UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

C.A. No. 14-1248

UNITED STATES OF AMERICA,
Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES
Plaintiffs-Intervenors-Appellants,

v.

MOON MOO FARM, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PROGRESS,
THE HONORABLE ROMULUS N. REMUS, DISTRICT JUDGE

NO. 155-CV-2014

BRIEF FOR PLAINTIFFS-INTERVENORS-APPELLANTS

Team 5,
ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

This case concerns an appeal from a judgment of the United States District Court for the District of New Union issued in its Order dated June 1, 2014. The Order granted Defendant's motion for summary judgment and denied the motions for summary judgment of the Plaintiffs. The Plaintiffs below alleged violations of the Clean Water Act ("CWA"), 33 U.S.C. § 1342 (2012), and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-92(k) (2012). Each of these acts grants district courts federal question jurisdiction without regard to amount in controversy or diversity. The District Court's order is a final decision, and subject matter jurisdiction is proper in this Court over any appeal from a final decision of the District Court. 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

1. Whether the Queechunk Canal, a man-made waterway, is a public trust navigable water of the state of New Union allowing for a public right of navigation when the canal connects two sections of the Deep Quod River, a navigable body of water, and the canal has been continuously used by the public for navigation.

2. Whether evidence obtained through trespass and without a warrant is admissible when used solely for a civil enforcement proceeding under the CWA and when a private individual gathered the evidence.

3. Whether Moon Moo Farm requires a permit under the CWA National Pollutant Discharge Elimination System ("NPDES") when (a) it possesses 350 head of dairy cattle and discharges manure and acid whey into a navigable water; or (b) its Nutrient Management Plan ("NMP") filed with the New Union Department of Agriculture ("DOA") was never reviewed by the agency, nor was it offered for public comment prior to its approval.

4. Whether Moon Moo Farm is subject to a citizen suit under RCRA when (a) it applied manure and acid whey to the ground in excess of their usefulness as a fertilizer, causing the mixture to run into a waterway used as a source of drinking water; and (b) increased levels of nitrates in the same drinking water made it unsafe for consumption by some individuals.

STATEMENT OF THE CASE

This is an appeal from a final order of the District Court for the District of New Union, which granted Moon Moo Farm's motion for summary judgment on all claims and counterclaim

and denied the United States' and Deep Quod Riverwatcher's motion for summary judgment alleging CWA and RCRA violations. R. at 12.

Initially, Deep Quod Riverwatcher ("Riverwatcher"), together with one of its members Mr. Dean James, served Defendant Moon Moo Farm, the New Union Department of Environmental Quality ("DEQ"), and the United States Environmental Protection Agency ("EPA") with a letter of intent to sue pursuant to the citizen suit provisions of CWA § 505 and RCRA § 7002. R. at 7. Before the mandatory sixty-day waiting period expired, 33 U.S.C. § 1365(b)(1)(A) (2012), the United States, acting on behalf of the EPA, filed suit against Defendant, claiming that Defendant violated CWA § 301(a), 33 U.S.C. § 1311(a) (2012), by discharging a pollutant without an NPDES permit. R. at 4, 7. At the close of RCRA's mandatory waiting period, 42 U.S.C. § 6972(b)(1)(A) (2012), Riverwatcher intervened in the government's CWA suit and alleged additional violations under RCRA. R. at 7. In response to the claims against it, Defendant filed a counterclaim for damages and injunctive relief, alleging that James was trespassing when he collected samples used to support the case against Moon Moo Farm. R. at 4. All parties then filed motions for summary judgment on all issues. R. at 7.

The District Court ruled in favor of Defendant on all issues, dismissing the complaints against it and awarding damages on the trespass counterclaim. R. at 12. In doing so, the court held that: (1) Dean James was trespassing when he entered the Queechunk Canal, (2) Any evidence gathered by James while trespassing was inadmissible, (3) Moon Moo Farm was not a Concentrated Animal Feeding Operation ("CAFO"), (4) Any discharge by Defendant (even if proven) would be exempt from NPDES permitting requirements by the agricultural stormwater exemption, (5) The land application of manure and acid whey did not qualify as "solid waste," and (6) There was no "imminent and substantial" endangerment to human health. R. at 7-12.

The United States and Riverwatcher each filed a Notice of Appeal. R. at 1. The United States appeals the lower court's holdings that Queechunk Canal is not a publically navigable waterway, that evidence obtained by James was inadmissible, and that Defendant was not a CAFO, and whether Riverwatcher established an imminent and substantial endangerment. *Id.* Riverwatcher joins the United States on its appeal of each of these issues, and additionally appeals the lower court's holding that Defendant qualifies for the agricultural stormwater exemption, as well as the dismissal of Riverwatcher's open dumping and imminent and substantial endangerment claims. *Id*. Riverwatcher also appeals the award of damages against them. R. at 2.

STATEMENT OF THE FACTS

Defendant Moon Moo Farm. Defendant is an active dairy operation sited on 150 acres located on a bend in the Deep Quod River, approximately 10 miles upstream from the city of Farmville. R. at 4-5. In 2010, Defendant increased its population of dairy cattle from 170 to 350. R. at 5. Since 2012, Defendant has been accepting acid whey left over from yogurt production at the Chokos Greek Yogurt ("Chokos") plant in Farmville. *Id*. The farm blends this liquid with manure collected from its own cattle, stores the mixture in a lagoon, and periodically spreads it over its fields using tank trailers. *Id.* The farm grows Bermuda grass on these fields for use as summer silage. *Id.* Defendant does not have an NPDES permit for this activity but it does operate under an NMP, an approved plan neither reviewed by the DOA nor subjected to comment by the public. R. at 5-6. The NMP purportedly allows for spreading activity during rain events, a management practice thought to be "very poor." R. at 6.

Queechunk Canal. The Queechunk Canal is a bypass of the Deep Quod River that was excavated in the 1940s by a previous owner of the farm. R. at 5. This canal, installed for flood control, is fully within the boundaries of Moon Moo Farm, cutting across the peninsula created by the natural river bend. *Id*. Defendant has posted Queechunk Canal "no trespassing." *Id.* Despite the

postings, the canal is navigable-in-fact and commonly used as a shortcut to avoid the bend in the Deep Quod. *Id.* Moon Moo Farm's fields drain into the canal through at least one drainage ditch. R. at 6.

Deep Quod River and Farmville's Drinking Water Supply. The Deep Quod River is a navigable-in-fact water body that flows into the Mississippi river which itself is an interstate water body that has traditionally been used for commercial navigation. R. at 5. The river flows downstream to the community of Farmville and is a source the municipality's drinking water supply. *Id.* The spring after the Defendant began spreading its new mixture on the fields, the residents downstream began to complain about the smell and clouded brown color of the water. R. at 6. The Farmville Water Authority ("FWA") thus issued a nitrate advisory. *Id.* This advisory warned Farmville residents of health risks to infants from drinking the city's tap water. R. at 7. As the Deep Quod watershed is heavily farmed, nitrate advisories had been issued in six of the past twelve years. *Id.* The most recent notice, however, is the first in four years and the first since Defendant started spreading acid whey. *Id.*

Dean James and the Nitrate Contamination. Mr. James is a member of Riverwatcher, an organization interested in the environmental quality of the Deep Quod River. R. at 4. In response to Farmville citizens' complaints about the polluted water, James entered the Queechunk Canal in a small boat during a period of heavy rain. R. at 6. He observed manure spreading and subsequent brown water flowing into the canal through a drainage ditch. *Id*. James collected samples of the water flowing from the ditch and sent these samples to a water-testing laboratory for analysis. *Id*. The results indicated "highly elevated levels of nitrates and fecal coliforms." *Id*. These pollutants are unprocessed nutrient runoff from the Defendant's fields, a result of applying a mixture

containing acid whey, in amounts and at a pH level far beyond the effective nutrient uptake capacity of the Bermuda grass crop. *Id.*

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's grant of Defendant's motion for summary judgment and examines all evidence "in the light most favorable to the non-moving party." *OSI, Inc. v. United States*, 525 F.3d 1294, 1297 (11th Cir. 2008). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

SUMMARY OF THE ARGUMENT

The District Court erred in granting Defendant's motion for summary judgment. It incorrectly held that Queechunk Canal is not a publicly navigable waterway, that evidence obtained by James is inadmissible in a civil enforcement proceeding brought under the CWA, that Defendant is not a CAFO and the agricultural stormwater exemption excepts any discharge from the ditch from the NPDES permitting requirement, and that Defendant is not subject to a citizen suit under RCRA because its land application of fertilizer does not constitute a solid waste nor present an imminent and substantial endangerment to the health of Farmville's citizens.

