No. 14-1248 Team 56

# UNITED STATES COURT OF APPEALS
# FOR THE TWELFTH CIRCUIT

No. 155-CV-2014

**UNITED STATES OF AMERICA, Plaintiff-Appellant, and**

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

**v.**

**MOON MOO FARM, INC., Defendant-Appellee**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION**

## BRIEF OF DEEP QUOD RIVERWATCHER, INC., AND DEAN JAMES, PLAINTIFF-INTERVENORS-APPELLANTS

**ORAL ARGUMENT REQUESTED**

**Attorneys for Plaintiff-Intervenors-Appellants**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(c)(1), Intervenor-Appellant, Deep Quod Riverwatcher Inc. ("Riverwatcher"), submits the following corporate disclosure statement.

Riverwatcher is a non-profit environmental organization, incorporated under the State of New Union, is not publicly traded, and has no parent corporation. Additionally, there is no stock issued, so there is no publicly held corporation owning ten percent or more of the stock.

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## JURISDICTIONAL STATEMENT

The Federal Water Pollution Control Act, 33 U.S.C. § 1311, *et seq.*, referred to as the Clean Water Act ("CWA"), provides judicial review of actions by the EPA Administrator; including the addition of pollutants to navigable waters and issuance of permits for discharges. This court has original jurisdiction pursuant to 33 U.S.C. § 1369(b)(1) and Fed. R. App. P.15. The Act grants district courts federal question jurisdiction without regard to amount in controversy or diversity. 33 U.S.C. § 1365(a).

This action was brought for violations of the Resource Conservation and Recovery Act ("RCRA"), pursuant to 42 U.S.C. §§ 6945(a), 6972(a)(1)(B) (2014). Subject matter jurisdiction vests in the United States District Court for the District of New Union by the RCRA citizen suit provision. *See* 42 U.S.C. § 6972 (a).

On June 1, 2014, the District Court issued a final judgment favoring the Defendant-Appellee, Moon Moo Farm (the "Farm"). Thereafter, the Plaintiffs-Appellants, United States of America on behalf of the EPA and Deep Quod Riverwatcher with Dean James ("Riverwatcher"), filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(A). This court has appellate jurisdiction as the appeal is from a final judgment disposing of all claims. *See* 28 U.S.C. § 1291 (2014).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**I.** Is the man-made Canal a public trust navigable waterway under the Clean Water Act if it is commonly used by the public and has capabilities for interstate commerce?

**II.** If the Canal is not a public trust navigable water, is the evidence obtained through trespass and without a warrant still admissible in a civil enforcement proceeding where there are not constitutional violations and the exclusionary rule does not apply?

**III.** Does the Farm qualify as a CAFO, a "point source" under 33 U.S.C. §§1362 (14) subject to direct permitting regulations by NPDES?

**IV.** If the Farm is not a CAFO, does its land application of a manure substance during a rainstorm remove it from the agricultural stormwater exemption and subject it to NPDES permitting if this application was not in accordance with appropriate agricultural practices under 40 C.F.R 122.23(e)?

**V.** Under RCRA, is the manure and whey mixture a "solid waste" when the whey was given to the Farm after the Chokos factory had no use for the product and this was mixed with manure and dumped onto an open field?

**VI.** Is contamination of the City's drinking water, which could lead to infant death, enough evidence to support a finding of imminent and substantial endangerment to human health or the environment?

## STATEMENT OF THE CASE

This appeal stems from the Farm violating the CWA, RCRA, and the National Pollutant Discharge Elimination System ("NPDES"), permitting requirements. The Farm allowed its manure land application to discharge through a runoff into the Queechunk Canal ("Canal"). The Canal is a man-made ditch, flowing alongside the Farm and into the Deep Quod River ("River"), a navigable water of the United States. Downstream from the Farm is Farmville, a town which derives its municipal water supply from the River.

The United States filed a complaint for civil penalties and injunctive relief for violations of the CWA against the Farm. The Farm is regulated by the State of New Union ("State"), and is required to submit a nutrient management plan ("NMP") to the Farmville Regional Office of the State of New Union Department of Agriculture ("DOA"), in compliance with its "no discharge" animal feeding operation. Riverwatcher intervened as a plaintiff after discovering pollutants discharged from the Farm through its investigation. The investigation was initiated due to complaints from Farmville citizens of water contamination.

In response to the complaint, the Farm filed an answer and counterclaim alleging the evidence obtained by Riverwatcher was the product of an illegal trespass and requested damages. Both parties then filed motions for summary judgment. The lower court dismissed the plaintiff's motion, granted the defendant's motion, and awarded the defendant $832,560.00 in damages.

On appeal Riverwatcher argues the Farm is a CAFO, subject to NPDES permitting, and its discharges are not exempt under the agricultural stormwater provision. Riverwatcher also argues that a trespass was not committed, the evidence obtained is admissible, and the award of damages was improper. Furthermore, Riverwatcher opposes the dismissal of its open dumping and substantial endangerment claims under the RCRA.

## STATEMENT OF THE FACTS

On or about April 12, 2013, the Farmville region received approximately two inches of rain. Although this was a significant storm event, it was far short of the twenty-five year storm mark—defined as at least five inches of rain within a twenty-four hour period. To alleviate potential flooding at the bend, the previous owners of the Farm excavated a bypass canal. The Farm owns the land on both sides of the Canal and has prominently posted "No Trespassing" signs.

The property surrounding the Canal houses and barns 350 unpasteurized dairy cattle. Manure and liquid waste from the farming operation is collected through a series of drains and pipes, which is transported to outdoor lagoons where it is temporarily stored. The waste is later applied as fertilizer through a land application process and spread over 150 acres. The fertilizer aids in the growth and harvest of Bermuda grass which is used for silage.

Since the Farm is regulated by the State as a "no discharge" animal feeding operation ("AFO") it must submit a NMP to the DOA for its land application and operational management procedures. The NMP submitted to the State addresses seasonal manure application rates. These rates are calculated according to the expected DOA uptake by crops. Although the State finds these calculations insufficient, it does not routinely review these plans for "no discharge" operations, nor are the plans subject to public review or comment.

