DOCKET NO. 14–1248

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MOON MOO FARM, INC.,
Defendant-Appellant,

UNITED STATES OF AMERICA
Plaintiff-Appellant,

and

DEEP QUOD RIVERWATCHER, INC., AND DEAN JAMES,
Intervener-Plaintiff-Appellant,

v.

MOON MOO FARM, INC.,
Defendant-Appellant.

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

CASE NO. 155–CV–2014

BRIEF OF APPELLANT UNITED STATES OF AMERICA

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

STATUTES & REGULATIONS

SECONDARY SOURCES

JURISDICTION

This case involves an appeal following the issuance of the Order of the United States District Court for New Union, granting Moon Moo Farm's motion for summary judgment on all claims and denying EPA's and Riverwatcher's motions for summary judgment on all claims. R. at 1, 12. The district court had proper supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) (2006) because the facts constituting the trespass were inextricably bound up with the occurrences giving rise to Riverwatcher's affirmative federal claims. The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for the District of New Union. 28 U.S.C. § 1291(2006).

STATEMENT OF THE ISSUES

I. The public trust doctrine provides that public trust navigable waters in a state must be held by the state in trust for the benefit of all the people and private interests cannot interfere with the public's use. Moon Moo Farm owns the lands under and adjacent to the Queechunk Canal. Can this man-made canal, which is navigable in fact and diverts most of the water from a preexisting water of the United States, be deemed a public trust navigable water?

II. The Fourth Amendment protects citizens from unreasonable searches and seizures from government agencies and other public officers. Mr. Dean James, a private citizen acting in good faith, obtained evidence of illegal discharges with no governmental influence or assistance while on his boat in the Queechunk Canal. May this evidence be admissible in a civil enforcement action?

III. Under the Clean Water Act, absent a permit and subject to certain limitations, the discharge of any pollutant by any person shall be unlawful. A discharge means any addition of any pollutant to waters from any point source, which includes concentrated animal feeding operations. Can Moon Moo Farm, a dairy farm definable as a medium concentrated animal feeding operation, escape liability for actually discharging manure into waters of the United States despite a precipitation-related event?

IV. Under the Resource Conservation and Recovery Act, a private citizen can bring suit if he or she establishes an imminent and substantial endangerment to human health. Riverwatcher has alleged that Moon Moo Farm's manure and acid whey mixture has contaminated its drinking water source and which may be harmful to infants if ingested. Has Riverwatcher met its burden to maintain its imminent and substantial endangerment claim?

STATUTORY AND REGULATORY BACKGROUND

The Federal Water Pollution Control Act ("FWPCA"), more commonly referred to as the Clean Water Act ("CWA"), FWPCA §§ 101 - 607, 33 U.S.C §§ 1251 - 1387, is the primary federal statute that the Environmental Protection Agency ("EPA") uses to regulate water pollution. It was created "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." FWPCA § 101(a), 33 U.S.C. § 1251(a). To achieve this goal, the CWA imposes national, technology-based standards on individual "point sources" to make the nation's waters fishable and swimmable by eliminating the discharge of pollutants into navigable waters. *Id*. A point source is defined as "any discernible, confined, and discrete conveyance…from which pollutants are or may be discharged." FWPCA § 502(14), 33 U.S.C. § 1362(14).

Recognizing, however, that a sudden and outright prohibition of all water discharges by certain members of the public would bring necessary societal activities to a grinding halt, *see* S. Rep. 92-414, 42-43 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3709, Congress structured the CWA to allow for the granting of permits through the National Pollutant Discharge Elimination System ("NPDES") which control the amount and concentration of certain pollutants. FWPCA § 301(a), 33 U.S.C. § 1311(a). NPDES permits may be issued by the EPA itself or by the states if federally-approved. FWPCA § 402, 33 U.S.C. § 1342.

Relevant for this case, Congress amended § 1362(14) in 1987 to add an exemption to the statutory definition of a point source. The Water Quality Act of 1987, Pub. L. No. 100-4, § 503, 101 Stat. 7, 75 (1987). As amended, § 1362(14) defined "point source" as:

> [A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture*. *Id*. (italics added).

Despite the additional language, however, Congress chose not to define the term "agricultural stormwater" and the EPA did not promulgate any regulations defining the term.

After being sued in 1989 for failing to publish a plan to revise existing effluent limitations for the industry pursuant to 33 U.S.C. § 1314(m), the EPA began drafting new rules which were

ultimately promulgated a rule in 2003. *NPDES Permit Regulation and ELGs and Standards for CAFOs*, 68 Fed. Reg. 7176 (Feb. 12, 2003) ("2003 CAFO Rule"), *codified at* 40 C.F.R. §§ 122.23, 122.42. These rules which, *inter alia*, expanded the definition of exempt "agricultural stormwater discharge" to include land application discharges,[1] if the application comported with appropriate site-specific nutrient management practices. *Id*. at 7198. If the land application was not in compliance with those practices, however, the land application discharge would be an unpermitted discharge in violation of the CWA. *Id*.

Although many parts of the 2003 CAFO Rule were struck down in *Waterkeeper Alliance v. Envtl. Prot. Agency*, 399 F.3d 486 (2nd Cir. 2005), the Second Circuit upheld EPA's determination regarding land application discharges and explained that EPA's interpretation of the [Clean Water] Act in this regard was reasonable in light of Congressional intent in excluding agricultural stormwater from the meaning of the term "point source." *Id.* at 508-09. In response to the Second Circuit's decision, the EPA revised its rules to adhere to the *Waterkeeper* decision, allowed for notice and comment, and issued the new rule in 2008. *See Revised NPDES Permit Regulation and Effluent Limitations Guidelines for CAFOs in Response to the Waterkeeper*, 73 Fed. Reg. 70418 (Nov. 20, 2008) ("2008 CAFO Rule"). The EPA also issued several guidance letters reiterating that "the agricultural stormwater exemption applies only to precipitation-related discharges from land application areas...where application of manure, litter, or process wastewater is in accordance with appropriate nutrient management practices [NMPs]" and not to "discharges from the CAFO production area." *See Nat'l Pork Producers Council v. Envtl. Prot. Agency*, 635 F.3d. 738 (5th Cir. 2011). Although challenged in *Nat'l Pork*, the Fifth Circuit held that not only were the EPA Letters not reviewable, but also that such letters "merely restate § 1432's prohibition against discharging pollutants without an NPDES permit." *Id*. at 756.