First, Queechunk Canal is a public trust navigable water of the State of New Union. The District Court incorrectly relied on the Supreme Court's decision in *Kaiser*, which held that the public has no right to navigation on a man-made waterway because it is not subject to the federal navigational servitude. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979). *Kaiser* concerns the scope of Congress's power to regulate waters used in interstate commerce. Since Queechunk Canal is a purely intrastate waterway, Congress's authority under the federal navigational servitude does not apply. However, even if this Court applies *Kaiser*, few of the factors on which the Supreme Court relied are present. Moreover, this case concerns the extent of

New Union's public trust over Queechunk Canal. The Public Trust Doctrine is a "matter of state law." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). In establishing the scope of the Public Trust Doctrine, several state courts have held that the public's right of navigation extends to man-made navigable water bodies. *E.g.*, *Fish House, Inc. v. Clark*, 693 S.E.2d 208 (N.C. Ct. App. 2010). This Court should likewise extend the State of New Union's Public Trust Doctrine to man-made ditches, like Queechunk Canal, which the public has long used for purposes of navigation.

Second, even if this Court finds that Queechunk Canal is not a public trust navigable water, evidence obtained by James while visiting Moon Moo Farm without a warrant is admissible in a civil enforcement proceeding brought under the CWA. While the exclusionary rule bars the admissibility of evidence obtained in violation of the Fourth Amendment in certain types of proceedings, *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011), the Supreme Court has consistently refused to extend this doctrine to civil actions where the social costs greatly outweigh the benefits of deterrence. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998). These costs are particularly high in proceedings intended to prevent ongoing violations of the law. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Accordingly, the exclusionary rule should not extend to a civil action brought under the CWA. Holding otherwise would prevent concerned citizens like James from discovering CWA violations and would undercut both the government and public's ability to enjoin wrongdoers from the continued pollution of our nation's waterways. Additionally, the exclusionary rule does not extend to evidence gathered by private citizens like James. The two Courts of Appeals holding that the rule extends to civil actions involved searches by government agents, not private individuals. *See, e.g.*, *Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455 (6th Cir. 1994).

Third, Defendant is a point source subject to the CWA's NPDES permitting requirements because it qualifies as a Medium CAFO. 40 C.F.R. § 122.23(b)(6) (2014) (defining Medium CAFO as an operation with at least 200 head of mature dairy cattle that discharges pollutants into the waters of the United States). It is uncontroverted that Defendant has 350 head of dairy cattle. Also, the evidence gathered by James reveals that Defendant is discharging pollutants from a drainage ditch into Queechunk Canal, a water of the United States. Therefore, Defendant needed to obtain an NPDES permit before it discharged its mixture into Queechunk Canal. If James' evidence is inadmissible, Defendant still meets the second requirement of the Medium CAFO definition because the nitrate advisory issued by the FWA exhibits a harm that can be fairly traceable to Defendant's activities, which have polluted the Deep Quod River. Yet even if this Court finds that Defendant is not a Medium CAFO, Defendant is still a point source and subject to NPDES permitting liability. The agricultural stormwater exemption is inapplicable because Defendant's NMP is invalid; it was neither reviewed by the New Union DOA nor made available for public comment as required by the regulations. *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 490-504 (2d Cir. 2005) (interpreting requirements under 40 C.F.R. § 122.42(e)(6)(ii)).

Finally, Defendant is subject to a citizen suit under RCRA. First, its activities violate the statute's prohibition against the open dumping of solid waste. Defendant's fertilizer mixture constitutes a solid waste because the acid whey is a material discarded from Chokos' yogurt manufacturing operations, blended with manure, and sprayed onto Defendant's fields. *See* 42 U.S.C. § 6903(27) (2012) (defining "solid waste"). Moreover, Defendant applies the mixture in such a quantity as to exceed the land's ability to effectively absorb and utilize the material as fertilizer. In turn, these unprocessed nutrients flow into the Deep Quod River. Second,

Riverwatcher has presented a genuine issue as to whether the mixture constitutes "an imminent and substantial endangerment" to the health of Farmville's citizens that is subject to redress under RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(B). Riverwatcher has alleged that certain Farmville residents are in danger of substantial harm should they drink from the town's water supply. Recognizing this hazard, authorities in Farmville issued a nitrate advisory warning its residents to refrain from allowing infants to consume the water. Since RCRA § 7002(a)(1)(B) does not require proof of "but for" causation or actual harm, *Hudson Riverkeeper Fund, Inc. v. Atl. Richfield Co.*, 138 F. Supp. 2d 482 (S.D.N.Y. 2001), Riverwatcher has established the existence of an imminent and substantial endangerment.

For these reasons, this Court should reverse the District Court's granting of Defendant's motion for summary judgment and remand the case for further review.

ARGUMENT

I. QUEECHUNK CANAL IS A PUBLIC TRUST NAVIGABLE WATER OF NEW UNION SUBJECT TO A PUBLIC RIGHT OF NAVIGATION BECAUSE THE PREVIOUS OWNER OF THE FARM CREATED THE CANAL TO CONNECT IT TO DEEP QUOD RIVER, A NAVIGABLE WATERWAY, AND THE PUBLIC USES THE CANAL TO TRAVERSE THE RIVER.

Under the age-old Public Trust Doctrine, states, rather than private individuals, hold certain natural resources in trust for the public. *See, e.g.*, *Martin v. Waddell*, 41 U.S. 367, 413 (1842) ("[T]he shores, and rivers and bays and arms of the sea, and the land under them . . . [are] held as a public trust for the benefit of the whole community[.]"). The doctrine recognizes the importance of and seeks to protect and preserve the public's "use of navigable waters from private interruption and encroachment." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436 (1892). In furtherance of these goals, the Public Trust Doctrine has remained a province of state law: that is, each state "determine[s] the scope of the public trust over waters within their borders." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012).

The court below erred in holding that there is no public right of navigation in Queechunk Canal. First, the district court incorrectly relied on the Supreme Court's decision in *Kaiser*, which applies only to the applicability of the federal navigational servitude to man-made water bodies, not the Public Trust Doctrine. Even if this Court applies *Kaiser*, however, very few of the decisive factors in that case are present, warranting a conclusion that Queechunk Canal is a public trust navigable water of the State of New Union. Second, as a matter of state law, the Public Trust Doctrine should extend to man-made navigable water bodies, such as Queechunk Canal, because the public has consistently used the canal to navigate up and down the river without effective exclusions by Moon Moo Farm. Thus, this Court should reverse the decision below and find that Queechunk Canal is a public trust navigable water of the State of New Union.

a. The Supreme Court's decision in *Kaiser* does not control because it applies only to the scope of federal navigational servitude, not the Public Trust Doctrine.

Apart from a state's power to determine the scope of the public trust over intrastate waters, *PPL Montana, LLC*, 132 S. Ct. at 1235, Congress has the authority to regulate waters used in interstate commerce under the Commerce Clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3; *Gibbons v. Ogden*, 9 Wheat. 1, 189 (1824) (holding that the power to regulate interstate commerce includes the regulation of navigation). This authority over interstate waterways, known as the federal navigational servitude, confers upon the public the right to use navigable waters for the purpose of interstate commerce. *See Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979). However, the federal navigational servitude is not absolute and does not extend to every interstate water body. *See, e.g.*, *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 208-10 (1979).

In particular, the Supreme Court has held that the public does not enjoy a right of navigation on a man-made waterway because it is not subject to the federal navigational servitude.

Kaiser Aetna, 444 U.S. at 178-80. In *Kaiser*, defendant owned Kaupa Pond, private property under Hawaii law. *Id.* at 165. Using its own money, defendant dredged and filled the lagoon to both create a "marina-style community" and connect it to the adjacent bay and the Pacific Ocean. *Id.* at 167. Defendant restricted use of and access to the marina. *Id.* at 168. The Army Corps of Engineers, however, maintained that the public had a right to access the pond because defendant's improvements created a navigable water of the United States subject to the federal navigational servitude. *Id.*

The Court disagreed with the Corps, concluding that there was no public right of navigation in the pond because the federal navigational servitude did not extend to this privately owned, man-made water body. *Id.* at 180; *Vaughn*, 444 U.S. at 209 ("[N]o general right of use in the public arose [in man-made canals dredged with private funds] by reason of the authority over navigation conferred upon Congress by the Commerce Clause . . . ."). The Court pointed to four factors in support of its conclusion: (1) Kuapa Pond was private property under state law; (2) the pond was non-navigable in its natural state and did not compare to waterways subject to the federal navigational servitude; (3) appellant had turned the pond into a navigable waterway through its own private investment; and (4) the Corps had previously authorized the improvements. *Kaiser*, 444 U.S. at 178-79; *Dardar v. Lafourche Realty Co.*, 985 F.2d 824, 832 (5th Cir. 1993) (stating the *Kaiser* factors and concluding that no public right of navigation exists on a canal "dredged on private property with private funds").