Under the CWA, AFOs must submit NMPs to the DOA. The EPA is the regulating authority charged with enforcing the CWA and addressing potential violations. The EPA regulates CAFOs as point sources for discharge and the NPDES specifies the permitting requirements for such discharges. The EPA guidelines strictly prohibit solid waste application to floodplains. Although the EPA and the State have authority to issue NPDES permits, the Farm does not hold a

discharge permit. Therefore, any discharge into a navigable stream falls within the authority of the EPA, and can be in direct violation of the CWA, absent a NPDES permit.

In late winter and early spring of 2013, Riverwatcher received complaints of a manure stench and turbid brown discoloration of the water in the River. In response, Riverwatcher patrolled the River to investigate. As it is common practice to use the Canal for a shortcut up and down the River, Riverwatcher investigated in an outboard craft known as a "jon boat." Upon reaching the Farm's property, Riverwatcher photographed the discoloration of the water flowing from the fields, and observed the land application procedures. Additionally he obtain samples of the polluted water from the ditch, which were later taken to a laboratory, tested, and revealed highly elevated levels of nitrates and fecal coliforms. Thereafter, the City of Farmville issued a nitrate advisory for infants to refrain from domestic water consumption.

## SUMMARY OF ARGUMENT

The Canal is a navigable waterway, subject to the public trust doctrine. The Canal is navigable because it has the potential, physical capabilities, and determined geographic limits for interstate commerce. Additionally, as the citizens of Farmville routinely used the Canal to travel up and down the River, the Canal must be made accessible to the public. Even if the Canal is not determined to be navigable, the evidence obtained is nevertheless admissible because the exclusionary rule does not apply to civil actions.

The Farm operates an AFO which qualifies as a medium CAFO, and contributed to the pollution of the waters of the United States through its land application practices. As a CAFO, the Farm is a point source, and is subject to NPDES permitting requirements. 33 U.S.C. § 1362(14). Even if the Farm's operation was found to not qualified as a CAFO, but operates as a "no discharge" AFO, it is still subject to NPDES permitting, because it discharged into the

waters of the United States. Such discharge is not in compliance with accepted and appropriate land application procedures, and was without a NPDES permit pursuant to 40 C.F.R. § 122.23.

The Farm's waste disposal contaminated groundwater with solid waste containing nitrates exceeding levels safe for infant consumption and in violation of the EPA's open dumping criteria. The District Court misapplied the imminent and substantial endangerment standard contained in 42 U.S.C. § 6972 (a)(1)(B). In interpreting this standard, the use of "may present," "imminent," and "substantial," reflect Congressional intent to give courts broad authority to eliminate any risk of harm. The District Court failed to consider the full scope of risk from the nitrate contamination and the harms to the environment as well as the impacts on infant health.

Accordingly, we respectfully request this Court reverse and remand on all issues addressed, under the applicable law set forth herein.

## ARGUMENT

### I. Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union allowing for a public right of navigation despite private ownership of the banks on both sides and the bottom of the canal by the Farm.

The Public Trust Doctrine ("Doctrine"), was created to protect and preserve navigable rivers, ports, bays, and the coasts of the sea, for uses common to the public. *See Arnold v. Mundy*, 6 N.J.L. 1, 12 (1821). According to *Gwathmey v. State of North Carolina*, 464 S.E.2d 674 (N.C. 1995), all watercourses that are navigable-in-law are navigable-in-fact. Therefore, the public has "the right to the unobstructed navigation as a public highway for all purposes of pleasure or profit, of all watercourses, whether tidal or inland, that are in their natural condition capable of such use." *Id.* at 682.

In arriving at the decision that the Canal is not a navigable waterway, the District Court relied on *Aetna v. United States*, 444 U.S. 164 (1979). *Aetna* held there is no public right of navigation in a manmade body of water. *Id.* This reliance resulted in the District Court concluding Riverwatcher committed a trespass. Contrary to the District Court's finding, *Fish House Inc. v. Clarke,* 693 S.E.2d 208, 212 (N.C. Ct. App. 2010), held "the controlling law of navigability concerning the body of water 'in its natural condition' reflects only upon the manner in which the water flows without diminution or obstruction." *Fish House, Inc.* also stated "any waterway, whether manmade or artificial, which is capable of navigation by watercraft constitutes navigable water under the public trust doctrine . . . ." *Id.*

To qualify under the Doctrine, a body of water must first be deemed navigable. *See Arnold*, 6 N.J.L. at 12. Navigable waters encompass those waters that "are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." 33 C.F.R. § 329.4 (2014). To determine if a body of water is navigable, several factors must be examined. *See* 33 C.F.R § 329.5 (2014). These factors include identifying the past, present, or potential presence of interstate or foreign commerce, the physical capabilities for use by commerce, and the defined geographic limits of the body of water. *Id.* Once navigability is established, the requirement that the body of water remain open to the public "applies laterally over the entire surface of the waterbody, and is not extinguished by later actions of events which impede or destroy navigable capacity." 33 C.F.R. § 329.4. Abiding by the principles underlying the Doctrine, all navigable waters of the State must remain open to the public. Therefore, the assertion that a trespass occurred is fallacious because the Canal is a navigable body of water, open to the public.

**A. The Canal is navigable water for purposes of the public trust doctrine.**

The Canal is a bypass in the River, which flows year-round and runs into the Mississippi River. R. at 5. The Mississippi River is a navigable-in-fact interstate body of water used for commercial navigation. In 1940, the Canal was developed to alleviate flooding at the River bend. *Id.* To achieve the desired purpose of the Canal, much of the water that flows through the River is diverted into the Canal. Since the Canal is fifty yards wide and three-to-four feet deep, it can be navigated via small boats or canoes. *Id.* However, in order for the Canal to be declared navigable under the public trust doctrine, three factors must be satisfied. *See* 33 C.F.R § 329.5.