The other statute in this case is the Resource Conservation and Recovery Act ("RCRA"). RCRA §§ 1002 - 11012, 42 U.S.C. §§ 6901 - 6992k (2012). In 1976, Congress revised the Solid Waste Disposal Act ("SWDA") and enacted RCRA in response to growing concerns about the health and environmental problems associated with the rising tide of waste materials generated by an ever-increasing human population. *See* RCRA § 1002(a), 42 U.S.C. § 6901(a). RCRA

[1] The EPA defined the "land application area" to mean land under the control of an AFO [animal feeding operation] owner or operator…to which manure, litter, or process wastewater from the production area is or may be applied." 40 C.F.R. § 122.23(b)(3).

contains regulatory standards but also has a health-oriented focus to achieve its goals of conservation, reducing waste disposal, and minimizing threats to human health and the environment. *Id*. at § 1002(b), § 6901(b). Moreover, RCRA is directed by the EPA or authorized states and "the program imposes comprehensive obligations and carries significant sanctions for noncompliance.[2]

Relevant here, RCRA allows citizens to initiate suit to enforce RCRA's waste disposal requirements or remedy contamination. RCRA § 7002, 42 U.S.C. § 6972. Once initiated, the suit may be maintained if, *inter alia*, the citizen can show that some person or entity is causing an "imminent and substantial danger" from their handling of solid or hazardous wastes. For hazardous wastes to be subject to regulation, the substance in question must be a solid waste. Solid wastes include "garbage, refuse, sludge from a waste treatment plant...and other discarded material, including solid, liquid and semisolid, or contained gaseous material resulting from industrial, commercial, mining, and *agricultural operations*." RCRA § 1004(27), 42 U.S.C. § 6903(27) (italics added). If determined the be a solid waste, then a factfinder can determine whether or not the substance is a hazardous waste subject to regulation under RCRA.[3]

STATEMENT OF THE FACTS

THE PUBLIC CALLS AND EPA ANSWERS

In the winter of 2012 through the early spring of 2013, Deep Quod Riverwatcher, Inc. ("Riverwatcher"), a non-profit environmental organization incorporated in New Union, began receiving complaints that the Deep Quod River smelled of manure and was an unusually brown in color. R. at 6. In response to these complaints, and coupled with the fact that the Farmville Water Authority had issued three "nitrate advisories" within the past five years warning of high levels of nitrates and unsafe drinking water for infants, Mr. Dean James took action (hereinafter "Riverwatcher" also includes Mr. Dean James). R. at 6. Mr. James is a citizen of New Union and the head of the Deep Quod River organization. R. at 6.

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[2] Theodore L. Garrett, The RCRA Practice Manual 1 (3rd ed. 2013).

[3] The term "hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may –

(A) cause or significantly contribute to an increase in mortality or an increase in serious irreversible...illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored transported, or disposed of, or otherwise managed. RCRA § 1004(5), 42 U.S.C. § 6903(5).

On April 12, 2013, Mr. James packed up his "jon boat"[4] and performed an investigatory patrol up and down the Deep Quod River. R. at 6. When Mr. James reached the Queechunk Canal ("Canal"), like most everyone else who traverses the Deep Quod River, he ignored the "No Trespassing" signs and proceeded up the Canal adjacent to Moon Moo Farm's ("Moon Moo Farm" or "Farm") fields. R. at 6. While remaining on his boat, Mr. James observed and photographed manure spreading operations taking place on the fields. R. at 6. Although manure spreading is common practice in agriculture, Mr. James also observed and photographed discolored brown water flowing directly into the Canal via a drainage ditch connected to the same fields. R. at 6. Lastly, Mr. James took samples of the water flowing from the ditch were it entered the canal. R. at 6. At his own expense, he had them tested and the results showed highly elevated levels of nitrates and fecal coliforms. R. at 6.

With the evidence obtained, Riverwatcher, led by Mr. James, served on Moon Moo Farm, EPA, and the New Union Department of Environmental Quality, a letter of intent to sue under the citizen suit provisions of the FWPCA § 505 and RCRA § 7002. R. at 7. Before the expiration of the waiting period after notice, however, EPA concluded that Mr. James had provided enough evidence of illegal discharging that they themselves moved forward in bringing its own civil enforcement action against Moon Moo Farm. R. at 7. In this civil, the EPA sought civil penalties under FWPCA § 309(d) as well as injunctive relief under FWPCA § 309(b). R. at 7. Moon Moo Farm answered the complaint and also asserted a counterclaim seeking damages and injunctive relief for trespass against the intervenors Riverwatcher. R. at 7.

MEANWHILE, BACK AT THE FARM

Moon Moo Farm, Inc. is a dairy farm located ten miles from the City of Farmville in the State of new Union, where it is also incorporated and has its principal place of business. R. at 4. The Farm currently owns 350 head of milk cows, yet like most present-day agricultural operations, it houses its cows in a barn instead of raising them in open fields. R. at 4. To deal with the incredible amounts of manure produced from the cows, the cow barn is equipped with a series of drains and pipes to catch the manure and other liquid wastes and channel them out to an outdoor storage lagoon. R. at 4-5. Recently, however, Moon Moo Farm doubled its milking herd

[4] A jon boat is a flat-bottomed boat constructed of aluminum, fiberglass, or wood with one, two, or three bench seats. They are generally used for fishing and hunting.

from 170 cows to 350 cows; in order serve the growing demand for Greek yogurt production at the relatively new Chokos Greek Yogurt processing plant also located in Farmville. R. at 5. Along with the growth in dairy cattle, and manure wastes that naturally follow; since 2012, the Farm has also agreed to take on accept some of the yogurt plant's acid whey. R. at 5. To manage the multiple substances and chemicals, the far, adds the acid whey to its manure lagoons and sprays the mixture on its fields. R. at 5.

THE FIELD AND THE CANAL

As a supplemental source of income, Moon Moo Farm grows Bermuda grass on a nearby field, and this grass is dried and harvested each year for silage. R. at 5. To fertilize these fields, the liquid manure from its storage lagoon is periodically pumped into tank trailers, which are then hauled by tractor, and spread on Moon Moo Farm's field area. R. at 5. This field lies adjacent to the Queechunk Canal, an artificially created body of water that was excavated in the 1940's by a previous owner. R. at 5. This Canal is essentially a bypass canal and it connects to the Deep Quod River – a water of the United States – via its upstream inlet and downstream outlet. The Canal itself is a rather large channel, spanning 150-feet across and 3 to 4-feet deep. R. at 5. Since those qualities make it navigable by canoe or small boat at any given time and since the Deep Quod River flows directly into the Mississippi River, it is frequently used as a nautical shortcut by the public, even with Moon Moo Farm's "No Trespassing" signs. R. at 5.

EPILOGUE

Based on these and other facts and affidavits from the EPA and intervenor Riverwatcher, both plaintiffs moved for summary judgment. R. at 4. Moon Moo Farm also moved for summary judgment and counterclaimed for common law trespass. R. at 4. After due deliberation, the Honorable Romulus N. Remus ultimately agreed with the defendant and granted its motions for dismissal and its trespass counterclaim. R. at 4. This appeal followed.

STATEMENT OF THE CASE

This case revolves around Animal Feeding Operations ("AFOs"), the management of industrialized animal wastes, and the proper assignment of liability under the Clean Water Act and the Resource Conservation and Recovery Act. Unlike human wastes, which are constantly treated and sanitized, animal manure, excrements, and process wastewater from agricultural

operations are subjected to minimal or no treatment. Since improper management of manure continues to cause serious acute and chronic water quality problems throughout the United States,[5] the EPA dedicates substantial time to regulating AFOs that meet the definition of Concentrated Animal Feeding Operations ("CAFOs").[6]

The EPA was made aware of potentially improper manure discharges when Mr. Dean James of Riverwatcher provided notice to the EPA along with his evidence stemming from the drainage ditch owned by Moon Moo Farm. Shortly after, the United States filed suit on behalf of the EPA seeking injunctive relief and civil penalties for violations by Defendant Moon Moo Farm of the permitting requirements of the FWPCA under 33 U.S.C. §§ 1311(a), 1319(c), (d), and 1342. Riverwatcher also intervened as plaintiffs and asserted a claim under FWPCA, 33 U.S.C. § 1365, as well as a RCRA claim under 42 U.S.C. § 6972. Moon Moo Farm answered the complaint and asserted a counterclaim seeking damages and injunctive relief for trespass against Riverwatcher. Both sides moved for summary judgment.