In the present case, *Kaiser* and its progeny do not apply because Queechunk Canal is an intrastate water body subject to the Public Trust Doctrine. Unlike *Kaiser* and *Vaughn*, Queechunk Canal is not an interstate waterway; rather, it is a navigable, intrastate water body connected to the State of New Union's Deep Quod River. R. at 5. While this River does run into the Mississippi

River, an interstate body of water, the record does not indicate that Queechunk Canal or Deep Quod River crosses state lines. *See id.* Since the Canal is purely intrastate, Congress' constitutional authority to regulate interstate waters under the federal navigational servitude does not apply. Instead, the present case concerns the extent of New Union's public trust over Queechunk Canal, a waterway within its borders. R. at 2. Therefore, the court below erred in relying on *Kaiser*.

Yet even if this Court applies *Kaiser*, very few of the factors on which the Supreme Court relied are present. Since Queechunk Canal was non-existent prior to its excavation, R. at 5, similar to Kuapa Pond, the canal was non-navigable in its natural state. However, unlike Kuapa Pond, there is nothing in the record to suggest that Queechunk Canal was historically private property under New Union law. *See* R. at 5. Moreover, whereas the defendant in *Kaiser* had converted the pond to a navigable waterway through its own private investment, *Kaiser*, 444 U.S. at 169, Moon Moo Farm did nothing to neither construct nor improve Queechunk Canal. R. at 5. Rather, the previous owner of the farm facility wholly created the Canal. *Id.* Finally, although the defendant in *Kaiser* obtained the Corps approval prior to the pond improvements, *Kaiser*, 444 U.S. at 179, a New Union state agency has never authorized the creation of Queechunk Canal. R. at 5. In turn, even if this Court applies *Kaiser*, the present case is sufficiently distinct to warrant a finding that the Canal is a public trust navigable water of New Union.

b. As a matter of state law, the Public Trust Doctrine should extend to man-made navigable water bodies, such as Queechunk Canal.

The Public Trust Doctrine is a "matter of state law." *PPL Montana, LLC*, 132 S. Ct. at 1235. In contrast to the federal navigational servitude, its purview does not rest on the Constitution because "the States retain residual power to determine [its] scope . . . over waters within their borders." *Id.*

In determining the scope of the Public Trust Doctrine, several state courts have held that the public's right of navigation extends to man-made, navigable water bodies. *E.g.*, *Fish House, Inc. v. Clarke*, 693 S.E.2d 208 (N.C. Ct. App. 2010). In *Fish House*, plaintiff and defendant owned neighboring parcels of land, and on the western border of plaintiff's property, there was a man-made canal. *Id.* at 131-32. Plaintiff brought suit against defendant, claiming that defendant trespassed on plaintiffs canal by regularly allowing boats to enter and dock on the waterway's western edge. *Id.* at 132. In response, defendant argued, in part, that the canal was a navigable waterway subject to the state's Public Trust Doctrine and held for the benefit of the public. *Id.* at 134. In noting that members of the public had long used the canal for navigation and commerce, *id.* at 135-36, the court agreed with defendant and concluded that "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes 'navigable water' under the public trust doctrine of this state." *Id.* at 135.

The purpose for which an owner constructs a man-made canal is also important to the determination of whether it is navigable water subject to a state's public trust. *State ex rel. Medlock v. S.C. Coastal Council*, 346 S.E.2d 716, 718 (S.C. 1986). For instance, the Court of Appeals of South Carolina has found that a canal constructed to join a navigable river "may regarded as a part of the river." *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990). Similarly, in *Medlock*, the Supreme Court of South Carolina held that canals created for the purpose of water control, but now used by the public for navigation, "have become the functional equivalent of natural streams." *S.C. Coastal Council*, 346 S.E.2d at 718. In both cases, the courts concluded that the canals were subject to the Public Trust Doctrine. *Id.* at 719; *Hughes*, 399 S.E.2d at 25.

Furthermore, where the public has by and large been permitted access to the man-made waterway, it is more likely to be navigable water held for the benefit of the public. *Hughes*, 346

S.E.2d at 26. In *Hughes*, various owners of the canal had tried to exclude members of the public from using the waterway by erecting "No Trespassing" signs, as well as constructing a gate at and stringing a wire across its outfall. *Id.* at 25. The court, however, brushed these efforts aside, finding that the canal was navigable, in part, because the public had not been "continuously and consistently excluded." *Id.* at 26 (internal quotation marks omitted).

New Union's Public Trust Doctrine should extend to man-made ditches like Queechunk Canal. As in *Fish House*, members of the public in New Union have long and frequently used Queechunk Canal to traverse the Deep Quod River by canoe or small boat. R. at 5. Additionally, just as the owner in *S.C. Coastal Council* constructed the canal for the purpose of water control, *S.C. Coastal Council*, 346 S.E.2d at 718, the previous owner of the farm facility created Queechunk Canal "to alleviate flooding at the river bend." R. at 5. The Canal has, in a sense, "become the functional equivalent of" the River. *S.C. Coastal Council*, 346 S.E.2d at 718. Moreover, whereas the owners of the waterway in *Hughes* attempted to exclude members of the public through the use of signs, gates, and wire, *Hughes*, 399 S.E.2d at 25, Moon Moo Farm merely posted "No Trespassing" signs on its property. R. at 5. Since the court in *Hughes* concluded that these heightened efforts were insufficient to overcome a finding of navigability, this Court should conclude similarly where Moon Moo Farm has done less. In turn, Queechunk Canal is a public trust navigable water of New Union subject to a public right of navigation.

II. EVEN IF THE CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER, EVIDENCE OBTAINED BY JAMES WHILE VISITING MOON MOO FARM WITHOUT A WARRANT IS ADMISSIBLE IN A CIVIL ENFORCEMENT PROCEEDING BROUGHT UNDER THE CWA.

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C § 1251 (2012). The EPA brought this civil enforcement action against Moon Moo Farm under the CWA to impose civil penalties, *id.* § 1319(d), and seek

injunctive relief, *id.* § 1319(b). Riverwatcher intervened as a plaintiff under CWA's citizen suit provision. *Id.* § 1365(b)(1)(B) ("[I]f [EPA] . . . has commenced and is diligently prosecuting a civil or criminal action in a court of the United States . . . any citizen may intervene as a matter of right.").

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amen. IV. The Supreme Court has recognized that the governments' *use* of evidence gathered in violation of the Fourth Amendment is not in itself unconstitutional. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). It is the unlawful search or seizure—rather than the use of the evidence obtained therein—that violates the Fourth Amendment. *United States v. Calandra*, 414 U.S. 338, 354 (1974). The exclusionary rule, "a judicially created remedy of [the Supreme] Court's own making," bars the admissibility of evidence *obtained* in violation of the Fourth Amendment in certain types of proceedings. *Davis v. United States*, 131 S. Ct. 2419, 2426, 2427 (2011). The principle purpose of the exclusionary rule is "to deter future Fourth Amendment violations." *Id.* In determining whether this prudential rule applies in a given setting, the Supreme Court has "repeatedly declined to extend [it] to proceedings other than criminal trials." *Scott*, 524 U.S. at 363.

The court below erred in holding that the evidence of CWA violations obtained by James from Moon Moo Farm was not admissible. First, the Supreme Court has never applied the Fourth Amendment exclusionary rule to civil enforcement proceedings. Second, even if this Court finds that the exclusionary rule applies to civil enforcement proceedings, it does not extend to evidence gathered by private citizens like James.

a. The Supreme Court has never applied the Fourth Amendment exclusionary rule to civil enforcement proceedings.

Courts perform a cost-benefit analysis to determine whether a particular proceeding warrants the use of the exclusionary rule. *United States v. Janis*, 428 U.S. 433, 453-54 (1998). Consequently, the exclusionary rule applies only in contexts where its benefits of deterrence outweigh its "substantial social costs." *United States v. Leon*, 468 U.S. 897, 907 (1984).

In weighing these costs and benefits, the Supreme Court has repeatedly refused to extend the exclusionary rule to civil enforcement proceedings. *E.g.*, *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984). In *Janis*, for example, the Court held that the exclusionary rule does not bar the admissibility of unconstitutionally obtained evidence in a civil tax proceeding. *Janis*, 428 U.S. at 459. The Court reasoned that the social costs of barring relevant evidence in the civil context outweighed the trivial deterrence benefits, which were truly minimal given the recognized application of the exclusionary rule to state and federal criminal trials. *Id.* at 448-49. The Court has also declined to extend the exclusionary rule to civil probation revocation hearings. *Scott*, 524 U.S. at 364, 369 ("Application of the exclusionary rule would hinder the function of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."). Indeed in the civil context, the Court has recognized that the benefits of the exclusionary rule likely outweigh the costs solely in proceedings involving "intrasovereign" violations. *Janis*, 428 U.S. at 456; *Lopez-Mendoza*, 468 U.S. at 1043.