First, the Canal must have past, present, or future potential for interstate or foreign commerce. *See* 33 C.F.R. § 329.5. To satisfy this factor, the Canal must express the ability for commercial use. *See* 33 C.F.R § 329.6 (2014). The determinative factor to consider is whether the body of water is capable to be used by the public for transportation of commerce purposes, not the time, extent, or manner. *Id.*

It is undisputed that the Canal is commonly used as a shortcut up and down the River. R. at 5. Because the River runs into the Mississippi River, the potential for interstate commerce is significant. Even if a body of water is entirely within the confines of a state, it is nevertheless capable of interstate commerce. *See* 33 C.F.R § 329.7 (2014). "This is especially clear when it physically connects with a generally acknowledged avenue of interstate commerce, such as the ocean or one of the Great Lakes, and is yet wholly within one state." *Id.* Since the River physically connects with the Mississippi River, a generally acknowledged avenue of interstate commerce, the Canal has similar capabilities. The mere fact that the Canal has not been used in the past for interstate commerce is irrelevant. *See* 33 C.F.R. § 329.5.

Navigability may be found "in a waterbody's susceptibility for use in its ordinary condition or by reasonable improvement to transport interstate commerce. This may be either in its natural or improved condition, and may thus be existent although there has been no actual use to date." 33 C.F.R § 329.9 (2014). Similarly, *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990), held the "[f]act that a waterway is artificial, not natural, is not controlling. When a canal is constructed to connect with a navigable river, the canal may be regarded as part of the river." Because the Canal diverts most of the water flow from the River, is connected indirectly to the Mississippi River, and has the potential for interstate commerce, the first factor is satisfied.

The second factor requires the Canal to exhibit physical capabilities for use of commerce. *See* 33 C.F.R § 329.5. Since canoes and small boats navigate through the Canal, it has the required capabilities. Similar to the Canal in this case, in *State ex rel. Medlock v. S.C. Coastal Council*, the court stated all navigable streams "'shall be common highways and forever free . . .'" 346 S.E.2d 716, 718–719 (S.C. 1986) (citations omitted).

It is undisputed that the Canal is not a natural body of water, but rather is manmade or artificial. The previous property owner—to alleviate flooding at the River bend—excavated the Canal. The Farm's argument that the Canal is manmade and not a publically navigable waterway is flawed because "[n]avigability may also be found where artificial aids have been or may be used to make the waterbody suitable for use in navigation." 33 C.F.R § 329.8 (2014). Once the Canal was created, canoes and other small boats commonly used the Canal as a shortcut up and down the River, thereby proving suitable for navigation. R. at 5.

Further, "an artificial channel may often constitute a navigable water . . . even though it has been privately developed and maintained, or passes through private property." 33 C.F.R § 329.8. Thus, "[p]rivate ownership of the lands underlying the waterbody, or of the lands through

which it runs, does not preclude a finding of navigability." *Id.* Although the Farm privately owns both sides of the Canal, the Canal may be considered a navigable waterway. Consequently, the fact that the Farm posted a "No Trespassing" sign does not prevent the Canal from being a publicly navigable waterway. Only when a privately constructed and operated canal is not used to transport interstate commerce, nor used by the public, is the canal deemed unnavigable. *Id*. However, the public commonly uses the Canal as a means of travelling up and down the River, so private ownership of both sides of the Canal does not preclude navigability, rendering the second factor satisfied.

The third factor requires the geographic limits of the canal be examined. *See* 33 C.F.R § 329.5. "Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark." 33 C.F.R. § 329.11 (2014). Additionally, "[m]arshlands and similar areas are thus considered navigable-in-law, but only so far as the area is subject to inundation by the ordinary high waters." *Id.*

Riverwatcher initially patrolled the River in a jon boat to investigate the complaints received. R. at 6. Upon reaching the Canal, samples were obtained from the water and photographs were taken. *Id.* This area is protected under federal regulatory jurisdiction because the geographic limits of navigability extend to the edge of the waterbody and shallow areas. *See* 33 C.F.R. § 329.11. Because the samples were taken from a publically navigable waterway, it follows that the third factor is satisfied and a trespass did not occur.

### B. Riverwatcher did not Trespass on the Farm.

The rationale for deciding a trespass occurred was founded on a misguided belief that the Canal is not a navigable body of water. In response to this Court's request to find applicable case law delineating otherwise, *Fish House Inc.* proves fruitful.

In *Fish House Inc.*, the plaintiff brought a trespass action against the defendant to enjoin the defendant from using a portion of the Old Sam Spencer Ditch (the "Ditch"). *See* 693 S.E.2d 208, 210 (2010). The Ditch bordered both parties' property. *Id.* The trial court found the only rights the plaintiff and defendant had in the waters of the Ditch were as members of the public. *Id.* The trial court held that the waters of the Ditch were navigable waters held in public trust in the State and the action was dismissed. *Id.* On appeal, the issue was whether the trial court erred in dismissing the plaintiff's action for trespass. *Id.* at 211. The plaintiff argued that because the Ditch was a manmade waterway, the plaintiff was entitled to exclude the defendant. *Id.* In response, the appellate court affirmed the trial court's holding and stated that the Ditch "although manmade, is a navigable waterway held by the state in trust for all citizens of North Carolina." *Id.* Similar to *Fish House Inc.*, Riverwatcher requests that this Court reverse the finding of a trespass because the Queechunk Canal is a navigable waterway held in trust for all citizens in the State of New Union.

## II. Even if the canal is not deemed a public trust navigable water, the evidence obtained through trespass and without a warrant is nevertheless admissible in a civil enforcement proceeding brought under the Clean Water Act §§ 309 (b), (d) and 505.

The lower court held the evidence obtained from the Farm inadmissible because the court stated the exclusionary rule of the Fourth Amendment applies. R. at 9. This holding reflects the argument that the exclusionary rule extends to civil actions.