The district court granted Moon Moo Farm's motion to dismiss finding that, *inter alia*, the Queechunk Canal is a man-made body of water not subject to the public trust doctrine, Mr. James was trespassing when he acquired his evidence, that the illegally obtained evidence was inadmissible under the exclusionary rule of the Fourth Amendment, and Moon Moo Farm was not required to apply for and obtain an NPDES permit.

The United States appeals the district court's motion for Moon Moo Farm for four reasons. First, the Queechunk Canal is a public trust navigable waterway that is also subject to public right of navigation under the Commerce Clause. Second, since subject to a public right of navigation, Mr. Dean James was not trespassing on the Canal's waters. Therefore, the evidence he collected from the Canal was legally obtained and may be used as evidence of illegal discharging by Moon Moo Farm. Third, Moon Moo Farm should be required to apply for and obtain an NPDES permit since it is a Medium CAFO that is actually discharging into waters of the United States. Fourth and finally, although the mixture is not a solid waste, the mixture of manure and other effluents constitute an imminent and substantial danger to human health

[5] NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176 (Feb. 12, 2003).

[6] Sara R. Reichenauer, *Issuing Violations Without Tangible Evidence: Computer Modeling for Clean Water Act Enforcement*, 95 IOWA L. REV. 1011, 1019-20 (2010).

subject to redress under RCRA § 7002(a)(1)(B). This Court ordered additional briefing on the substantive merits of the case.

SUMMARY OF THE ARGUMENT

It has been almost twenty years since Congress's deadline to eliminate the discharge of pollutants into navigable waters has passed,[7] but CAFOs, and to a lesser extent AFOs, continue to degrade American water quality due to their generation of massive amounts of animal waste and other chemicals. Appellant United States, on behalf of EPA, brought this suit against Appellee Moon Moo Farm, Inc. because based on evidence properly collected by Mr. Dean James. The evidence showed that Moon Moo Farm was discharging manure from its feeding operation into waters of the United States and it discovered soon after that they were doing so without a NPDES permit. The Honorable Romulus N. Remus of the United States District Court for the District of Progress dismissed all claims against the Farm. The United States maintains that the district court erred in granting summary judgment in favor of the Farm and this Court should reverse and remand for further proceedings.

The district court first erred in ruling that the Queechunk Canal was not a public trust navigable water of the state of New Union. The court instead concluded that because it was privately excavated and because the submerged lands and adjacent banks are the property of the Farm, the owners had the right to exclude others from traversing its waters. The court's mistake was compounded when it ruled that regardless of whether or not the Canal was private property, the public could still not traverse its waters under the Commerce Clause of the Constitution. The fact that the Canal was artificially created has no bearing on whether or not the public may use its waters, especially based on the Canal's physical characteristics and local geography and for these reasons the district court's ruling was wrong.

The district court then ruled, based on the mistaken belief that the Canal wasn't subject to public use, that the evidence obtained by Mr. James and passed on to the EPA was inadmissible because it was obtained illegally. The court believed that since the photographs and water samples were obtained improperly via Mr. James's private trespass, the EPA was forbidden to use such evidence since it was essentially fruit of the poisonous tree. This determination was also

[7] "It is the national goal that the discharge of pollutants into navigable waters be eliminated by 1985." FWPCA § 101(a)(1).

incorrect since the Fourth Amendment's prohibition against unreasonable searches and seizures, and any evidence obtained therefrom, applies only to government action, not private action. Moreover, even if Mr. James's patrol over the waters of the Queechunk Canal was indeed a trespass, the evidence should still be admissible since it was obtained in good faith by a private citizen acting in a way that is legislatively sanctioned by Congress.

Having ruled that the evidence before it was subject to the exclusionary rule of the Fourth Amendment, the court then decided that there was no evidence left from which the EPA could establish a discharge of pollutants from the Farm's drainage ditch and granted summary judgment in the favor of the Defendant. But the court failed to take into consideration that the Farm's characteristics make it definable as a medium-sized concentrated animal feeding operation, which Congress has mandated be regulated as point sources. Since the Farm itself is the proximate source from which pollutants are directly introduced into waters of the United States and since other evidence (e.g. complaints from residents and nitrate advisories) suggests that the Farm has been polluting without a permit for some time, the district court's determination that the Farm has not violated the CWA should be reversed.

Finally, the district court erred in determining that Riverwatcher had not established that the Farm's mixture of manure and acid whey constitutes an imminent and substantial danger to human health subject to redress under RCRA. Although the United States does not necessarily agree with Riverwatcher's claims that such a mixture constitutes a solid waste, it is clear that Riverwatcher has established that the mixture has created a danger to the people of Farmville and is entitled to bring such action under RCRA's citizen suit provision.

In conclusion, the district court's decision eviscerates the delegated authority of the EPA. It frustrates those who have taken affirmative action to abide by the rules and it rewards those, like Moon Moo Farm, who unjustly profit by polluting America's waters but do not help bear the burden of managing its wastes. If left uncorrected, the decision by Judge Remus will – in the short term – open the flood gates to other AFOs and CAFOs challenging the EPA on clearly established rules. But in the long term, the costs will flow directly on society as a whole in the form of clean-up costs and will continue to harm the people of Farmville by negatively affecting its water supplies. Therefore, the decision should be reversed and the case should be remanded for further proceedings.

STANDARD OF REVIEW

In order to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id*. at 556. This court reviews a district court's dismissal of a complaint *de novo* and this court accepts all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in the plaintiff's favor. *Operating Local 649 Annuity v. Smith Barney Fund*, 595 F.3d 86, 91 (2nd Cir. 2010).

ARGUMENT

I. The Queechunk Canal is a public trust navigable in fact water of the State of New Union and also subject to a public right of navigation under the Commerce Clause of the United States.

The Queechunk Canal ("Canal") is first subject to the public trust doctrine of the State of New Union. The public trust doctrine provides that "public trust lands, waters, and living resources in a State are held by the State in trust for the benefit of all the people, and establishes the right of the public to fully enjoy public trust lands, waters, and living resources for a wide variety of recognized public uses."[8] By extension:

> [B]ecause of the "public" nature of trust lands, the title to them is not a singular title...rather, public trust land is vested with two titles: the [dominant] *jus publicum*, the public's right to use and enjoy trust lands and waters for commerce, navigation, fishing, bathing, and other related public purposes, and the [subservient] *jus privatum*, or the proprietary rights in the use and possession of trust lands.[9]

Unlike trust lands, however, trust waters cannot be privately owned. *See United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1912) (stating "that the running water in a great navigable stream is capable of private ownership is inconceivable").

[8] David C. Slade et al., Putting the Public Trust Doctrine to Work 1 (2nd ed. 1997).
[9] *Id*.

Even if the Canal were not subject to New Union's public trust doctrine, it would still be subject to public use under the federal navigable servitude pursuant to Congress's power under the Commerce Clause. This clause states that the Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Relevant here, "commerce includes navigation, and all navigable waters of the United States which are accessible from [a] state other than those in which they lie are the public property of the nation and subject to all requisite commerce legislation by Congress." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979). On that basis, Congress has the broad authority to regulate over the use of channels of interstate commerce; the instrumentalities, persons, or things of interstate commerce, and activities that have a significant relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Since the Queechunk Canal is navigable in fact, is used as a channel for interstate commerce, and has a significant relation to interstate commerce, the man-made Canal is subject to the dominant navigational servitude allowing for public use. Accordingly, since the Canal's waters are concurrently regulated by the State of New Union under the public trust doctrine and the federal government under the Commerce Clause, Moon Moo Farm must yield to the public's dominant right to traverse the waters of the Queechunk Canal.