Additionally, the Court has emphasized that the exclusionary rule does not apply to civil proceedings intended to prevent continuing violations of the law. *Lopez-Mendoza*, 468 U.S. at 1050. In *Lopez-Mendoza*, the Court held that the exclusionary rule does not apply to civil deportation proceedings. *Id.* As in *Janis*, the Court found that the costs of applying the exclusionary rule in deportation proceedings far exceeded the benefits because such proceedings

are designed not to punish past violations of the law, but rather to prevent continuing transgressions. *Id.* at 1046. In drawing this distinction between punishment and prevention, the Court relied, in part, on an example from environmental law. It stated, "Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained . . . ." *Id.*

In keeping with the tradition of the Supreme Court, this Court should hold that the Fourth Amendment exclusionary rule does not bar the admissibility of evidence obtained by James in a civil enforcement proceeding brought under the CWA. Here, the costs of the exclusionary rule outweigh its benefits. As in the context of probation revocation hearings, *see Scott*, 524 U.S. 357, application of the exclusionary rule would impede the functioning of the CWA, which is designed to "to restore and maintain" waters like Queechunk Canal and Deep Quod River. 33 U.S.C § 1251. It would be unduly burdensome for the EPA and citizens of New Union to discover CWA violations without the investigative work of James and other concerned individuals.

Additionally, the CWA's civil enforcement provision is designed to allow the EPA to enjoin wrongdoers from continuing to pollute the Nation's waterways. *See id.* § 1319(b). The Court in *Lopez-Mendoza* stated that the exclusionary rule does not extend to such civil proceedings intended to prevent ongoing violations of the law, rather than to punish past transgressions. *Lopez-Mendoza*, 468 U.S. at 1050. While the EPA and Riverwatcher do seek to impose civil penalties on Moon Moo Farm, R. at 9, this action is simply in addition to the parties' prayer for injunctive relief—to stop Moon Moo Farm from continuing to violate the CWA. Moreover, the Court has opined that application of the exclusionary rule would be particularly troubling in the environmental context. *Lopez-Mendoza*, 468 U.S. at 1046. The present case also does not involve

an intrasovereign context; the EPA and James are not agents of the same government. Rather, Riverwatchers is a non-governmental environmental organization. Therefore, the costs outweigh the benefits. The court below erred in holding that the exclusionary rule applies to this civil enforcement proceeding brought under the CWA.

b. Even if the exclusionary rule applies to civil enforcement proceedings, it does not apply to evidence gathered by private citizens like James.

The Fourth Amendment protects citizens against unlawful searches and seizures by the government; however, this protection does not extend to private individuals. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

The two Courts of Appeals holding that the exclusionary rule extends to civil enforcement actions brought under the Occupational Safety and Health Act involved searches by government agents, not private individuals. *See Trinity Indus., Inc. v. Occupational Safety & Health Review Comm'n*, 16 F.3d 1455 (6th Cir. 1994); *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986). In *Smith Steel*, the employer manufactured iron castings and the process exposed some of its employees to high levels of contaminants. *Smith Steel Casting Co.*, 800 F.2d at 1331. In the course of a workplace investigation, the employer denied the Occupational Safety and Health Administration's ("OSHA") compliance officer access to the manufacturing area. *Id.* The Secretary of Labor sought and received a warrant, and, based on evidence subsequently gathered, OSHA issued citations to the employer for failure to comply with Agency standards. *Id.* The employer, however, argued that OSHA obtained the evidence through an invalid warrant. *Id.* In adhering to the *Lopez-Mendoza* prevention-punishment distinction, the Fifth Circuit determined that the exclusionary rule applied to OSHA proceedings "where the object is to assess penalties against the employer for past violations of OSHA regulations." *Id.* at 1334; *Trinity Industries, Inc.*, 16 F.3d at

1462 (adopting the holding in *Smith Steel* where employer argued that evidence obtained by OSHA at its facility exceeded the scope of the warrant).

Where private individuals have obtained evidence unlawfully, however, courts have held that the exclusionary rule is inapplicable. *Sackler v. Sackler*, 203 N.E.2d 481 (N.Y. 1965). In *Sackler*, the husband and his private eyes obtained evidence by "illegal forcible entry into the wife's home," and offered it in the divorce proceeding to prove that the wife had committed adultery. *Id.* at 482. Despite the unlawful nature of the obtainment, the New York Court of Appeals held that the evidence was admissible nonetheless. *Id.* at 484. In reaching this conclusion, the court relied on the Supreme Court's holding in *Burdeau* and reasoned, "[T]he Fourth Amendment has nothing to do with nongovernmental intrusions." *Id.* at 483. Other courts have agreed with the ruling in *Sackler*. *E.g.*, *Del Presto v. Del Presto*, 235 A.2d 240 (N.J. Super. Ct. App. Div. 1967).

Even if this Court applies *Trinity Industries* and *Smith Steel* to the present case, the evidence gathered by Dean James, a private individual, will be admissible. James, a member of the Riverwatchers, had reached Moon Moo Farm's property by traveling up the Queechunk Canal. R. at 6. During his investigation, he photographed the farm's manure spreading operations and polluted water flowing into the canal. *Id.* Additionally, he took samples of this water, which later tested for "highly elevated levels of nitrates and fecal coliforms." *Id.* The EPA and Riverwatchers base their CWA claims on the evidence obtained by James. R. at 9. Like the OSHA proceedings in *Trinity Industries* and *Smith Steel*, the case at bar is a civil enforcement action. *Id.* However, in *Trinity Industries* and *Smith Steel*, government agents obtained the evidence unlawfully. Here, James, a private individual—much like the husband in *Sackler*—took the photographs and gathered the samples. R. at 6. Since the Supreme Court has held that Fourth Amendment guarantees do not protect against nongovernmental intrusions, *Trinity Industries* and *Smith Steel*

are not controlling and the exclusionary rule does not apply to the present case. *Burdeau*, 256 U.S. at 475. Additionally, the lower court's remark that "EPA should not be able to avoid the Fourth Amendment limits . . . by allowing a do-gooder organization to do its dirty work for it," R. at 9, is inconsistent with Fourth Amendment jurisprudence. It is the unlawful search or seizure—not the mere *use* of the evidence so obtained—that violates the Fourth Amendment. *United States v. Calandra*, 414 U.S. at 354. Therefore, this Court should reverse the decision below and hold that evidence of the CWA violations obtained by James from Moon Moo Farm are admissible.

III. MOON MOO FARM REQUIRES AN NPDES PERMIT BECAUSE IT IS A CAFO, AND EVEN IF THE COURT DISAGREES, MOON MOO FARM'S DISCHARGES DO NOT QUALIFY FOR THE AGRICULTRUAL STORMWATER EXEMPTION.

CAFOs are a specific type of animal feeding system that the CWA has defined as a point source because, given the high number of livestock contained in a relatively small area, these operations pose a risk of releasing concentrated pollutants into the water. 40 C.F.R. § 122.23 (2012). If an operation fits the statutory definition of a CAFO, it is subject to NPDES permitting requirements. *Id.* The CWA defines a "Medium" CAFO as an operation with at least 200 head of mature dairy cows, which discharges of pollutants into the waters of the United States. *Id*. at § 122.23(b)(6). With 350 head of dairy cattle, Defendant satisfies the first requirement of a Medium CAFO, as the court below observed. R. at 8. In turn, the only requirement at issue under the definition of "Medium" CAFO is whether there is evidence that Defendant discharged a pollutant into waters of the United States. 40 C.F.R. § 122.23(b)(6)(ii).

Even if Moon Moo Farm is not a CAFO, it is required to obtain an NPDES permits because it does not qualify for the agricultural stormwater exemption. This exemption only applies to CAFOs, so a non-CAFO cannot claim its protection. 40 C.F.R. § 122.23(e). If Moon Moo Farm concedes that it qualifies as a CAFO, or if this court rules that the exemption can be applied to a non-CAFO, the Defendant still does not qualify because its NMP was not appropriately approved.

The agricultural stormwater exemption takes effect, in part, when a fertilizer is applied in accordance with site-specific nutrient management practices. *Waterkeeper Alliance, Inc. v. U.S. Envtl. Prot. Agency*, 399 F.3d 486, 496 (2d Cir. 2005) (citing 40 C.F.R. § 122.23(e)). In this case, Moon Moo Farm is following an NMP, which the New Union DOA approved without internal review or public comment. R. at 5. Courts have consistently held that an NMP is invalid when they are not reviewed by the appropriate agency, or if the public is not given the opportunity to comment on the plan before its approval. *Waterkeeper Alliance*, 399 F.3d at 490-504 (interpreting requirements under 40 C.F.R. § 122.42(e)(6)(ii)) and 33 U.S.C. § 1251(e)).

The court below erred in holding that the Defendant did not require a NPDES permit. First, Moon Moo Farm is a Medium CAFO because it has 350 head of dairy cattle and discharges pollutants into Queechunk Canal. Therefore it is required to obtain an NPDES permit. Second, even if this Court finds that Moon Moo Farm is not a CAFO, their NMP was neither reviewed by the New Union DOA nor offered for public comment, and is therefore invalid and incapable of qualifying them for the agricultural stormwater exemption.

a. Moon Moo Farm meets the statutory definition of a CAFO, and therefore requires an NPDES permit, because it has more than 200 head of dairy cattle and discharges waste into navigable waters through a point source.