It is undisputed that Riverwatcher did not have a warrant to conduct a search and seizure upon the Farm. However, the evidence is nevertheless admissible because the exclusionary rule does not extend to a civil action brought under the CWA. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. In *Mapp v. Ohio,* the Court declared the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" 367 U.S. 643, 656 (1961) (citations omitted). However, in this action, the Farm alleges a civil trespass, not a constitutional violation. Extending the exclusionary rule to this case blurs the purpose of the rule. Further, "[i]n the complex and turbulent history of the rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state." *United States v. Janis*, 428 U.S. 433, 447 (1976).

In extending the exclusionary rule to this case, the lower court relied on *Trinity Indus., Inc. v. Occupational Safety and Health Review Comm'n*, 16 F.3d 1455 (6th Cir. 1994), and *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986). Both cases were concerned with the Occupational Safety and Health Act ("OSHA"). *See* 29 U.S.C. § 651 (2014). However, this action was not brought under the OSHA, rather under the CWA. The lower court analogized the OSHA to the CWA, failing to cite any precedent declaring these statutes analogous to one another. R. at 9. Additionally, in both *Trinity Industries, Inc.* and *Brock*, the issues centered on the exclusion of evidence obtained by an invalid warrant to an administrative inspection. *See* 16 F.3d at 1457–1459; 800 F.2d at 1330. These cases are distinguishable because the action in this case was brought under violations of

the CWA, no warrant was obtained, and Riverwatcher is not an administrative agency, but rather a non-profit organization.

## III. The Farm is required to obtain a NPDES permit because it is a CAFO subject to permitting by virtue of being a point source and through discharge of manure from its land application area.

The CWA contains a "citizen-enforceable zero-discharge standard . . . the standard for the permitting requirement under the [NPDES]." Karl S. Coplan, *Citizen Litigants Citizen Regulators: Four Cases Where Citizen Suits Drove Development of Clean Water Law*, 25 Colo. Nat. Resources, Energy & Envtl L. Rev. 61, 68 (2014). A point source discharge of water pollutants other than a zero discharge requires a permit. *Id.* Riverwatcher joined this suit pursuant to 33 U.S.C. § 1365 as the prohibition against unpermitted discharges is unambiguously within the ambit of the citizen enforcement suit. *Id.*; *see also* 33 U.S.C. § 1365 (2014). Thus, "[t]he discharge of *any pollutant* by *any person* shall be unlawful." 33 U.S.C. § 1311 (a) (2014) (emphasis added).

The CWA prohibits point sources from discharging pollutants into the waters of the United States, unless it is in compliance with a valid NPDES permit obtained prior to discharge. 40 C.F.R. § 122.23 (2014) CAFOs are point sources, and any point source that discharges without a NPDES permit is in violation, and remains in violation of the CWA until it obtains a permit, or no longer meets the definition of a point source. *See* 33 U.S.C. § 1362(14) (2014); 40 C.F.R. § 412.30 (2014); 40 C.F.R. § 122.23 (2014).

### A. The Farm is a Concentrated Animal Feeding Operation.

First, to qualify as a CAFO, an operation must be an AFO. 40 C.F.R. § 122.23 An AFO is a facility where animals are stabled or confined, and fed or maintained, for at least forty-five days within a year. 40 C.F.R. § 122.23. Additionally, crops, vegetation, forage growth, or post-harvest

residues are not sustained in the normal growing season over any portion of the facility. *Id.* A CAFO is similarly defined as an AFO, but classified according to size. 40 C.F.R. § 122.23(b)(6). An AFO may qualify as a medium CAFO if 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 animal confined in the operation.

40 C.F.R. § 122.23(b)(6)(ii)(A)(B). The EPA or a state environmental agency may designate an AFO as a CAFO, subject to permitting regulation, if it determines the facility is "a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.23(c).

The Farm qualifies as a medium CAFO, housing between 200 and 699 mature dairy cows. Since there is no claim that any waters of the United States pass over, across or through the Farm's operation, it must qualify as a CAFO as it discharges pollutants through a manmade ditch and device. 40 C.F.R. § 122.23(b)(6)(ii). The Farm houses 350 unpastured cattle. R. at 4. Periodically, manure from storage lagoons is pumped into tank trailers and spread over 150 acres of the Farm's fields. R. at 5. The fact that crops are grown on the fields does not preclude the Farm from CAFO classification. The vegetation criteria applies to the facility or lot in which the animals are confined under the definition. *Cmty Ass'n for Restoration of the Env. v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002).

The Farm qualifies as a CAFO because it discharges pollutants through a manmade ditch installed and excavated by its predecessor. Even though the Farm did not construct the ditch, it is nevertheless liable. For example, the court in *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 45 (5th Cir. 1980), held one is "not relieved from liability simply because it does not actually construct the conveyances" by which the pollutants are deposited. Riverwatcher observed discharge running

through the Canal, a manmade ditch, and directly depositing pollutants into waters of the United States. R. at 6. Thus, the Farm qualifies as a medium CAFO because it falls within the animal quota for dairy cattle, and pollutants were discharged from a manmade ditch into the waters of the United States.

### B. CAFOs constitute a "point source" under the CWA, and therefore are subject to NPDES permitting requirements.

CAFOs are point sources under the CWA. 33 U.S.C. § 1362 (14). The NPDES regulates discharges from point sources into the waters of the United States. 40 C.F.R. § 122.23. The term "ditch" is included in the definition of a point source. 33 U.S.C. § 1362(14). However, a CAFO is the only industry specifically identified by Congress and included in the statutory definition of a "point source." 33 U.S.C. § 1362(14). By specifically naming CAFOs as point sources, Congress recognized the need to regulate pollutants generated and discharged from these operations. This contention is supported by *Natural Resources Def. Council v. Train.* 396 F. Supp. 1393 (D.D.C. 1975). In *Train* the court held the EPA could not exempt discharges from a CAFO from the NPDES permitting requirements. *Id.* at 1402.