A. The Queechunk Canal is a public trust navigable water of New Union since the state may not abdicate its control over non-tidal navigable waterways to private owners.

The American public trust doctrine, unlike the English doctrine from which it evolved, extends to navigable freshwater bodies. It generally holds that the ownership of submerged lands under navigable waters within a state's boundaries do not belong to the federal government, since in most instances the title to those submerged lands passed to the state. *See Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 453 (1892) ("the state holds the title to the lands under the navigable waters…and that title carries with it control over the waters above them, whenever the lands are subjected to use"); *see also PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1227-28 (2012) ("Upon statehood, the State gains title within its borders to the beds of waters then navigable or tidally influenced; it may allocate and govern those lands according to state law subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce).

However, the Supreme Court went on to explain that such title:

> [I]s a title different in character from that which the state holds in lands intended for sale…It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. *Illinois Cent. R. Co*. at 453.

Therefore, states may convey the jus privatum interest in trust lands to private ownership, but the public's jus publicum interest – always to be held by the state – cannot be conveyed or alienated. *See Id*. at 453 ("The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties...than it can abdicate its police powers").

Contrary to Moon Moo Farm's wishes, the waters flowing over its Canal are held in the public trust. Appellees are correct that the bypass was created solely through privately-held lands (*e.g.*, Moon Moo Farms jus privatum lands) and were properly conveyed by New Union. R. at 5. Appellees are also correct that the submerged lands and its adjacent banks are privately owned. R at 5. But they are incorrect in stating that by having ownership of the same entitles them to ownership of the water that flows above it. By excavating the Canal in such a way that diverts most of the water from the Deep Quod River, the State of New Union has now become obligated to hold the jus publicum water in trust for the people of New Union. Indeed, states have the power and authority to revoke a conveyance that unduly diminishes or destroys the state's jus publicum control over the conveyed land. *See Illinois Cent. R. Co.*, at 460 ("any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumes at any time"). Whether or not the Farm is entitled to just compensation under the Fifth Amendment is another matter for another time. All that matters here is that Moon Moo Farm cannot prevent the "uninvited" ingress and egress by the public on the waters flowing over its submerged lands.

B. The Queechunk Canal is a navigable in fact water subject to public navigation since it is a channel of interstate commerce and is significantly related to interstate commerce.

Even if the State of New Union were not the trustee of the Queechunk Canal via the public trust doctrine, it nonetheless is subject to public navigation since it is a channel of interstate commerce and it significantly relates to interstate commerce by substantially affecting a

preexisting natural navigable waterway. "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States…[and] for this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." *Gilman v. City of Philadelphia*, 70 U.S. 713, 724-25; *see also The Daniel Ball*, 77 U.S. 557 (1870) (creating the standard of "navigability in fact" for those waterways which had practical usefulness to the public; usefulness being defined by the waters capacity for commercial utility and transport). This formulation has lasted for almost a century and a half and the Supreme Court recently reiterated this standard by stating that under the navigability in fact rule:

> [T]hose rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. *PPL Montana, LLC v. Montana*, 132 S.Ct. 1215, 1229 (2012) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)).

Thus, as long as the water is deemed navigable in fact, a private landowner may not exclude the public from traversing its waters upon which commercial navigation may be sustained. *PPL Montana, at 1227*. That being true, however, a private owner may still be able to defend his or her private use if, and only if, the body of water is artificially created *and* if it does not divert or destroy any preexisting natural navigable waterway. *Vaughn v. Vermilion Corp.*, 444 U.S. at 209 (italics added).

The Queechunk Canal has been used, and remains susceptible to use in its ordinary condition, as a channel for commerce via customary modes of trade and travel, making it navigable in fact and subject to the navigational servitude pursuant to the Commerce Clause. It further comes within the reach of the Commerce Clause because, although it is artificially created, it substantially affects commerce by diverting most of the water flow from a pre-existing navigable waterway. Therefore, the District Court should be reversed.

1. The Queechunk Canal is a channel for interstate commerce since in its ordinary condition it has the capacity for commercial utility.

The Queechunk Canal is a navigable in fact channel for interstate commerce despite private construction and private ownership of the submerged land and adjacent banks. Such waters:

> [C]onstitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form *in their ordinary condition by themselves, or by uniting with other waters*, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water. *The Daniel Ball*, 77 U.S. 557, 563 (1870) (italics added).

In determining a water's capacity for commercial use as a channel for interstate commerce, courts have considered various factors including the water's physical characteristics, such as depth, width, location, previous uses, and connection to other waters or termini, *see Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979), as well as seasonal limitations or obstructions to navigation, *see U.S. v. Harrell*, 926 F.2d 1036, 1038-40 (11th Cir. 1991). Thus, to have a capacity for use so as to be deemed navigable, a water must be found to be of adequate size and depth for navigation, relatively permanent in character, and located so it is useful to the public in exercising the navigational servitude. *Id*.

In applying these factors to the Queechunk Canal, the conclusion follows that the Canal must be regarded as navigable in fact. The Queechunk Canal is a man-made bypass canal located at a bend in the Deep Quod River. R. at 5. The Deep Quod River is a commercially utilized navigable waterway in New Union that flows year-round and runs directly into the Mississippi River, which is arguably America's most important interstate waterway. R. at 5. The Canal also diverts most of the water flow from the Deep Quod River, a water which Appellees conceded is a water of the United States, and is frequently used as a shortcut up and down the River. R. at 5. It is fifty yards wide, three to four-feet deep, and capable of being navigable by small boats and other watercraft at any given time. R. at 5. For all those reasons, the Queechunk Canal must be deemed a channel of interstate commerce subject to federal authority under the Commerce Clause.

Appellees will undoubtedly attempt to argue that just because the Queechunk Canal ultimately joins with other navigable waterways, *e.g.*, the Deep Quod River; it does not necessarily mean that the public has an automatic right to use it. *See Kaiser Aetna*, at 172-73 (holding that "while Kuapa Pond may be subject to regulation by the Corps of Engineers...it does not follow that the pond is also subject to a public right of access"). The United States does not disagree but instead asserts that the pond at issue in *Kaiser Aetna* is simply too dissimilar

from the Queechunk Canal. In fact, the Canal in this matter essentially mimics the Illinois and Michigan Canal at issue found in *In re Boyer*, 109 U.S. 629 (1884). The Illinois and Michigan Canal was located wholly in the territorial bounds of Illinois and was also an artificially created waterway, connecting Lake Michigan and the Chicago River with the Illinois and Mississippi Rivers. *Id*. at 631. The Illinois and Michigan Canal was substantially longer than the Queechunk Canal, but was only sixty-feet wide and six-feet deep. With those features in mind, the Supreme Court held that "navigable water situated as this canal is, used for the purposes for which it is used – a highway for commerce between ports and places in different states – is public water of the United States. *Id*. at 632.

In like manner, the Queechunk Canal is much more analogous to the Illinois and Michigan Canal from *In re Boyer* than it is to the Kuapa Pond from *Kaiser Aetna*. The Canal, as previously stated, is 150-feet wide and flows year round. It is also twice as deep as the Kuapa Pond at any given time and small boats are not only able to traverse its waters, but the public frequently does so since the Canal serves as a shortcut up and down the Deep Quod River. Therefore, since the Canal serves as a conduit for a major river in interstate commerce, the Canal should be deemed a channel for interstate commerce.