The applicable definition of "Medium" CAFO is an operation that has between "200 to 699 mature dairy cows" confined on its property, where "[p]ollutants 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). It is undisputed that Moon Moo Farm has 350 dairy cows confined in a barn on its property, which the District Court noted clearly satisfies the first prong of the definition. R. at 4, 8. Therefore, the only finding that must be made to qualify Moon Moo Farm as a CAFO is

that it is discharging pollutants into a water of the United States "through a man-made ditch, flushing system, or other similar man-made device."

i. The evidence gathered by James shows that Moon Moo Farm is discharging a pollutant into the waters of the United States through a man-made drainage ditch.

On April 12, 2013, James took water samples from a drainage ditch that was flowing directly into the Queechunk Canal. R. at 6. A water-testing laboratory evaluated the samples and found that the water possessed "highly elevated levels of nitrates and fecal coliforms." *Id*. These elevated levels are a direct result of the Defendant's mixing liquid manure and acid whey together and applying the mixture onto its fields. *Id*. Dr. Green, the Defendant's expert agronomist, conceded that the mixture's increased acidity reduced the ability of the Bermuda grass to absorb the nutrients, causing them to be released into the Deep Quod River. *Id*. This runoff satisfies the requirements of 40 C.F.R. § 122.23(b)(6)(ii)(A), as the defendant's actions are causing a pollutant to travel through a man-made ditch into a water of the United States.

Since both prongs of the statutory definition are satisfied, Moon Moo Farm is a "Medium" CAFO, and therefore was required to obtain a NPDES permit before it discharged pollutants into Queechunk Canal. As a CAFO, Moon Moo Farm has a duty to apply for the NPEDS permit; it is not the responsibility of the EPA or a similar agency to seek out the operation and issue the permit. *Nat'l Pork Producers Council v. U.S. Envtl. Prot. Agency,* 635 F.3d 738, 751 (5th Cir. 2011).

ii. Even if the Court rejects James' evidence, the nitrate advisory issued by the FWA is evidence of the discharge of a pollutant that is fairly traceable to Moon Moo Farm's actions.

For a plaintiff to have standing, there must, among other things, be a "causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In the context of the CWA, the Fourth Circuit has held that "plaintiffs need not show that a

particular defendant is the only cause of their injury" to meet the "fairly traceable" requirement. *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992). Rather, "plaintiffs must merely show that a defendant discharges a pollutant that 'causes or contributes to the kinds of injuries alleged by the plaintiffs.'" *Id.*

Defendant is a CAFO because the nitrate advisory issued by the FWA is evidence of the discharge of a pollutant into a water of the United States that is fairly traceable to Defendant's actions. In the spring of 2013, the FWA issued a nitrate advisory, warning that the high nitrate levels in the Deep Quod River made the city's municipal water supply unsafe for infants. R. at 6. It is not disputed that similar nitrate advisories were issued five times between 2002 and 2010 by the FWA. R. at 7. However, Dr. Susan Generis, an environmental health expert, has stated that it is her belief that the most recent advisory was a result of the Defendant's discharges. *Id.* Prior to the Defendant's addition of acid whey to manure into 2012, there was a period of two years without any warnings issued by the FWA. *Id.* However, the first spring after the Defendant began to spray the new mixture on its fields (spring of 2013), the nitrate levels rose to dangerous levels. R. at 6.

Dr. Generis cannot and need not establish that Defendant was the "but for" cause of the latest nitrate advisory because *Lujan* and *Watkins* only require that Defendant's conduct be "fairly traceable" to the harm. Defendant has already conceded that it is applying the mixture to its fields, which causes the Bermuda Grass to be unable to absorb the nitrogen in the manure. R. at 6. This unabsorbed nitrogen sits on the fields until rain washes it into the Queechunk Canal and then the Deep Quod River. This makes the defendant's actions fairly traceable to the nitrogen in the water, which prompted the issuance of the nitrate advisory. The history of pre-2013 nitrate advisories makes the nitrogen less traceable to its operations. However, it had been four years since the last advisory, which before this extended break had occurred every year or two. R. at 7. The

Defendant's addition of the acid whey to its manure directly coincides with the nitrate advisory, making it the fairly traceable cause of the pollutant in the water and satisfying the second prong of the CAFO statute. 40 C.F.R. § 122.23(b)(6).

b. Moon Moo Farm is subject to NPDES permit liability because its NMP is not valid when it was neither reviewed by the New Union DOA nor submitted for public comment.

The court below held that, because Moon Moo Farm's manure and acid whey mixture was applied to its fields in accordance with an NMP, its actions fell under the agricultural stormwater exemption to NPDES permit requirement. R. at 9-10. Since the court held that the Defendant was not a CAFO, *id.*, this conclusion is improper because the agricultural stormwater exemption applies only to CAFOs. 40 C.F.R. § 122.23(e). Even if Moon Moo Farm is a CAFO, or if this Court elects to apply the agricultural stormwater exemption to non-CAFOs, the lower court erred in applying the exemption. In reaching its conclusion, the court below pointed to the fact that Moon Moo Farm submitted a NMP to the Farmville Regional Office of the DOA. R. at 5. However, what the court below failed to consider, despite the fact that the record is clear on the matter, is that the DOA does not review the NMPs that are submitted, nor does it allow the public the opportunity to review and comment on the NMPs before they are implemented. *Id*. This is a violation of the CWA and therefore renders the NMP invalid.

i. If Moon Moo Farm is not a CAFO, the agricultural stormwater exemption cannot be used because it only applies to CAFOs.

The court below cited *Alt v. U.S. E.P.A.* when it ruled that "Moon Moo Farm is not a CAFO, and any discharge from the ditch . . . is exempted from NPDES permitting requirements by the agricultural stormwater exemption." R. at 9-10. In *Alt*, the EPA sued a CAFO involved in raising poultry after the agency discovered that the farm was discharging pollutants into a navigable water of the United States through water from precipitation. *Alt v. U.S. Envtl. Prot.*

Agency, 979 F. Supp. 2d 701, 704-05 (N.D.W. Va. 2013). The court held that the runoff was agricultural stormwater discharge and thereby "exempt from the NPDES permit requirement of the Clean Water Act." *Id*. at 713. While it is true there are many similarities between *Alt* and the present case, the farm in *Alt* was a CAFO, *id.* at 704, a key distinction from the present case that the lower court overlooked.

If Moon Moo Farm is not a CAFO, they cannot claim they protection under the agricultural stormwater exemption. This exemption only applies to "land application discharges *from a CAFO*." 40 C.F.R. § 122.23(e) (2012) (emphasis added). Even if this requirement is overlooked, Moon Moo Farm still does not qualify for the exemption.

ii. Actual harm is not required under the plain meaning of RCRA to show imminent and substantial endangerment.

In *Waterkeeper Alliance, Inc.*, the Second Circuit considered, among other things, whether the rules promulgated by the EPA under the CWA "empower[ed] NPDES authorities to issue permits to Large CAFOs in the absence of any meaningful review of the nutrient management plans those CAFOs have developed." *Waterkeeper Alliance, Inc.*, 399 F.3d at 498. The Second Circuit held that it was a violation of the CWA for an agency to approve a NMP without first reviewing it both because it failed to ensure that permits were only issued to complying entities and because it failed to prevent the applicant from "misunderstanding or misrepresenting" applicable effluent limitations and standards. *Id* at 501-02.

It is not contested that the New Union DOA did not review Moon Moo Farm's NMP, and therefore the DOA's approval of the plan was invalid. In turn, the agricultural stormwater exemption cannot apply because there is no valid NMP in effect.

iii. The New Union DOA did not give the public the opportunity to participate in the development of Moon Moo Farm's NMP as required by the CWA.

In addition to failing to review the NMP, the record states that the New Union DOA failed to allow the public opportunity to comment on any NMPs that are filed. R. at 5. In *Waterkeeper Alliance, Inc.*, the Second Circuit once again ruled that this was a violation of the CWA. *Waterkeeper Alliance, Inc.*, 399 F.3d at 503-04. The court stated, "Congress clearly intended to guarantee the public a meaningful role in the implementation of the [CWA]." *Id*. at 503. Not only does failing to allow for public comment "depriv[e] the public of its right to assist in the 'development, revision, and enforcement of . . . [an] *effluent limitation*,*"*" but it also compromises the public's ability to bring citizen-suits against violators. *Id*.

Because Moon Moo Farm's NMP was neither reviewed by the New Union DOA nor open to public comment, it was never a valid NMP. Therefore, Defendant cannot use the NMP to claim protection under the agricultural stormwater exemption.