Beyond the scope of a CAFO, the discharge at issue may also be regulated as a point source under the general "ditch" classification, because the effluent flowed through a "ditch" to the Canal, and into navigable waters. 33 U.S.C. § 1362 (14). Furthermore, prior precedent supports Riverwatcher's argument that the Farm CAFO discharge is in direct violation of the CWA. *See Concerned Area Residents for the Envt. v. Southview Farm,* 34 F.3d 114, 117–118 (2d Cir. 1994); *Am. Canoe Ass'n v. Murphy Farms, Inc.,* 412 F.3d 536, 538 (4th Cir. 2005); *Idaho Rural Council v. Bosma,* 143 F.Supp.2d 1169, 1176 (D.Idaho 2001) *Cmty Ass'n for Restoration of the Envt. v. Henry Bosma Dairy,* 305 F.3d 943, (9th Cir. 2002); *Higbee v. Starr,* 598 F. Supp. 323, 331 (D.Ark. 1984).

For example, in *Southview Farm*, the Second Circuit held the defendant's operations qualified as a CAFO. 34 F.3d at 115. Because the court held the operations to be a CAFO, a point source under the CWA, the liquid manure spreading operation was declared not an agricultural non-point source. *Id.* at 122. Additionally, in *Southview Farm*, the cattle were not pastured, but housed in barns, and the manure was collected and stored in lagoons for future use as fertilizer to its lands for crops. *Id.* at 117. The plaintiff in that case, observed the farm spreading liquid manure to a field, and the manure flowing through a ditch and into the Genessee River. *Id.* The defendant argued its operations were within the agricultural stormwater exemption, to point source discharges, under the CWA. *Id.* at 121. The court stated, "while the statute does include an exception for 'agricultural stormwater discharges,' there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." *Id.* at 115. Therefore, the court held the liquid manure spreading operations were point sources within the CWA, and the farm was within the definition of a CAFO, and not subject to the agricultural exemption. *Id* at 122.

Although *Southview Farm*, 40 C.F.R. § 122.23 (b)(3) extends the agricultural exemption to CAFOs. However, § 122.23(b)(3) declared the exemption only applicable where manure is applied according to site specific NMPs, which ensure *appropriate agricultural utilization* of the nutrients in the manure. 40 C.F.R. § 122.23 (e).

### C. Discharges from land application are subject to NPDES permitting requirements.

The amended regulations confirm land application of manure is subject to NPDES permitting, and any application in excess of agronomic rates is not exempt as agricultural stormwater discharge. *See* 40 C.F.R. § 122.23. These regulations include the discharge of manure to navigable waters, as a result of the manure application by the CAFO to appurtenant lands areas under its control. *See id.* Application areas include, "lands under the control of an AFO owner or

operator, whether it is owned . . . to which manure . . . from the production area is or may be applied." *Id.* As *Southview Farm* indicated, land application areas are an integral and indispensable part of CAFO operations. *Id* at 114.

### D. Agricultural Stormwater Discharges are exempt from the NPDES permitting requirements.

The CWA definition of point source expressly includes CAFOs, unless the agricultural stormwater exemption applies. *See* 33 U.S.C. § 1362. The largely undisputed facts establish that the Farm qualifies as a CAFO and pollutants were discharged from the Farm, to the Canal, and into the River. The agricultural stormwater exemption does not apply because the Farm's land application was not in accordance with appropriate agricultural practices. Further, it is uncontested that the pollutants originated from the Farm's CAFO and would be subject to regulation under the CWA. R at 8. The Farm argues that the pollutants, when applied through land application and combine with precipitation, are exempt as agricultural stormwater. Even though "a precipitation-related discharge of manure . . . from land areas under the control of a CAFO is an agricultural stormwater discharge," this is only applicable if the land application was applied according to "site specific nutrient management practices," ensuring "appropriate agricultural utilization of the nutrients in the manure . . . ." 40 C.F.R. § 122.23 (e). Thus, the Farm's argument that applying manure during a rain event is inconsistent with appropriate land application procedures, the statute, EPA's regulations, guidance documents, manuals, and prior court precedent.

Since Congress did not define the term, "agricultural stormwater," the EPA was left to reconcile the exemption with the explicit requirement of regulating discharges from CAFOs. Accordingly, where the precipitation is merely a contributing factor to the discharge, the pollutants from the Farm's CAFO result in an unqualified discharge and is in violation of the CWA. Moreover, the Fifth Circuit stated CAFOs that actually discharge into waters of the United States

are required to apply for NPDES permits. *See National Pork Producers Council v. EPA,* 133 S. Ct. 1326 (2013); *Alt v. United States E.P.A.,* 979 F. Supp. 2d 701, 708 (N.D.W. Va. 2013). In *Waterkeeper Alliance, Inc. v. United States E.P.A.,* 399 F.3d 486 (2d Cir. 2005), the court rejected the defendant's argument that all stormwater discharges from land-applied waste be exempt from permitting requirements under the stormwater exemption. The court pointed to evidence that ninety percent of all CAFO waste is applied to land, applying the agricultural stormwater exemption to all discharges given this percentage, would largely defeat the purpose of the CAFO regulations under the CWA for water quality. *Id* at 511. Also, the court noted that excessive application of manure and other waste makes the discharge of pollutants during a rain event possible, and even probable. *Id.* at 494–95.

In this case, the manure was applied during a rainfall event to the fields saturated by the rain. R at 6. These occurrences led the discharge to flow from the fields and into the Canal. Therefore, it is not characterized as "stormwater" because the precipitation was merely a contributing factor and the not the direct cause. Additionally, the District Court's reliance on *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D.W. Va. 2013) is misplaced. *Alt* is distinguishable from this case because in *Alt* the court stated that runoff, outside the animal production area, did not constitute a CAFO discharge. *Id* at 713–714. In contrast, the fields from which the discharge emanated, in this case, are under the control of the Farm and part of the CAFO. Whereas in *Alt*, the discharge ran across a neighboring pasture and into navigable waters. *Id* at 704. The discharge in *Alt* was not the result of a land application practice, as was the discharge from the Farm.

