by applying the mixture in accordance with the NMP on file with the New Union Department of Agriculture. (R. at 5-6). The NMP did not prohibit the land application of the mixture during a rain event. (R. at 6-7). Finally, like in *No Spray Coal. Inc.,* the mixture was not being discarded when it was applied to the fields with the design of effecting the intended purpose of fertilizing the fields.

Because the mixture was not being discarded and was being put to a beneficial use, it does not constitute a solid waste under RCRA. Consequently, the EPA has no regulatory

[2] "The high price of commercial fertilizer has heightened interest in the use of livestock manure for supplying crop nutrients and has significantly increased the value of manure as a nutrient source." Bob Koehler and Bill Lazarus, *What is Dairy Manure Really Worth?*, http://faculty.apec.umn.edu/wlazarus/documents/release_dairy.htm (last visited Nov. 14, 2014).

authority over Moon Moo Farm's application of this mixture. This Court should affirm the lower court's dismissal of Riverwatcher's claim that Moon Moo Farm was illegally disposing of solid waste.

B. The Discharge Posed an Imminent and Substantial Endangerment Because There Is a Present Threat to Portions of the Farmville Population.

In addition to the regulation of "solid waste," RCRA also provides enforcement mechanisms to prevent "imminent and substantial endangerment to public health or the environment." The EPA is authorized to address such endangerments under Section 7003 of RCRA, 42 U.S.C. § 6973. However, if the EPA does not take action, citizens may under the citizen suit provision. The citizen suit provision provides that:

> [A]ny person may commence a civil action on his own behalf against any person... who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any … waste which may present an imminent and substantial endangerment to health or the environment.

7002(a)(1)(B). This provision was added by the 1984 Amendment to RCRA "in an effort to invigorate citizen litigation." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1158 (9th Cir. 1989).

The Court in *Dague v. City of Burlington* noted that the "imminent and substantial endangerment" standard is a broad one:

> Significantly, congress used the word 'may' to preface the standard of liability: 'present an imminent and substantial endangerment to health or the environment[.]' This is expansive language, which is intended to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes.

Dague v. City of Burlington, 935 F.2d 1343, 1355 (2d Cir. 1991) *rev'd in part*, 505 U.S. 557 (1992)(emphasis in the original); *see also Maine People's Alliance And Natural Res. Def. Council v. Mallinckrodt, Inc.,* 471 F.3d 277, 288 (1st Cir. 2006) (noting that "at least four of our

sister circuits have construed [the citizen suit provision] expansively" and that "all four courts have emphasized the preeminence of the word 'may' in defining the degree of risk needed to support [the citizen suit provision] liability standard.").

1. The Discharge is a Present Threat and Moon Moo Farm Has Taken No Preventative Action.

The first requirement for filing a citizen suit is that harm must be "imminent." The Supreme Court in *Meghrig v. KFC Western, Inc*., found that imminence means "that there must be a threat which is present now, although the impact of the threat may not be felt until later." *Meghrig v. KFC W., Inc*., 516 U.S. 479, 486 (1996)(quoting *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994)); *see Price,* 39 F.3d at 1011 (finding that "imminency [sic] does not require a showing that actual harm will occur immediately so long as the risk of threatened harm is present"). The court in *Price v. U.S. Navy* also held that immanency refers "to the nature of the threat rather than identification of the time when the endangerment initially arose." *Price*, 39 F.3d at 213.

In *Crandall v. City & County of Denver, Colorado*, the plaintiffs sued for injunctive relief under the citizen suit provision of RCRA. *Crandall v. City & Cnty. of Denver, Colo.*, 594 F.3d 1231, 1232 (10th Cir. 2010). Plaintiff's were concerned that aircraft de-icing fluid, which can produce hydrogen-sulfide gas when it decomposes, endangered human health at the Denver International Airport. *Id*. At the time of trial, however, there was no detectible hydrogen-sulfide gas at the airport. *Id*. at 1238. The Court stated "the gas could be a problem *only if* full-plane de-icing were to be renewed at the concourse gates and the measures instituted by Denver were then to prove ineffective in protecting people from the gas." *Id*. at 1238-39 (emphasis added). The Court found that "[i]t is not enough under RCRA that in the future someone may do something with solid waste that, absent protective measures, can injure human health." *Id*. at 1239.