IV. MOON MOO FARM'S ACTIVITIES ARE SUBJECT TO RCRA'S OPEN DUMPING BAN BECAUSE THE MANURE/WHEY MIXTURE MEETS THE STATUTORY DEFINITION OF SOLID WASTE AND THE SUBSEQUENT IMPACT TO FARMVILLE'S WATER SUPPLY CONSTITUTES AN IMMINENT AND SUBSTANTIAL ENDANGERMENT.

RCRA prohibits open dumping of solid waste. 42 U.S.C. § 6945(a). The statute defines "solid waste", in part, as "discarded material including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations." *Id.* § 6903(27). Under RCRA, "disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water . . . ." *Id.* § 6903(3). If an entity places a defined solid waste on their land without a permit they are in violation of RCRA. *Id.* § 6945(a). Defendant takes acid whey, a material discarded from Choko's yogurt manufacturing operations, mixes it with its own manure, and sprays on its fields. R. at 5. Additionally, Defendant's application of the whey-containing mixture ("the mixture") is in a

quantity that exceeds the land's ability to absorb and utilize the material as fertilizer, which results in discharge to the Deep Quod River. R. at 6. Several courts, including the District Court for the Eastern District of Washington, have held that such over application constitutes a discharge of a solid waste. *Cmty. Ass'n for Restoration of the Env't, Inc. v. R & M Haak, LLC*, No. 13-CV-3026-TOR, 2013 WL 3188855, at *4 (E.D. Wash. June 21, 2013).

These land application activities of Defendant are causing an increase to the level of nitrates to the Deep Quod River. R. at 6. The river is a drinking water source of the town of Farmville. R. at 5. In order to safeguard the public health, Farmville has had to institute bans on drinking water due to increases in the nitrate concentration in the river. R. at 6. In the face of an "imminent and substantial endangerment" to public, RCRA allows a citizen action to halt activities that impose the threat. 40 C.F.R. § 7002(a)(1)(B). A direct causal connection between an endangerment and a polluter's activities is not required, only that there is a "substantial likelihood" that a polluter's actions have caused the harm complained of. *Hudson Riverkeeper Fund, Inc. v. Atl. Richfield Co.*, 138 F. Supp. 2d 482, 488 (S.D.N.Y. 2001).

The court below erred in holding that the Defendant was not disposing of solid waste when it over applied a discarded material onto its land. Additionally, it erred in holding that these activities must be a "but for" cause of the bespoiling of Farmville's drinking supply. R. at 11-12. First, Defendant is spreading a solid waste because acid whey is a discarded material. Additionally, the Defendant is causing this material to enter the Deep Quod River, raising the nitrate level in river – a fact sufficient to allege an imminent and substantial endangerment to the public health of Farmville's residents. Therefore, this court should find that the Plaintiff has a right to bring these charges against the Defendant under RCRA's citizen suit provisions.

a. Moon Moo Farm's activities are subject to RCRA's open dumping restrictions because the manure/whey mixture is a solid waste composed of discarded material.

Chokos Greek Yogurt processing facility produces the acid whey in the mixture. R. at 5. The mixture has a pH of 6.1 and it is not disputed that fertilizer with a pH of 6.1, when applied to Bermuda grass, overloads the ability of the grass adequately to fully absorb the mixture's nitrogen load. R. at 6. Despite this uncontested fact, the court below determined that because the ingredients are "agricultural wastes," they cannot be the cause of a condition of "open dumping" under RCRA. R. at 11. Additionally, the court below held that even if the material fit the definition of solid waste, it is exempt under 40 C.F.R. § 257.1(c)(1) because it is being returned to the fields as soil conditioners. R. at 11. This is clearly an incorrect interpretation of RCRA with the court below failing to consider the full ambit of the regulations and the fact that the whey is a discarded constituent of an industrial process.

i. Acid whey is a "waste" that is "discarded" from an industrial process and is therefore a solid waste when applied to off-site farm fields.

The district court's analysis does not take into account that the whey constituent of the mixture is a "solid waste" under the facts presented. Chokos strains yoghurt from milk and whey whey remains as an unusable byproduct. R. at 5. This spent material is shipped to Moon Moo Farm for mixing with he farm's manure stream and spreading on the farm's fields. R. at 5.

In a recent D.C. Circuit case, a manufacturer sent some of the byproduct generated in its production processes to a fertilizer producer for use as an ingredient in the blending of their product. *Howmet Corp. v. Envtl. Prot. Agency*, 614 F.3d 544, 548 (D.C. Cir. 2010). The manufacturer argued that the byproduct was a fertilizer ingredient, not "spent material" and therefore not subject to RCRA regulations. *Id.* at 547. The court noted, "'solid waste' is 'discarded material . . . resulting from industrial, commercial, mining, and agricultural operations.'" *Id.* (citing

42 U.S.C. § 6903(27)). The court also cited regulations defining discarded material as including "recycled materials (materials that have been 'used, reused, or reclaimed'), and spent materials (any material so contaminated by use it can no longer serve 'the purpose for which it was produced without processing,')." *Id*. (citations omitted). The court affirmed EPA's interpretation that the "primary purpose" for which a material is produced is its "initial use" and the Agency's solid waste regulations intend to place limits on reuse of spent material. *Id.* at 552. In the case at bar, the acid whey is a solid waste because it is being used beyond its primary purpose in the production of yogurt.

It has been argued below that, because the acid whey is being applied to grass ultimately harvested and used as silage for cows to produce the milk necessary to produce yet more yogurt, the acid whey is being "used or reused as an effective substitute for a commercial product" and "returned to the original process from which they are generated…as a substitute for feedstock materials" 40 C.F.R. §§ 261.2(e)(ii), (iii). Indeed, the district court cites two cases, *Oklahoma v. Tyson Foods, Inc*. and *Safe Air for Everyone v. Meyer* to suggest that RCRA's solid waste regulations do not apply Moon Moo's agricultural practices.

However, the *Tyson* decision is distinguished from the case at bar because the court's holding in *Tyson* that poultry litter was not waste turned on the fact that litter has a well defined commercial market and was therefore not being discarded. *Oklahoma v. Tyson Foods, Inc*., No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *40-46 (N.D. Okla. Feb. 17, 2010). There is neither record of commercial value of Chokos' acid whey nor any mention in the record that Defendant pays Choko's for the material. Furthermore, after reviewing legislative history in, the Ninth Circuit determined that "[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. Pacific Gas & Elec., 713 F.3d 502, 515 (9th Cir. 2013). Clearly, under this standard and in contrast to the commercially valuable poultry litter at issue in *Tyson*, spent acid whey is solid waste.

Safe Air for Everyone too is distinguished in that farmers were returning the nutrients to the original process from which they were generated by burning grass crops. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1037-38 (9th Cir. 2004). There is no definitive statement in the record that Defendant supplies the entirety of Chokos' milk requirements and therefore an issue of fact exists as to whether the whey is being returned from the process from which it was generated.

Even if facts could be produced that show the whey is a commercial product used by Defendant as part of the process from which it is generated, the district court's contention that the mixture is not a waste must fail because EPA regulations require spent materials to be "managed such that there is no placement on the land." 40 C.F.R. § 261.2(e)(1)(iii). Indeed, the D.C. Circuit held in *Howmet* that recycled materials used to produce products that "are applied to the land…are treated as solid waste regardless, even if the recycling involves use, reuse, or return to the original process." *Howmet Corp.*, 614 F.3d at 553. Because the whey accepted by Defendant is a solid waste, disposal of solid waste occurs when the mixture in applied to the fields.

ii. Materials applied to the land in excess of usefulness as a fertilizer are a "solid waste" under RCRA.

In the instant case, Moon Moo Farm is applying a mixture with an indicated pH of 6.1, a weak acid. R. at 6. This acidic condition results in nitrogen content in excess of the capacity of Bermuda grass to utilize the nutrients contained in the mixture with the unprocessed nutrients being released to the environment. *Id.* These facts are undisputed. *Id*. In light of this use of the mixture, the court below ruled that even if the mixture is a solid waste, Riverwatcher's open

dumping claim must fail because both manure and whey are being returned to the soil as fertilizer making such application exempt under 40 C.F.R. § 257.1(c)(1). R. at 11.

The District Court's reliance on §257.1(c)(1) depends on the assumption that fertilizer applied in quantities exceeding the nutrient capacity of the Bermuda grass remains fertilizer. This question was considered under similar facts in *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc*. The *Water Keeper* court held that "no blanket exemption excludes animal waste from the 'solid waste' definition." *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, No. 4:01-CV-27-H(3), 2001 U.S. Dist. LEXIS 21314, at *14 (E.D.N.C. Sept. 20, 2001). Instead, the court stated that "[t]he question of whether defendants return animal waste to the soil for fertilization purposes or instead apply waste in such large quantities that its usefulness as organic fertilizer is eliminated is a question of fact." *Id.* The District Court for the Eastern District of Washington held that "discarding" manure by over application to fields qualifies it as a "solid waste" under RCRA and that such a well-pleaded factual allegation is entitled to a presumption of truth, stating a plausible claim for relief under RCRA. *Cmty. Ass'n for Restoration of the Env't, Inc. v. R & M Haak, LLC*, No. 13-CV-3026-TOR, 2013 WL 3188855, at *5 (E.D. Wash. June 21, 2013).