Finally, the State did not initially review the plan, as it was submitted pursuant to the "no discharge" AFO. R. at 5. Rather, it was only upon later review that the State found the plan insufficient. *Id*. Further, Dr. Mae's testimony provided evidence suggesting that land application

during a rain event is a very poor management practice, almost always resulting in excess runoff. R. at 6. Based on Dr. Mae's statements, such land application practices do not constitute *appropriate* agricultural utilization of the nutrients in the manure. *See* 40 C.F.R § 122.42(e)(1)(vi)-(ix).

## IV. In the event that the Farm is not a CAFO, excess nutrient discharges from its manure application removes it from the agricultural stormwater exemption and subjects it to NPDES permitting liability.

Land application, of manure in excess of agronomic rates, triggers the NPDES permitting requirements and is not an exempt agricultural stormwater discharge. Once a facility discharges illegally, it is subject to NPDES permitting and the permit will regulate the land application through a NMP that is incorporated into the permit. Christopher R. Brown, *Uncooperative Federalism, Misguided Textualism: The Federal Courts' Mistaken Hostility Toward Pre-Discharge Regulation of Confined Animal Feeding Operations Under the Clean Water Act*, 30 Temp. J. Sci. Tech. & Envtl. L. 175, 189–192 (2011). An unpermitted AFO must document compliance with appropriate nutrient management standards. S*ee* 40 C.F.R § 122.42 (e)(1)(vi)-(ix). The State failed to enforce permitting requirements for the Farm as a CAFO, or a "no discharge" AFO by failing to review the Farm's NMP. Therefore, EPA is compelled to enforce the regulation and permitting requirements in compliance with the CWA. EPA is also authorized to enforce any violations of the CWA for discharges that result from excessive land application practices, and civil and criminal sanctions may be imposed for such violations. 33 U.S.C. § 1319 (2014).

The Farm operates as a "no discharge" AFO which contributed to the pollution of the waters of the United States through its land application practices. Even if not qualified as a CAFO,

the Farm is nevertheless subject to regulations for any discharge, and is in violation of the CWA for any discharges of pollutants into waters of the United States.

## V. The Farm is subject to a citizen suit under RCRA because its land application practices constitute the disposal of a non-hazardous solid waste.

The RCRA is a "comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Brod v. Omya, Inc.*, 653 F.3d 156, 164–165 (2d Cir. 2011). RCRA provides private individuals a means to commence an action in a district court to enforce RCRA's waste disposal mandates. 42 U.S.C. § 6972 (2014). The citizen suit provision, § 6972(b)(2)(A), provides for an imminent and substantial endangerment claim under § 6972 (a)(1)(B). Suits brought under § 6972 (a)(1)(A), such as an open dumping claim, are subject to similar notice and delay requirements, all of which have been satisfied and remain uncontested in the case at hand. 42 U.S.C. § 6972 (b)(1)(A) (2014).

### A. The Farm's waste disposal practices constitute application of solid waste under 40 C.F.R. § 261.2(a)(1).

Pursuant to RCRA, "solid waste" is "any garbage, refuse . . . and other *discarded material,* including solid . . . [or] liquid . . ." including "[d]iscarded material . . . resulting from industrial, commercial . . . and agricultural operations . . . ." 42 U.S.C. § 6903(27) (emphasis added); *see also* 42 U.S.C. § 6901(a)(2) (referring to "scrap, discarded, and waste materials."). RCRA does not define discarded material. Courts have applied the term within its plain meaning as "cast aside; reject; abandon; give up." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004) (quoting The New Shorter Oxford English Dictionary 684 (4th ed.1993)). RCRA's definition of disposal, is "discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste . . . into or on any land or water." 42 U.S.C. § 6903(3). The lower court erred in finding that "it is

far from clear that these materials are being 'discarded'" because the acid whey is a discarded waste material that was given to the Farm and abandoned by Chokos. R. at 11.

**B. The Farm's placement of solid waste onto their fields constituted open dumping because the solid waste was discarded in a manner that contaminates groundwater and does not fall within the agricultural waste exclusion under 40 C.F.R. 261.4(b)(2).**

Congress enacted RCRA to "eliminate the last remaining loophole in environmental law" by regulating the "disposal of discarded materials and hazardous wastes." H.R.Rep. No. 94–1491(I), at 4 (1976). Accordingly, RCRA covers waste by-products of manufacturing processes as well as manufactured products themselves once they have served their intended purposes. *No Spray Coal., Inc. v. City of New York,* 252 F.3d 150 (2d Cir. 2001). The key to a manufactured product being a solid waste, is if that product has served its "intended purpose" and is no longer wanted. *Id.* Certain "commercial chemical products . . . are not solid wastes if they are applied to the land and that is their ordinary manner of use." 40 C.F.R. § 261.2 (c)(ii) (2014). However, RCRA § 4005 specifically prohibits the practice of "open dumping of solid waste." 42 U.S.C. § 6945 (a).

In *No Spray Coal.,* the Second Circuit held that "pesticides are not . . . 'discarded' when sprayed into the air with the design of effecting their intended purpose." 252 F.3d at 150 (citations omitted). In *Ecological Rights,* the court found_wood preservative applied to utility poles to preserve them is its intended purpose, and is not an RCRA "solid waste." 713 F.3d 502, 516 (9th Cir. 2013). This analysis turns on whether the material is being placed in the environment as "an expected consequence of the [product's] intended use." *Id.* If yes, it has not been "discarded." *Id.* Further, the court in *Safe Air for Everyone* found the reasoning of several circuits persuasive in identifying whether a material qualifies as "solid waste," particularly:

> 1) whether the material is "destined for beneficial reuse or recycling in a continuous process by the generating industry itself;" (2) whether the materials are being actively reused, or whether they merely have the potential of being reused; (3) whether the materials are reused by its original owner, as opposed to use by a salvager or reclaimer.