2. The Queechunk Canal further gives the public a right of access since it substantially affects interstate commerce by diverting most of the water flow from a preexisting natural navigable waterway.

The Canal is further subject to federal authority since it also substantially affects interstate commerce. *Lopez*, 514 U.S. at 559. In *United States v. Darby*, 312 U.S. 100 (1941), the Supreme Court held that:

> [T]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Id.* at 118.

Although the Supreme Court has since reigned in some of the reach of this third prong in many ways, they have still strongly adhered to the idea that in determining if something has a

significant relation to interstate commerce "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Lopez*, at 559.

Appellants agree with the Supreme Court in *Vaughn v. Vermilion*, 444 U.S. 206 (1979), which held that that "channels built on private property and with private funds, [and created] in such a manner that they ultimately join with other navigable waterways," will not necessarily mean that such waterways are open to use by all citizens of the United States. *Id*. at 208. Yet, one cannot ignore that the Court also ruled that:

> [I]t could not be said as a matter of law that if it was proved that the waterways were constructed in part by means of diversion or destruction of a preexisting natural navigable waterway, this would not constitute a defense under federal law to prayer for injunctive relief against public use of the canals." *Vaughn*, 444 U.S. at 209.

In other words, "the defendants would have a right under federal law to use Vermilion's channels as a substitute for any natural, navigable waterway substantially impaired or destroyed by construction of the artificial system." *Vermilion Corp. v. Vaughn*, La., 397 So.2d 490, 492 (1981) (Dennis, J.).

The Queechunk Canal substantially affects interstate commerce because the Canal diverts "most" of the water flow from the Deep Quod River, a preexisting natural navigable waterway that is frequently used commercially to bring products to the Mississippi River. R. at 5. "Most" is defined as "greatest in number or greatest in amount, extent, or degree." *The American Heritage Dictionary* (5th ed. 2011). If it only diverted a *small* or *minimal* portion of the water flow so that the Deep Quod River would not be impaired, then this argument would not likely suffice. But since it diverts *most* of the water, the Canal by its very nature substantially affects interstate commerce by forcing commercial and other watercraft to use it as a bypass. Thus, the Queechunk Canal is a channel of interstate commerce which substantially affects interstate commerce and must be deemed a water of the United States subject to the navigational servitude.

All in all, based on the characteristics of the Canal, it is subject to public use under the public trust doctrine and Congress's overriding authority under the Commerce Clause and Moon Moo Farm may not forbid the public from traversing the waters over and between its privately-held lands.

II. The evidence obtained from Dean James should be admissible in this civil enforcement action because he was acting as a private citizen on a specific violation and because EPA acted on the "good faith exception" to the exclusionary rule.

The Fourth Amendment to the U.S. Constitution provides in part, "The right of the people to be secure in their persons, house papers, and effects, against unreasonable searches and seizures, shall not be violated," U.S. Const. amend. IV, and this provision has been incorporated to the states via the 14th Amendment. *See generally Wolf v. Colorado*, 338 U.S. 25 (1949); *see also Mapp v. Ohio*, 367 U.S. 643 (1961). However, the protection of the Fourth Amendment against unreasonable searches and seizures applies *only to government action*. *Burdeau v. McDowell*, 256 U.S. 465 (1921) (emphasis added). In other words, absent a search and seizure made under the influence of or with the assistance of government agents, a private search and seizure is deemed outside Fourth Amendment protection.[10]

Additionally, even if the Queechunk Canal is neither a public trust navigable water nor subject to the navigational servitude, the evidence obtained by Riverwatcher's trespass should nonetheless be admitted since EPA officials acted in good faith since the agency had no reason to believe that such evidence may have been obtained via a trespass. The good faith exception doctrine is an exception to the exclusionary rule that provides that illegally gathered evidence can be admitted at trial if police officers have reason to believe their actions are legal. *See generally United States v. Leon*, 468 U.S. 897 (1984); *accord Herring v. United States*, 555 U.S. 135 (2009). Further still, when an environmental statute has a provision that the general public can make a complaint, which can lead to an investigation, the agency *or* individual can act by implementing a complete investigation. *Trinity Indus. v. OSHRC*, 16 F.3d 1455, 1460 (6th Cir. 1994) (emphasis added). Since it was objectively reasonable for both Mr. James and EPA to behave in the way they did, without considering whether the evidence was illegally obtained, the evidence should be admitted.

A. The evidence in this matter, including photographs and water samples, was provided to the EPA by Dean James acting as a private citizen without the influence of or assistance from the government.

Mr. Dean James is a private citizen who can conduct a search and seizure for evidence because the exclusionary rule of the Fourth Amendment does not apply to private members of

[10] Michael Wukmer, The Fourth Amendment Following Private Searches: Is There a Privacy Interest to Protect? 52 U. CIN. L. REV. 172, 175 (1983).

the public provided there is no influence of, or assistance by, the government. When a private citizen is not acting as an agent of the government at the time of a search and seizure, the evidence obtained therein will be admissible. *Burdeau v. McDowell*, 256 U.S. 465 (1921). "The Fourth Amendment gives protection against unlawful searches and seizures [and]…its protection applies to governmental action." *Id*. at 475. In *Burdeau*, one rival stole another's papers and handed them to the government, who subsequently utilized the papers to make a case against the original owner of the papers. *Id.* at 478. The Supreme Court ruled that the evidence handed over to the government could be used against the original owner because, even though the seizure was illegal, the party who seized it was not a government agent and the Fourth Amendment exclusionary rule is specifically meant for a private citizen to be protected against the government. *Id.* at 481. In fact, even where it would seem that the collector of the evidence had an agenda against his rival, the Court still chose not to return the property, but rather use it for the trial against the true owner. *Id*. at 470; *see also Matter of Moore*, 885 S.W.2d 722 (Mo. Ct. App. W.D. 1994) (explaining that it matters not how the evidence in question was obtained in civil cases because constitutional protections are only implicated in governmental, not private, action). *Id*. at 727.

Much like the true owner of the papers in *Burdeau*, Moon Moo Farm cannot change the fact that the evidence exists and the government now has it to use against them in their case. Although the evidence *may* have been obtained via trespass,[11] similar to how the papers in *Burdeau* were taken from the original owner, it should still be admissible because the operation was headed by a private citizen. Mr. James, like the person who seized the papers from his rival in *Burdeau*, was not simply doing the dirty work for the government, but rather was acting in his capacity as a citizen and member of the Riverwatcher organization against another private party. Although Mr. James could be considered adversarial to Moon Moo Farm, just as the parties were in *Burdeau*, no connection existed between the government and private evidence collector. In addition, the Fourth Amendment exclusionary rule does not apply in strictly civil cases, such as this case is; but will usually only apply in criminal indictment cases such as *Burdeau*. Therefore, the evidence that Mr. James obtained during his "allegedly illegal" search and seizure on the Queechunk Canal to investigate Moon Moo Farm should be admissible because the Fourth

[11] Appellant still maintains that Mr. James's excursion was legal based on the arguments presented in §§ I. and II.

Amendment exclusionary rule does not apply when a private citizen supplies the evidence to the government for their own private benefit.