Moon Moo Farm's actions are distinguishable from those at issue in *Crandall* and pose an imminent risk to human health and the environment. The harm presented by these actions is not speculative because the concentration of the manure mixture poses a present threat to infants if they consume water from the Deep Quod River, which is the drinking water source for Farmville. (R. at 5-6). Additionally, Moon Moo Farm has not taken preventative measures to alleviate the harm. In fact, Moon Moo Farm furthered the harm when it applied the mixture during a rain event, which lead to excess runoff. (R. at 6).

2. The Endangerment is Substantial Because It Presents a Serious Threat to an Already Vulnerable Portion of the Farmville Population.

Second, the harm must be substantial. The term "substantial" is not defined in RCRA, however, courts have found "substantial," in this context, is defined as "serious." *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 210 (2d Cir. 2009). The Tenth Circuit also addressed the definition of substantial in *Burlington Northern & Santa Fe Railroad Co. v. Grant*. *Burlington N. & Santa Fe Ry. Co.*, 505 F.3d 1013 (10th Cir. 2007). The Court held that "an endangerment is substantial under RCRA when it is serious," and "where there is reasonable concern that someone or something may be exposed to [a] risk of harm." *Id*. at 1021. Also, "substantial does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that excess deaths will occur, or that a water supply will be contaminated to a specific degree)[.]" *Newark Grp. v. Dopaco, Inc.*, No. 2:08-CV-02623, 2010 WL 3619457, at *6 (E.D. Cal. Sept. 13, 2010)(internal quotations omitted).

In the *Newark Group v. Dopaco, Inc.*, plaintiffs argued that the demolition of a building created a substantial harm because a toxic substance could potentially be released. *Newark Grp.*, 2010 WL 3619457, at *5. Newark Group presented evidence that the release of toluene was at

such a level as to pose threats of explosion and asphyxiation risks. *Id*. The plaintiffs argued that the planned demolitions "could create an exceedingly dangerous explosive condition." *Id*. at *7.

In the present case the harm posed by Moon Moo Farm's application of the mixture is substantial, analogous to *Newark Group*. The threats in *Newark Group* presented a potential for bodily injury, similar to the contaminated drinking water used by Farmville residents. (R. at 6). This water posed a substantial harm to infants because of the nitrate concentration. *Id*. While the district court stated that the nitrate levels "posed no health risks to adults and juveniles, and that households with infants administer[ed] bottled water to their infants, avoiding any potential health risk[;]" that is not dispositive. (R. at 11). While the harm does not effect the entire population, it does effect a part of the population that is already vulnerable. Specifically, the nitrate levels raise a reasonable concern that infants will suffer adverse health effects.

Because the manure mixture was applied to the fields during a rain event, it lead to excess run-off that increased the nitrate levels in the Deep Quod River. The increased nitrate levels pose an "imminent and substantial" harm to human health and the environment, making the citizen suit provision of RCRA applicable.

CONCLUSION

Based upon the forgoing reasons, Appellant respectfully requests this Court to reverse the decision of the District Court and find that the Queechunk Canal is subject to the Public Trust and the evidence collected by Dean James is admissible. Second, Appellant respectfully requests this Court to reverse the decision of the District Court and find that Moon Moo Farm is a CAFO. Third, Appellant respectfully requests this Court to affirm the District Court and find that Moon Moo Farm's discharge is agricultural stormwater and exempt from regulation. Finally, Appellant respectfully requests this Court to reverse the decision of the District Court and find that Moon

Moo Farm's manure mixture is not a "solid waste" but that the mixture poses an imminent and substantial endangerment to human health and the environment.

Team 41
Counsel for Appellant