373 F.3d at 1041.

Whey is the liquid substance obtained by separating the coagulum from milk or cream in cheese and yogurt production. Whey obtained from a procedure, in which a significant amount of lactose is converted to lactic acid, or from the curd formation by direct acidification of milk, is known as acid whey. Carissa Wolf, *Away with the Whey: Chobani Yogurt Puts Rural Idaho in a Stink*, Boise Weekly, Aug. 14, 2013, http://www.boiseweekly.com/boise/away-with-the-whey-chobani-yogurt-puts-rural-idaho-in-a-stink/Content?oid=2929398. Greek yogurt production yields a tremendous amount of acid whey. There is a 3:1 ratio of acid whey-infused water to every drop of Greek yogurt that is spread onto farm fields. Stephen R. Miller, *Three Legal Approaches to Rural Economic Development*, Kan. J.L. & Pub. Pol'y, Spring 2014, at 345, 359.

The fertilizer disposal practices, apart from the mixture of whey, constitute a solid waste subject to RCRA. In *Cmty. Ass'n for Restoration of the Env't, Inc. v. George & Margaret LLC*, 954 F. Supp. 2d 1151, 1154 (E.D. Wash. 2013) defendants argued that manure, used by the dairies as fertilizer, was not "discarded" and was therefore not "solid waste" within the meaning of RCRA. The defendants also cited to EPA regulations exempt from federal waste disposal standards as "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." *Id.* at 1162; *see also* 40 C.F.R. § 257.1 (c)(1). The defendants argued that the manure was "useful" as a fertilizer, and was not transformed into "solid waste" when over-applied or leaked as an unintended consequence of its intended use. Finally, defendants argued that imposing RCRA liability for over-application of manure as "solid waste" would lead to the

"untenable result" of requiring every dairy in the nation to operate, as a sanitary landfill. An illegal "open dump" is "any facility or site where solid waste is disposed of which is not a sanitary landfill." 42 U.S.C. § 6903(14); *see also Cmty. Ass'n for Restoration of the Env't, Inc.,* 954 F. Supp. 2d at 1162.

However, the court agreed with the plaintiffs ("CARE") who contended manure leaked into groundwater and over-applied to fields is "discarded" because it has been abandoned and no longer serves a useful purpose and when manure is applied in quantities greater than crop in-take, the nutrients can leach into the soil and groundwater, resulting in high nitrates. The court explicitly stated, no blanket animal waste exception excludes animal waste from the solid waste definition. "Instead, the determination of whether defendants "return" animal waste to the soil as [fertilizer] is a functional inquiry focusing on defendants' use of the animal waste products rather than the agricultural waste definition." *Id.*

Although 40 C.F.R. § 257.1 (c)(1) specifically states the agricultural exemption applies to "manures and crop residues, returned to the soil as fertilizers or soil conditioner," these are not the facts of the case at hand because acid whey is neither manure nor a crop residue. The Chokos plant was open for three years before the Farm began accepting acid whey produced by the plant. R. at 5. Since 2012, the Farm has added acid whey to its manure lagoons mixture spread on its fields. *Id.* However, the fact that the whey is mixed with manure, does not transform the acid whey into manure or crop residue. Land application occurred during a rain event, which according to expert Dr. Ella Mae, "is a very poor management practice and will nearly always result in excess runoff of nutrients from fields." R. at 6. The fact that the farm may not have violated its NMP requirements in manure application, is irrelevant under the precedent set forth in *Cmty. Ass'n for Restoration of the Env't, Inc.*, *supra*.

The cases referenced in the District Court's opinion can be differentiated from this case because the manure from direct agricultural byproducts allows direct recycling under the agricultural exemption. While it may be argued that acid whey comes from milk, to apply the agricultural exemption is far-reaching. Acid whey is the result of a straining process that occurs in yogurt-making and is a product separate from its origin. In frequent cases, yogurt companies are even forced to pay farmers to take this waste off their hands. Dan Charles, *Why Greek Yogurt Makers Want Whey To Go Away*, NATIONAL PUBLIC RADIO, Nov. 21, 2012, *available at* http://www.npr.org/blogs/thesalt/2012/11/21/165478127/why-greek-yogurt-makers-want-whey-to-go-away.

For similar reasons, the court also erred in finding the mixture was excluded from being a solid waste because it was a "land application of agricultural products" as "manure and whey are agricultural wastes." R. at 11. It is undisputed that the runoff from the Farm's land application fields contained "pollutants in the form of nitrates, a chemical waste, and fecal coliforms, as well as suspended solids." R. at 7. The Farm concedes "suspended solids" were present. This evidences that solids were dumped after serving their intended purpose. Furthermore, the direct discarding of this solid resulted in runoff into water taking the form of a "suspended solid."

## VI. The District Court erred in applying the imminent and substantial endangerment standard in terms of potential harms to individuals and the environment.

A plaintiff must establish three things in an imminent and substantial endangerment citizen suit under RCRA. 42 U.S.C. § 6972 (a)(1)(B). First, the defendant . . . is a generator or transporter of solid or hazardous waste. *Id.* Second, the defendant has "contributed" . . . disposal of solid or hazardous waste. *Id.* Third, the waste in question may present an imminent and substantial endangerment to health or the environment. *Id.* The "crux of the case" turns on the issue of whether

the substance in question is "solid waste" within the meaning of RCRA. *Safe Air for Everyone*, 373 F.3d at 1041.

### A. The imminent and substantial endangerment standard requires consideration of the full extent of the risk under 42 U.S.C. § 6972 (a)(1)(B).

Section 6972, provides that suit may be brought against any person "who has contributed or who is contributing to . . . disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." The essential focus is upon the "may present an imminent and substantial endangerment to health or the environment" language of § 6972(a)(1)(B). As a threshold matter, the operative word in § 6972(a)(1)(B) is "may." *Interfaith Community Organization v. Honeywell Int'l, Inc.*, 399 F.3d 248, 258 (3d Cir.2005); *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 299 (5th Cir. 2001); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir.1991). This "expansive language" allows courts authority to grant equitable relief to the extent necessary to eliminate any risk posed by toxic wastes. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1020 (10th Cir. 2007).