B. Even if Dean James was trespassing on the Queechunk Canal, the evidence he obtained should nonetheless be admissible under the good faith exception to the exclusionary rule since both he and EPA acted reasonably.

Even if the Queechunk Canal is not considered a public trust navigable water, and even if the exclusionary rule could apply in this matter, the evidence obtained by Mr. James should still be admitted because, although he was trespassing, both he and the EPA officials acted on a specific violation and the good faith exception to the exclusionary rule should apply. When evidence is obtained by a governmental actor in a search and seizure, depending on a facially valid warrant that turns out to be invalid, the good faith exception to the exclusionary rule will apply such that the evidence will be admitted. *United States v. Leon*, 468 U.S. 897, 900 (1984). In *Leon*, police officers reasonably relied in good faith on a search warrant to obtain evidence to pursue a drug-trafficking investigation. *Id.* at 897. Subsequent to completion of the investigation, it was found that probable cause did not support their warrant to search and seize. *Id.* at 906. The Court applied a balancing test approach to the evidence such that when officers are operating in "good faith" within the Fourth Amendment requirements, the evidence will be admissible in the prosecution's case in chief. *Id.* at 913. Based on the good faith exception, the evidence found with the bad warrant against the drug-traffickers was admissible because the officers thought the warrant was good. *See also Davis v. United States*, 131 S.Ct. 2419 (2011) (holding that improperly seized evidence was still admissible because the police officers were following precedent at the time of the search).

Even assuming that Mr. James is eventually proven wrong about his freedom to traverse up and down the Queechunk Canal, the photographs and water samples he obtained should still be admissible. First, just like the police officers in *Leon*, Mr. James was acting in good faith when he traveled up the Queechunk Canal. Despite the "No Trespassing" signs, the Canal is frequently used as a shortcut by the public and Mr. James, acting on the good faith belief that the public had a right to be on its waters, remained in his boat and he did not step foot on the Farm's actual property. Second, both the CWA and RCRA are legislatively written to allow citizens who meet the standing requirements to bring suit. *See* FWPCA § 505, RCRA 7002. Being a private citizen acting on complaints coming in to the Riverwatcher organization, Mr. James rightfully believed

he could investigate potential violations and nowhere does it say that a citizen must first contact the EPA to get warrant. Thus, just like the officers in *Davis*, Mr. James followed the legislatively authorized procedures and to hold otherwise would frustrate Congressional intent.

In like manner and based on many of the same reasons, the EPA also acted in good faith. First, EPA is well aware of Congress's rules on citizen actions and the allowance for citizens to bring suit if, after notice to the EPA, the situation is not remedied by EPA in their official capacity. *See* FWPCA § 505, RCRA 7002. Since EPA must first be given the opportunity to remedy the potential problem, it is common for citizens to not only give notice to the EPA, but also provide EPA with supporting evidence for their claims. Second, there is no evidence from the record to suggest that EPA suspected that the evidence retrieved by Mr. James was indeed obtained via a potentially illegal trespass. At the same time, such a suspicion would be irrelevant as long as EPA did not direct or influence Mr. James to gather the evidence.

C. Mr. James was acting on a specific complaint upon which an agency or an individual can conduct a complete investigation.

Further still, Riverwatcher acted on a specific complaint in the community that a polluting company and/or farm had violated environmental laws and caused great harm to the drinking water supply, which led to the investigation. When an environmental statute has a provision that the general public can make a complaint, which can lead to an investigation, the agency or individual can act by implementing a complete investigation. *Trinity Indus. v. OSHRC*, 16 F.3d 1455, 1460 (6th Cir. 1994). In *Trinity*, an employee at a tank manufacturing company filed a complaint about a specific violation for which the agency responded by completing a full investigation into what might be wrong with the company. *Id.* at 1480. The company argued that the evidence obtained in the complete investigation of their facilities was not admissible because the search should have been limited in scope to the employee complaint about the specific violation. *Id* at 1490. Ultimately, the Court agreed with the agency that the good faith exception did apply to the evidence obtained through its warrant, but said going forward that the Fourth Amendment will still control in most cases. *Id*. Riverwatcher acted on a specific complaint in the community that a recent polluting company had violated environmental laws and caused great harm to the drinking water supply, which lead to the investigation.

Much like the agency in *Trinity*, Riverwatcher acted from a greater concern of what might happen to society if he did not say or do anything based on the complaints that were being heard from the general public. When the benefits to society combine with reasonable reliance in good faith on a warrant to outweigh the suppression of the evidence through the exclusionary rule, much as they did in *Trinity*, the interests of the aggrieved party will be overcome and the evidence that was obtained by Riverwatcher should be admissible. Much like the employee in *Trinity* who triggered an investigation with a complaint, it is not necessary to have many complaints; just one complaint which can lead to an investigation from which evidence obtained in good faith will be admissible. Thus, when society is going to be harmed, as it was by Moon Moo Farm, the high standard of the Fourth Amendment's exclusionary rule can be overcome when even one complaint of a violation is made by the community as long as the investigation is made in good faith reliance on the violation.

III. Moon Moo Farm is a point source subject to regulatory oversight because it is a Medium CAFO and runoff from its land application of manure via a drainage ditch is an actual discharge subject to NPDES permitting.

Moon Moo Farm, Inc., including its manure land application area and drainage ditch therein, is a Medium Concentrated Animal Feeding Operation ("CAFO") since the dairy farm operation as a whole maintains 350 dairy cattle in a confined area where neither crops nor vegetation are grown and its drainage ditch allows manure and other pollutants to flow into waters of the United States. The Clean Water Act ("CWA") provides that, absent an NPDES permit and subject to certain limitations, "the discharge of any pollutant[12] by any person[13] shall be unlawful." FWPCA § 301(a), 33 U.S.C. § 1311(a). A discharge means "any addition of any pollutant to navigable waters from any point source." FWPCA § 502(12), 33 U.S.C. § 1362(12). The term point source means:

> [A]ny discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged. *Id*. (italics added).

[12] A pollutant includes "solid waste...sewage... biological materials...and agricultural waste discharged into water," FWPCA § 502(6), 33 U.S.C. § 1362(6)

[13] The term person means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body. FWPCA § 502(5), 33 U.S.C. § 1362(5).

As demonstrated by the specific language, Congress expressly required the EPA to regulate CAFOs by specifically designating them as point sources. Thus, Moon Moo Farm, being a Medium CAFO, constitutes a point source subject to National Pollutant Discharge Elimination System Permit ("NPDES") permitting. 40 C.F.R. § 122.23(e).

A Medium CAFO *may* be able to avoid liability but *only if* the discharge was either an "agricultural stormwater discharge or a return flow from irrigated agriculture." *See* FWPCA § 502(14), 33 U.S.C. § 1362(14) (emphasis added). As previously stated, in 1987, Congress amended the definition of a point source to include these two exceptions. However, "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." *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2nd Cir. 1994). Just as Southview Farm could not escape liability for its land application discharges originally discovered by private citizens, Moon Moo Farm cannot escape liability from discharges originally found by Riverwatcher. Although it is undisputed that a rain event had passed through the Farmville area the day after Mr. Dean James collected his water samples and took his photographs, R. at 6, when combined with other circumstantial evidence, it becomes clear that Moon Moo Farm's discharges are likely the result of land application area discharges, and not the result of agricultural stormwater discharges.