Defendant applies the manure/whey mixture to 150 acres of fields planted in Bermuda grass. R. at 5. Defendant increased its population of dairy cows from 170 to 350 in 2010. *Id.* Moon Moo first accepted acid whey to apply to its fields in 2012. *Id.* Without considering the addition of acid whey to the manure stream, the increase in cow population alone constitutes more than a doubling of the fertilizer throughput of the farm. There is no indication in the record that Defendant increased its acreage to accommodate this extra volume nor that Defendant uses the mixture in any way other than spraying on the fields. These undisputed factual assertions alone are enough to warrant inquiry into the Respondent's use of the animal waste products. Therefore, this court

should remand this case to the district court as the Respondent's overuse of fertilizer constitutes open dumping of solid waste.

b. Defendant imminently and substantially endangered Farmville's drinking water supply because RCRA merely requires the potential for harm and not "but for" causation.

The court below held that, even if Defendant's manure/whey mixture is a solid waste, Riverwatcher did not present sufficient evidence "to establish a genuine issue that Moon Moo Farm's land spreading practices present imminent and substantial endangerment to human health" because "but for" causation has not been shown. R. at 11. The court below concluded that an imminent and substantial endangerment to human health does not exist because nitrates do not pose a threat to adults and juveniles and because infants can drink bottled water. R. at 12. However, the court below is in error because violation of RCRA § 7002(a)(1)(B) does not require "but for" causation of actual harm, only that such disposal may cause harm in the future.

i. Evidence of "but for" causation is not required under RCRA.

RCRA provides for a citizen action when there exists a potential for a release of solid waste that *may* endanger human health or the environment. 42 U.S.C. § 6972(a)(1)(B). The provision reads, in part, that suit may be brought "against any person . . . who is contributing to the *past or present handling* . . . or disposal of any solid or hazardous waste which *may* present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a) (emphasis added). The plain language of this provision indicates that Riverwatcher does not face the burden of proving that Defendant's land spreading activities are the actual cause of the elevated levels of nitrates in the Deep Quod River, but only show that they might be.

The court in *Hudson Riverkeeper* addressed the issue of linking a specific person's activities to a discreet type of contamination in order to satisfy causation under section 7002(a)(1)(B) by holding that only "substantial likelihood" that a polluters actions caused the

complained of harm is necessary under RCRA. *Hudson Riverkeeper Fund, Inc. v. Atl. Richfield Co.*, 138 F. Supp. 2d 482, 488 (S.D.N.Y. 2001) (a manufacturer's activities were alleged to have polluted an adjacent river). Similarly, the Second Circuit held that the district court below correctly interpreted section 7002(a)(1)(B) as requiring the plaintiff show that a specific defendant's "waste was of a type that *could* contribute" to an "endangerment to health or the environment that *may* exist." *Prisco v. A & D Carting Corp.,* 168 F.3d 593, 609 (2d Cir. 1999) (emphasis added) (an aggrieved landfill operator failed to connect the waste brought in by a trucking company with contamination leaching into neighboring wetlands).

Because of the history of nitrate advisories and Defendant's discharge in the source of Farmville's drinking water supply, it is clear that the Defendant's practices are contributing to the increased levels of nitrates in the waters of the Deep Quad River. R. at 6. It is equally clear that high the effect of high concentrations of nitrates is causing the drinking water to become unsafe. *Id.* The District Court's interpretation of section 7002 suggests that the cause and effect stated in the record must be directly linked to support a substantial endangerment claim. Such an interpretation is clearly erroneous and is neither supported by a plain reading of the statute nor by relevant case law that holds that a direct linkage is not required to establish a genuine issue.

ii. Actual harm is not required under the plain meaning of RCRA to show imminent and substantial endangerment.

The court below held that, because elevated levels of nitrates in drinking water do not pose a risk to adults and juveniles and that households have been advised to provide bottled water to infants, potential health risks are avoided and therefore imminent and substantial engagement is not present. The court cites a district court case out of Kansas to substantiate its holding that, because consumers of water from contaminated wells were warned of the danger of the water coupled with the availability of bottled water, the need for imminent action under RCRA is obviated. *Davies v.*

National Cooperative Refinery Ass'n, 963 F. Supp. 990, 999 (D. Kan. 1997). *Davies* however is distinguished from the instant case because not only did the groundwater impact requiring the use of bottled water impact only a single business, the cause of the contamination was undergoing active and effective state-mandated remediation that reversed the spread of the chemical pollution plume away from municipal water wells. *Id.* In the instant case, the contamination being introduced into the river by Defendant's active operations is causing the water supply of an entire city to be dangerous to the city's most vulnerable residents.

The court below is mistaken that merely providing notice not to drink water is a solution sufficient to defeat the imminent and substantial endangerment claim under § 7002. The Tenth Circuit held that imminent and substantial endangerment does not mean an actual harm is ongoing but is imminent "as long as the risk of threatened harm is present." *Burlington Northern & Santa Fe Ry. v. Grant* 505 F.3d 1013, 1020 (10th Cir. 2007) (a reasonable probability that a contaminant would continue to migrate from defendant's property is enough to confer liability under RCRA). The court reasoned that a threat is substantial when "there is reasonable cause for concern that someone or something may be exposed to risk of harm by release . . . in the event remedial action is not taken." *Id.* at 1021. Other courts have similarly found that mere token efforts to avoid drinking water contamination will not defeat a claim of imminent and substantial endangerment under RCRA. *See, e.g.*, *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985) (holding that imminent and substantial endangerment existed at dumpsites, though there was "no evidence that any resident was in danger of having drinking water contaminated by past operations"); *United States v. Vertac Chem. Corp.*, 489 F. Supp. 870, 880-81 (E.D. Ark. 1980) (finding reasonable medical concern for public health constituted imminent and substantial endangerment despite any proof of a contaminant escaping or actual harm caused by it).

Reasonable concern for the health of the public caused the authorities in Farmville to issue a warning to residents not to allow their infants to consume the water. This nitrate warning is evidence that members of the public are exposed to a risk of harm and therefore the imminent and substantial endangerment requirement of §7002 has been met. Accordingly, this Court should reverse the ruling of the court below and hold that Farmville's residents face imminent and substantial endangerment.

CONCLUSION

The District Court erred in granting Defendant's motion for summary judgment for the foregoing reasons. First, Queechunk Canal is a public trust navigable water of the State of New Union. Second, even if this Court finds that Queechunk Canal is not a public trust navigable water, evidence obtained by James while visiting Moon Moo Farm without a warrant is admissible in a civil enforcement proceeding brought under the CWA. Third, Defendant is a point source subject to the CWA's NPDES permitting requirements. Finally, Defendant is subject to a citizen suit under RCRA.

For these reasons, this Court should reverse the District Court's granting of Defendant's motion for summary judgment, as well as its holding and award of damages for Defendant's counter-claim, and remand the case for further review.

APPENDIX A

Relevant Sections of the Clean Water Act

33 U.S.C. § 1251. Congressional Declaration of Goals and Policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

* * * *

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

* * * *

33 U.S.C. § 1311. Effluent Limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * *

33 U.S.C. § 1319. Enforcement

* * * *

(b) Civil actions

The 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 under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

* * * *

33 U.S.C. § 1342. National Pollutant Discharge Elimination System

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which--

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast

Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;
(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;
(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and
(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

* * * *

33 U.S.C. § 1365. Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter 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 under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

* * * *

APPENDIX B

Relevant Sections of RCRA

42 U.S.C. § 6901. Congressional Findings

(a) Solid waste

The Congress finds with respect to solid waste--

(1) that the continuing technological progress and improvement in methods of manufacture, packaging, and marketing of consumer products has resulted in an ever-mounting increase, and in a change in the characteristics, of the mass material discarded by the purchaser of such products;

(2) that the economic and population growth of our Nation, and the improvements in the standard of living enjoyed by our population, have required increased industrial production to meet our needs, and have made necessary the demolition of old buildings, the construction of new buildings, and the provision of highways and other avenues of transportation, which, together with related industrial, commercial, and agricultural operations, have resulted in a rising tide of scrap, discarded, and waste materials;

(3) that the continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas;

(4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action through financial and technical assistance and leadership in the development, demonstration, and application of new and improved methods and processes to reduce the amount of waste and unsalvageable materials and to provide for proper and economical solid waste disposal practices.

(b) Environment and health

The Congress finds with respect to the environment and health, that--

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act [42 U.S.C.A. § 7401 et seq.], the Water Pollution Control Act [33 U.S.C.A. § 1251 et seq.], and

other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

(c) Materials

The Congress finds with respect to materials, that--

(1) millions of tons of recoverable material which could be used are needlessly buried each year;

(2) methods are available to separate usable materials from solid waste; and

(3) the recovery and conservation of such materials can reduce the dependence of the United States on foreign resources and reduce the deficit in its balance of payments.