The term "imminent" is not defined by RCRA. However, the Supreme Court held "endangerment can only be 'imminent' if it threatens to occur immediately." *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996). Nevertheless, a finding of "immanency" does not require a showing that actual harm will occur immediately, as long as the risk of threatened harm is present. *Id.* at 485. The term "substantial" is also undefined by RCRA. Case law defines an endangerment as "substantial" when it is reasonable cause for concern that someone or something may be exposed to risk of harm by release of these substances in the event remedial action is not taken. *See Calif. Dept. of Toxic Substances Control v. Interstate Non-Ferrous Corp*., 298 F.Supp.2d 930, 980 (E.D. Cal. 2003). Most importantly, "if an error is to be made in applying the endangerment standard,

the error must be made in favor of protecting public health, welfare and the environment." *Interfaith Cmty. Org.*, 399 F.3d. at 259; *see also Burlington N.*, 505 F.3d at 1021.

In *Burlington*, the Tenth Circuit held that injury to persons and the considerations of harm to the environment must be both evaluated. 505 F.3d at 1021. Section 6972(a)(1)(B)'s phrasing indicates proof of harm to a living population is unnecessary to succeed on the merits. *See also Interfaith Cmty. Org.*, 399 F.3d. at 259. The Farm's solid waste entered a drinking source, causing pollution and nitrate disposal. As discussed in the sections below, nitrates have significant impacts on human health and are a significant environmental impact to the River.

### B. The district court failed to adequately weigh the evidence that Moon Moo's disposal practices have allowed nitrates to seep into the water supply, deeming it unsafe for infant consumption.

The term "endangerment" has been interpreted by courts to mean a threatened or potential harm; thus, it is not necessary that the plaintiff show proof of actual harm to health or the environment. *Dague*, 935 F.2d at 1355–56. Therefore, relief is authorized when there *may* be a risk of harm. This gives effect to Congress' intent "to confer upon the courts the authority to grant affirmative equitable relief to the extent necessary to eliminate *any risk* posed by toxic wastes." Id. at 1355 (emphasis added); *see also Burlington*, 505 F.3d at 1013. (emphasis added).

Farmville uses the River as a drinking water source. R.at 5. After receiving complaints that the River smelled of manure and "was an unusually turbid brown color," Farmville issued an advisory stating high levels of nitrates made the water unsafe for infant consumption. Experts were unable to pinpoint the Farm as the only "but for" cause of nitrates; however, it is undisputed that Riverwatcher observed the contamination first-hand. R. at 6. Riverwatcher photographed the Farm's discolored water following from the fields through a drainage ditch into the Canal that directly connects with the River, Farmville's drinking source. *Id.* Riverwatcher also took samples

of the water flowing from the ditch and the test results showed "highly elevated levels of nitrates and fecal coliforms." *Id.* While the Farm may not be the only "but-for" cause, it is undisputedly at least one cause of the contamination that impacted both human health and the environment. Furthermore, under the appropriate imminent and substantial endangerment standard, this is enough. The court erred in dismissing this claim holding, "[i]t appears that nitrates pose no health risks to adults and juveniles, and that households with infants administer bottled water to their infants, avoiding any potential health risk." R. at 11–12. The District Court also incorrectly reasoned that because preventive measures could save infants, "[n]o imminent and substantial endangerment to human health thus exists." R. at 12.

Even if this Court holds that the whey and manure mixture did not harm the environment, the uncontested fact still remains that nitrate levels were too high for infant consumption. Infants fall within the "human health" element of harm, and they should not be overlooked as a victim. Although the advisory stated infants should be given bottled water, the municipal drinking water still remained unsafe for infant consumption as a result of the Farm's manure application practices. The EPA states, "[i]nfants below six months who drink water containing nitrate in excess of the maximum contaminant level could become seriously ill and, if untreated, may die. Symptoms include shortness of breath and blue baby syndrome." *Basic Information about Nitrate in Drinking Water*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (2014), *available at* http://water.epa.gov/drink/contaminants/basicinformation/nitrate.cfm. The standard is not whether the harm may be mitigated (i.e. feeding infants with bottled water). Mitigation does not allow the bad actor to escape liability under the appropriate imminent and substantial endangerment standard. See 42 U.S.C. § 6972. Therefore the lower court erred and the Farm should be held liable.

## CONCLUSION

The Canal is navigable water under the CWA, and is protected under the public trust doctrine. Therefore Riverwatcher did not commit a trespass because the Canal must remain open to the public, regardless of ownership. However, even if this Court does not find the Canal to be a navigable waterway, the evidence obtained by Riverwatcher is nevertheless admissible because the exclusionary rule does not apply. The evidence reflects a discharge into navigable waters. The CWA expressly prohibits point sources from discharging pollutants into the waters of the United States, with the exceptions of either an agricultural stormwater exemption or a valid NPDES permit obtained prior to discharge. Additionally, CAFOs are point sources, and therefore subject to NPDES permitting requirements. Even if the Farm does not qualify as a CAFO, it is still subject to NPDES permitting requirements as its land application procedures are not in compliance with an approved NMP or accepted as appropriate agricultural practices. Further, discharge from the Farm does not qualify as an agricultural stormwater runoff.

The Farm's application of fertilizer combined with acid whey constituted a solid waste. Therefore the Farm committed an open dumping of solid waste subject to RCRA regulation, as its application of fertilizer combined with acid whey constitutes a solid waste. Even if this court fails to find that the acid whey constitutes a solid waste, the lower court erred in applying the imminent and substantial endangerment standard as they did not give proper weight to the dangers the contamination presented to infants and the environment.

For the foregoing reasons we respectfully ask this court to reverse and remand on all issues addressed and under the applicable law set forth herein.