A. Moon Moo Farm meets the statutory definition of a Medium CAFO under regulations promulgated by the EPA.

Moon Moo Farm is at its core a Medium CAFO based on EPA's 2003 CAFO Rule. *NPDES Regulation and ELGs and Standards for CAFOs*, 68 Fed. Reg. 7176, 7188-90 (Feb. 12, 2003) (codified at 40 C.F.R. § 122.23). As per EPA regulations, to determine whether an agricultural enterprise is a CAFO, a two-tiered formulation is used. First, the enterprise must foundationally be an animal feeding operation ("AFO"), which is defined as "a lot or facility where…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 crops, vegetation, forage growth, and post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1)(i)-(ii) (2012). Second, in order to be designated a Medium CAFO, the type and number of animals that it stables or confines must fall within a series of ranges and, relevant

here; it discharges pollutants into waters of the United States through a man-made ditch, flushing system, or other man made device. 40 C.F.R. § 122.23(b)(6)(i)-(ii).

Since the amount of dairy cattle it stables is well within regulatory range and because pollutants are discharged into waters of the United States through a drainage ditch stemming from its manure land application field, Moon Moo Farm meets the definition of a Medium CAFO. Therefore, it is within EPA's province to impose a duty to apply for a NPDES permit on Moon Moo Farm.

1. Moon Moo Farm stables or confines 350 head of milking cows bringing it well within the regulatory criteria for dairy cattle on a Medium CAFO.

Moon Moo Farm meets the first prong of the second tier for defining a Medium CAFO. Under this prong, AFOs may be defined as Medium CAFOs if the type and number of animals that it stables or confines fall within a given range. 40 C.F.R § 122.23(b)(6)(i). For example, a dairy farm AFO can satisfy this prong if it confines between 200 and 699 mature dairy cows, whether milked or dry. Id. at § 122.23(b)(6)(i)(A). Although Moon Moo Farm used to have only 170 dairy cattle, R. at 5, it now stables or confines 350 dairy cattle, doubling its operations and placing it well within the regulatory range. Therefore, Moon Moo Farm easily meets this first prong.

2. Moon Moo Farm discharges manure and other pollutants into waters of the United States through a man-made ditch connected to its land application area.

Moon Moo Farm also clears the second prong of the CAFO test because manure and other pollutants are discharged into the Queechunk Canal. The second prong of the test states that an AFO, having satisfied the first prong, may be deemed a Medium CAFO if either:

> (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other 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 contact with the animals confined in the operation. 40 C.F.R. § 122.23(b)(1)(ii).

Moon Moo Farm meets the second prong under § 122.23(b)(1)(ii)(A). As shown by the photographs taken by Mr. James, discolored water brown water flowed directly from the Farm's

manure land application area to the Queechunk Canal via a drainage ditch. Moreover, the water samples collected by Mr. James at the mouth of the ditch showed highly elevated levels of nitrates and fecal coliforms, suggesting that such discharges were directly related to the Farm's application of manure and other pollutants to its fields.

Even putting that aside, Moon Moo Farm may argue that the drainage ditch from the land application area does not satisfy the criteria laid out in § 122.23(b)(6)(ii)(A) because its pollutants should not be fairly characterized as "from a point source," yet even that wouldn't matter. In *Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency*, 399 F.3d. 486 (2nd Cir. 2005), the Second Circuit held that that "any discharge from a land area under the control of a CAFO is a point source discharge subject to regulation because it is a discharge from a CAFO." *Id*. at 510. The Court further stated that whether "the land application run-off has been 'collected' or 'channelized' at the land application area is irrelevant to the determination regarding whether such run-off constitutes a CAFO discharge." *Id*. The only question is whether the farm is "the proximate source from which the pollutant is directly introduced to a destination water body." *See, Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2nd Cir. 2001).

Therefore, since Moon Moo Farm is *actually* discharging, *see, e.g., Waterkeeper*, 399 F.3d at 505 ("the CWA gives the EPA jurisdiction "to regulate and control only actual discharges – not potential discharges"); it has a duty to apply for a NPDES permit. Indeed, "it would be counter to congressional intent to hold that a requiring a discharging CAFO to obtain a permit is an unreasonable construction of the [Clean Water] Act." *Nat'l Pork Producers Council*, 635 F.3d 738, 751 (5th Cir. 2011).

B. Based on the totality of the evidence and the fact that Moon Moo Farm is a Medium CAFO, the Farm cannot claim its discharges were solely due to a precipitation-related event.

Although it is true that the Farmville region experienced a significant amount of rainfall between April 11 and April 12, 2013, based on the totality of the evidence, Moon Moo Farm has

been discharging manure and other pollutants into the Queechunk Canal via its manure land application area.[14]

The rule further explains that:

> [L]and 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 that application of that manure, litter, or wastewater by the CAFO to land area under its control is a discharge from that CAFO subject to permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. § 1362(14). *Id*. at § 122.23(e).

Therefore, when a discharge from a land application area under the control of a CAFO is primarily caused by rain, such a discharge is not subject to regulation because the rain – not the CAFO – is the proximate source of the discharge; but when "run-off is primarily caused by the over-saturation of the fields rather than the rain and [there are] sufficient quantities of manure...present, such a discharge is subject to regulation because the CAFO – not the rain – is the proximate source of the discharge. Therefore, any land application discharge that is not agricultural storm water is, by definition, a discharge "from" a CAFO that can be regulated as a point source discharge. *Waterkeeper*, at 510.

IV. Riverwatcher has made a prima facie case that Moon Moo Farm's mixture of manure and acid whey constitutes an imminent and substantial endangerment to human health subject to redress under RCRA § 7002.

Moon Moo Farm is subject to a citizen suit because Riverwatcher has a right to sue to abate an imminent and substantial endangerment to health and the environment, the Farm is the present handler of the hazardous waste, and Moon Moo Farm has contributed to the handling and disposal of hazardous waste. RCRA § 7002 provides in relevant part that any person may commence a civil action on his own behalf:

> [Against any person...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

[14] "Land application area" is defined as land under the control of an AFO owner or operator to which manure, litter, or process wastewater from the production area is or may be applied. 40 C.F.R. § 122.23(b)(3).

waste which may present an imminent and substantial endangerment to health or the environment. Id. at § 7002(a)(1)(B).

Once a private citizen or organization meets the prerequisite standing provisions to bring a claim, *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), to maintain a cause of action under RCRA, the plaintiff must show prima facie that (A) the conditions at the site may present an imminent and substantial endangerment to the health or the environment, (B) that the endangerment comes from the past or present handling, treatment, or disposal of solid or hazardous waste, and (C) that the defendant contributed to such handling, treatment or disposal of the solid or hazardous waste. *Acme Printing Ink Co. v. Menard, Inc.*, 870 F. Supp. 1465, 1478 (E.D. Wis. 1994). Since Mr. James and Riverwatcher have met their standing prerequisites to bring a claim, *see generally Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and because courts traditionally have held that standing is met when individuals or citizen groups have been injured, or threatened by injury, from solid or hazardous waste, Riverwatcher can bring suit. *See generally Maine People's Alliance v. Holtra Chem. Mfg. Co., LLC*, 211 F.Supp.2d 237 (D. Me. 2002); *Interfaith Cmty. Org. v. Honeywell Int'l Inc.*, 399 F. 3d 248 (3rd Cir. 2005), *cert. denied*, 545 U.S. 1129 (2005). In this case, although Riverwatcher was not currently being directly harmed by the high nitrates status of Farmville's drinking water, each human infant was constantly under the threat of being harmed. When Riverwatcher brought the citizen suit against Moon Moo Farm, he did so to protect the human beings that are now infants as well as those families that are planning on reproducing in the near future.