(d) Energy

The Congress finds with respect to energy, that--

(1) solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy;

(2) the need exists to develop alternative energy sources for public and private consumption in order to reduce our dependence on such sources as petroleum products, natural gas, nuclear and hydroelectric generation; and

(3) technology exists to produce usable energy from solid waste.

42 U.S.C. 6903. Definitions

As used in this chapter:

* * * *

(27) 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, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33, or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. § 2011 et seq.].

* * * *

42 U.S.C. 6945. Upgrading of Open Dumps

(a) Closing or upgrading of existing open dumps

Upon promulgation of criteria under section 6907(a)(3) of this title, any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 6972 of this title against persons engaged in the act of open dumping. For purposes of complying with section 6943(a)(2) and 6943(a)(3) of this title, each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) of this section shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 6907(a)(3) of this title).

* * * *

42 U.S.C. 6972. Citizen Suits

(a) In general

Except as provided in subsection (b) or (c) of this section, any person may commence a civil action on his own behalf--

(1) (A) against any person (including (a) the United States, and (b) any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter; or

(B) against any person, including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution, and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, 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; or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

(b) Actions prohibited

(1) No action may be commenced under subsection (a)(1)(A) of this section--

(A) prior to 60 days after the plaintiff has given notice of the violation to--

(i) the Administrator;

(ii) the State in which the alleged violation occurs; and

(iii) to any alleged violator of such permit, standard, regulation, condition, requirement, prohibition, or order,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of subchapter III of this chapter; or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance with such permit, standard, regulation, condition, requirement, prohibition, or order.

In any action under subsection (a)(1)(A) of this section in a court of the United States, any person may intervene as a matter of right.

* * * *

42 U.S.C. 6793. Imminent Hazard

(a) Authority of Administrator

Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment, or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractural[1] arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The Administrator shall provide notice to the affected State of any such suit. The Administrator may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

* * * *

APPENDIX C

Relevant Sections of the CFR

40 C.F.R. 122.23. Concentrated Animal Feeding Operations

(a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) Animal feeding operation ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12–month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) Concentrated animal feeding operation ("CAFO") means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) Large concentrated animal feeding operation ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;
(vii) 10,000 sheep or lambs;
(viii) 55,000 turkeys;
(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term manure is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) Medium concentrated animal feeding operation ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;
(B) 300 to 999 veal calves;
(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
(D) 750 to 2,499 swine each weighing 55 pounds or more;
(E) 3,000 to 9,999 swine each weighing less than 55 pounds;
(F) 150 to 499 horses;
(G) 3,000 to 9,999 sheep or lambs;
(H) 16,500 to 54,999 turkeys;
(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either 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.

(7) Process wastewater means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) Small concentrated animal feeding operation ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) How may an AFO be designated as a CAFO? The appropriate authority (i.e., State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) Who may designate?

(i) Approved States. In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) States with no approved program. The Regional Administrator may designate CAFOs in States that do not have an approved

program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) NPDES permit authorization.--

(1) Permit Requirement. A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

(2) Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(3) Information to submit with permit application. A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an

agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where 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, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) By when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit at the time that it discharges.

(g) [Reserved by 77 FR 44497]

(h) Procedures for CAFOs seeking coverage under a general permit.

(1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in

40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) For EPA–issued permits only. The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

40 C.F.R. 122.42. Additional Conditions Applicable to Specified Categories of NPDES Permits

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(e) Concentrated animal feeding operations (CAFOs). Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan 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 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

(ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

(iii) Ensure that clean water is diverted, as appropriate, from the production area;

(iv) Prevent direct contact of confined animals with waters of the United States;

(v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or

storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

(2) Recordkeeping requirements.

(i) The permittee must create, maintain for five years, and make available to the Director, upon request, the following records:

(A) All applicable records identified pursuant paragraph (e)(1)(ix) of this section;

(B) In addition, all CAFOs subject to 40 CFR part 412 must comply with record keeping requirements as specified in § 412.37(b) and (c) and § 412.47(b) and (c).

(ii) A copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request.

(3) Requirements relating to transfer of manure or process wastewater to other persons. Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. Large CAFOs must retain for five years records of the date, recipient name and address, and approximate amount of manure, litter or process wastewater transferred to another person.

(4) Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. The annual report must include:

(i) The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(ii) Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);

(iii) Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);

(iv) Total number of acres for land application covered by the nutrient management plan developed in accordance with paragraph (e)(1) of this section;

(v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;

(vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and

(vii) A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and

(viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

(5) Terms of the nutrient management plan. Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, 40 CFR 412.4(c), must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches,

unless the Director specifies that only one of these approaches may be used:

(i) Linear approach. An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

(A) The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(B) Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

(ii) Narrative rate approach. An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

(A) The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors

necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

(B) The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

(C) For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: The CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process

wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

(D) CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

(1) A field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

(2) The results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(6) Changes to a nutrient management plan. Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient

management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in 40 CFR 124.10. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient

management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) For EPA–issued permits only. Upon incorporation of the revised terms of the nutrient management plan into the permit, 40 CFR 124.19 specifies procedures for appeal of the permit decision. In addition to the procedures specified at 40 CFR 124.19, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

40 C.F.R. 257.1. Scope and Purpose

(a) Unless otherwise provided, the criteria in §§ 257.1 through 257.4 are adopted for determining which solid waste disposal facilities and practices pose a reasonable probability of adverse effects on health or the environment under sections 1008(a)(3) and 4004(a) of the Resource Conservation and Recovery Act (The Act). Unless otherwise provided, the criteria in §§ 257.5 through 257.30 are adopted for purposes of ensuring that non-municipal non-hazardous waste disposal units that receive conditionally exempt small quantity generator (CESQG) waste do not present risks to human health and the environment taking into account the practicable capability of such units in accordance with section 4010(c) of the Act.

(1) Facilities failing to satisfy either the criteria in §§ 257.1 through 257.4 or §§ 257.5 through 257.30 are considered open dumps, which are prohibited under section 4005 of the Act.

(2) Practices failing to satisfy either the criteria in §§ 257.1 through 257.4 or §§ 257.5 through 257.30 constitute open dumping, which is prohibited under section 4005 of the Act.

(b) These criteria also provide guidelines for the disposal of sewage sludge on the land when the sewage sludge is not used or disposed through a practice regulated in 40 CFR part 503.

(c) These criteria apply to all solid waste disposal facilities and practices with the following exceptions:

(1) The criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

(2) The criteria do not apply to overburden resulting from mining operations intended for return to the mine site.

(3) The criteria do not apply to the land application of domestic sewage or treated domestic sewage.

(4) The criteria do not apply to the location and operation of septic tanks. The criteria do, however, apply to the disposal of septic tank pumpings.

(5) The criteria do not apply to solid or dissolved materials in irrigation return flows.

(6) The criteria do not apply to industrial discharges which are point sources subject to permits under section 402 of the Clean Water Act, as amended.

(7) The criteria do not apply to source, special nuclear or byproduct material as defined by the Atomic Energy Act, as amended (68 Stat. 923).

(8) The criteria do not apply to hazardous waste disposal facilities which are subject to regulation under subtitle C of the Act.

(9) The criteria do not apply to disposal of solid waste by underground well injection subject to the regulations (40 CFR part 146) for the Underground Injection Control Program (UICP) under the Safe Drinking Water Act, as amended, 42 U.S.C. 3007 et seq.

(10) The criteria of this part do not apply to municipal solid waste landfill units, which are subject to the revised criteria contained in part 258 of this chapter.

(11) The criteria do not apply to the use or disposal sewage sludge on the land when the sewage sludge is used or disposed in accordance with 40 CFR part 503.

40 C.F.R. 261.2. Definition of Solid Waste

* * * *

(e) Materials that are not solid waste when recycled.

(1) Materials are not solid wastes when they can be shown to be recycled by being:

(i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or

(ii) Used or reused as effective substitutes for commercial products; or

(iii) Returned to the original process from which they are generated, without first being reclaimed or land disposed. The material must be returned as a substitute for feedstock materials. In cases where the original process to which the material is returned is a secondary process, the materials must be managed such that there is no placement on the land. In cases where the materials are generated and reclaimed within the primary mineral processing industry, the conditions of the exclusion found at § 261.4(a)(17) apply rather than this paragraph.

(2) The following materials are solid wastes, even if the recycling involves use, reuse, or return to the original process (described in paragraphs (e)(1)(i) through (iii) of this section):

(i) Materials used in a manner constituting disposal, or used to produce products that are applied to the land; or

(ii) Materials burned for energy recovery, used to produce a fuel, or contained in fuels; or

(iii) Materials accumulated speculatively; or

(iv) Materials listed in paragraphs (d)(1) and (d)(2) of this section.

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