A. Riverwatcher has established that the conditions present at the Farm and nearby Deep Quod watershed may present an imminent and substantial endangerment to both human health and the environment.

Riverwatcher has supplied enough evidence showing that there may be an imminent and substantial endangerment within its city's drinking water. To satisfy the first element, imminent and substantial endangerment must be shown. *See Browing v. Flexsteel Indus., Inc.*, 959 F.Supp.2d 1134, 1151 (N.D.Ind. 2013). "Endangerment, as contemplated by RCRA, need not be immediate in order for it to imminent; endangerment is 'imminent' if factors giving rise to it are present, even though some harm may not be realized for some time. *Maine People's*, 211 F.Supp.2d at 246. *See also Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2nd Cir. 1991) (holding that "a finding of 'imminency' does not require a showing that actual harm will occur

immediately so long as the risk of threatened harm is present."). To be sure, "the standard under § 6972(a) is in fact even more lenient...because injunctive relief is authorized when there *may* be a risk of harm, not just when there is a risk of harm.

Riverwatcher clearly can satisfy this element. Riverwatcher has shown such a potential risk by providing evidence based on their water samples and from "nitrate advisories" provided by the Farmville Water Authority. These advisories not only warned that the municipal water supply was unsafe for drinking by infants, but that it was so unsafe that parents should only give their infants bottled water. Thus, unlike the developers in *Browing*, Riverwatcher has been able to establish that a subset of humans are currently being affected by the water being polluted, and more could be endangered if some action is not taken.

Appellees will surely state that Riverwatcher cannot prove that these externalities were directly caused by them and that such nitrate advisories have been periodically publicized well before 2012. They will also undoubtedly bring up Riverwatcher's health expert who stated that it was impossible to state that Moon Moo Farm was the "but for" cause. However, their argument is not as strong as it may appear. Although it is true that many advisories have been issued in the past, the 2013 nitrate advisory came out one year after they began accepting acid whey and around the same time as complaints were being issued by the public to Riverwatcher. Although the townspeople of Farmville are currently feeding their infants bottles to avoid the present endangerment, it does not mean that the danger will be avoided forever because if the percentages became higher, adults might come to be endangered by drinking the water. Although the endangerment may not seem to be imminent and substantial currently, it may very well be so soon if no action is required of Moon Moo Farm. Moreover, the nitrates may not be *extremely* high, but to reiterate, all that is required for an "endangerment to remain substantial is if there is some reasonable cause for concern that someone or something may be exposed to risk or harm...if remedial action is not taken." *Maine Peoples*, 211 F.Supp.2d at 247. This concern is undeniable.

When Riverwatcher brought the citizen suit against Moon Moo Farm, he did so to protect the newborn infants as well as those families that are planning on reproducing in the near future. Much like the plaintiffs in *Maine People's* who did not need to prove that somebody was

currently being harmed; Riverwatcher must merely show that factors giving rise to endangerment are present, with harm to come in the future.

B. The endangerment to human health and environment likely stems from Moon Moo Farm's mixing of manure, acid whey, and other harmful chemicals.

Riverwatcher also meets the second factor to maintain a RCRA suit. To meet this threshold, the endangerment must come from the past or present handling, treatment, or disposal of solid or hazardous waste. *Acme Printing*, 870 F. Supp. at 1478. Based on the water sample evidence provided from Mr. James, the results showed highly elevated levels of nitrates and fecal coliforms. These samples were taken at the mouth of a drainage ditch connected to Moon Moo Farm's land application fields and it would be completely reasonable to state that although it is less likely that the past nitrate advisories were caused by Moon Moo Farm, it is more likely that the 2013 advisory is connected to the Farm's current increases in manure and acid whey. Lastly, Moon Moo Farm concedes that it has been accepting such materials and has been including it in its manure land application practices. Therefore, it is plausible that Moon Moo's present handling of mixed chemicals may be, in part, to blame.

C. Moon Moo Farm contributed to the disposal of hazardous waste by spreading the manure and acid whey mixture on its land application field and allowing the mixture to flow into waters of the United States via its drainage ditch.

Lastly, even though it may not be able to be proven that Moon Moo Farm is the "but for" cause of the high nitrate warnings of the drinking water for the vicinity around Moon Moo Farm, Riverwatcher need only show that the Farm be a contributor to the pollution of the water through their handling of their mixture. In *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 13-CV-3016-TOR, 2013 WL 3179575 (E.D. Wash. June 21, 2013), an environmental group brought a complaint against a dairy farm stating that the manure getting re-distributed to the fields around the cow pen was in excess and therefore should be considered a solid waste being distributed under RCRA. The appellants combined a CWA claim with a RCRA claim such that the goal is to keep the groundwater from being polluted and despite manure being specifically excluded within the meaning of the statute as written, the purpose of the legislation is being fulfilled when a claim is allowed to be made. In *Acme Printing Ink Co. Inc. v. Menard, Inc.*, a printing company sued the previous property owners for CERCLA and RCRA claims because there had been dumping at the site prior to their occupying the site and they wanted

contribution from them to perform studies on how polluted the land was. Although the CERCLA claims were dismissed, the RCRA claims were upheld as being in dispute because the printing company could prove that the previous owners, at a minimum, were a contributor to the pollution of the land and the imminent and substantial endangerment of the public. Moon Moo Farm need only be a contributor to the pollution of the drinking water in the vicinity of their farm, but not necessarily the only 'but for' cause of the pollution.

Much like the printing company in *Acme*, Riverwatcher must only prove that Moon Moo Farm is a contributor to the pollution in and around the farm. The main concern in the writing of the CWA and RCRA was to make sure that the drinking water around agricultural companies does not have a higher level of nitrates than it should have as stated in the commentary on RCRA. As Riverwatcher's water samples showed that water flowing from Moon Moo Farm's fields had a high amount of nitrates and fecal coliforms. Moreover, the location where Mr. James obtained his samples was at the mouth of the drainage ditch in the Queechunk Canal. Thus, unlike the plaintiffs in *Browing*, who only had an ATSDR[15] report from a public health assessment, Riverwatcher has physical proof of pollution coming from an exposure pathway on the property of Moon Moo Farm. Riverwatcher's citizen suit is based in § 6972(a)(1)(B), and, therefore, must have an imminent and substantial endangerment to human health or the environment, the endangerment comes from past or present handling of the waste in question, and the company contributed to the handling of the waste. It meets all three elements and Riverwatcher should be able to bring its claims.

CONCLUSION

For the reasons outlined above, Appellant asks this Court to reverse the district court on all issues. The facts and law in this case support the conclusions that the Queechunk Canal is a public trust navigable water that is also subject to the navigational servitude provided by the Commerce Clause; the evidence obtained by Riverwatcher was legally obtained, acquired in good faith by both EPA and Riverwatcher, and properly brought to EPA's attention; Moon Moo Farm is a Medium CAFO subject to permitting under the NPDES; and Riverwatcher has demonstrated that an imminent and substantial harm exists in the Deep Quod watershed. Since this case meets at the intersection of environmental and natural resources law, administrative

[15] An ATSDR is a toxicological report developed by the Agency for Toxic Substances & Disease Registry.

law, and evidence, this case can and should be properly addressed in in a district court setting. Therefore, Appellants pray that this Court reverses all of the district court's claims and remand for further proceedings.