Pace Environmental Law Review Online Companion

Volume 6
Issue 1 *Twenty-Seventh Annual Jeffrey G. Miller Pace National Environmental Law Moot Court Competition*

Article 5

February 2015

# Measuring Brief (Moon Moo Farm, Inc.)

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# TWENTY-SEVENTH ANNUAL JEFFREY G. MILLER PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

## Measuring Brief*

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CA. No. 14-1248
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
and
DEEP QUOD RIVERWATCHER, INC., & DEAN JAMES,
Plaintiffs-Intervenors-Appellants,
v.
MOON MOO FARM, INC.,
Defendant-Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW UNION

Brief for MOON MOO FARM, INC.

* This brief has been reprinted in its original format. Please note that the Table of Authorities and Table of Contents for this brief have been omitted.

## JURISDICTIONAL STATEMENT

The United States filed a complaint in the United States District Court for the District of New Union alleging Clean Water Act (CWA) violations on behalf of the United States Environmental Protection Agency (EPA) against Moon Moo Farm. Deep Quod Riverwatcher, an environmental organization, and its member Dean James (collectively "Riverwatcher") intervened. Riverwatcher asserted both an additional CWA claim and two claims under the Resource Conservation and Recovery Act (RCRA). Moon Moo crossclaimed for common law trespass based on Riverwatcher's conduct before suit. On April 21, 2014, the district court granted Moon Moo's motion for summary judgment dismissing the CWA and RCRA claims and ruling in its favor on the trespass claim. The district court's order is final, and jurisdiction is proper in this court pursuant to 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

I. Whether Moon Moo Farm requires a permit under the Clean Water Act NPDES permitting program because it is a point source under the statute.

II. Whether Moon Moo Farm can be subject to a citizen suit under RCRA because its application of manure and whey to its fields qualifies as solid waste disposal and, if so, whether that conduct creates an imminent and substantial threat of harm to human health.

III. Whether the Queechunk Canal, a man-made water body, is a public trust navigable water of the State of New Union

allowing for a public right of navigation despite private ownership of the banks on both side and the bottom of the canal by Moon Moo Farm.

IV. If the canal is not a public trust navigable water, whether evidence obtained through trespass and without a warrant is admissible in a civil enforcement proceeding brought under CWA §§ 309(b), (d) and 505.

## STATEMENT OF THE CASE

This is an appeal from the District Court for the District of New Union's grant of summary judgment against EPA and Riverwatcher. (R. 4). In its complaint, EPA asserted that Moon Moo Farm violated the CWA's permitting provisions—33 U.S.C. § 1311(a), 1319(b), 1319(d) and 1342. (R. 4). EPA alleged that Moon Moo was subject to NPDES permitting due to discharges resulting from Moon Moo's application of manure and whey to its field. (R. 7–8). Riverwatcher intervened, asserting both CWA and RCRA claims. (R. 4). Riverwatcher claimed that Moon Moo's conduct both qualified as open dumping under RCRA and created an "imminent and substantial endangerment to human health or the environment." (R. 10) (quoting 42 U.S.C. § 6972(a)(1)(B) (2012)). Moon Moo crossclaimed against Riverwatcher, asserting Dean James trespassed on private property to obtain evidence. Moon Moo sought both damages and injunctive relief. (R. 7).

All three parties sought summary judgment on the environmental claims after discovery, and Moon Moo sought summary judgment on its trespass claim. *Id.* The district court granted Moon Moo's motions and denied plaintiffs' motions. (R. 12). It held that Moon Moo was not a CAFO because James obtained evidence related to that issue through trespass; the evidence was therefore not admissible. (R. XX). The court awarded Moon Moo $ 832,560 in damages. (R. XX). Next, it concluded that land application of manure and whey is not solid waste disposal, defeating both RCRA claims. (R. 10). Even if the amendments were solid waste, the court held that Riverwatcher

produced insufficient evidence to establish imminent and substantial endangerment. (R. 11).

The United States (on behalf of EPA), Deep Quod Riverwatcher, and Dean James all filed Notices of Appeal challenging all three aspects of the court's decision. (R. 1).

## STATEMENT OF THE FACTS

Moon Moo Farm is a dairy farm with 350 head of cows in the State of New Union. (R. 4). It houses the cows in a barn and collects and stores their manure and liquid waste in an outdoor lagoon for use as fertilizer. (R. 4–5). Moon Moo designed its lagoon to withstand a 25-year rainfall event. (R. 5). Moon Moo spreads the manure over 150 acres of fields that grow Bermuda grass, which it uses for silage. *Id*. In 2010, Moon Moo increased its herd from 170 to the current 350 cows in an effort to meet increased demand for milk from the nearby Chokos Greek Yogurt processing facility. *Id*. For the past two years, Chokos has given Moon Moo acid whey produced by the plant, which Moon Moo adds to its lagoons and includes in the mixture sprayed on its fields. *Id*.

Moon Moo farm is located at a bend in the Deep Quod River. *Id*. To alleviate flooding, a previous farm owner constructed a bypass canal through the middle of the farm, known as the Queechunk Canal. *Id*. The canal, owned on both sides by Moon Moo and prominently posted with "No Trespassing" signs, is fifty yards wide, three to four feet deep, and can be navigated by a canoe or other small boat. *Id*. Despite the signs, the canal is commonly used as a shortcut up and down the Deep Quod, which flows year round, can be navigated by small boat, and runs into the Mississippi River. *Id*. The river also serves as a drinking water source for the downstream community of Farmville. *Id*.

New Union regulates Moon Moo as a "no-discharge" animal feeding operation. (R. 6). Because of this designation, Moon Moo must submit a Nutrient Management Plan (NMP) to the Farmville Regional Office of the State of New Union Department

of Agriculture (DOA). (R. 5). The NMP regulates manure application rates based on a calculation of expected nutrient uptake by Moon Moo's crops. *Id*. Although New Union has authorization to issue CWA permits, Moon Moo does not hold a permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES). (R. 5–6).

In early 2013, Deep Quod Riverwatcher, a nonprofit organization, received complaints that the river smelled of manure and was an unusual brown color. (R. 6). Around this time, the Farmville Water Authority (FWA) issued a nitrate advisory for its drinking water customers citing high levels of nitrates and fecal coliforms. *Id*. The advisory suggested that customers use bottled water for infant consumption, but also informed them that the water posed no risk to adults. *Id*.

In response to the complaints, Dean James investigated the river in a small outboard watercraft on April 12, 2013. *Id*. Between April 11 and 12, two inches of rain fell in the region, a significant storm event, but one far short of the five inches of rain in 24 hours needed to constitute a 25-year event. *Id*. James ignored the "No Trespassing" signs and entered the Queechunk Canal, where he photographed manure-spreading operations on Moon Moo's property and discolored brown water flowing from the fields into a drainage ditch. *Id*. James took samples of the ditch water as it entered the canal. *Id*. James later had the samples tested by a water-testing laboratory; tests showed elevated levels of nitrates and fecal coliforms. *Id*.

Moon Moo applies manure and whey to its fields in accordance with its NMP. *Id*. Riverwatcher submitted expert testimony to suggest that a low pH of 6.1 caused by the addition of acid whey to the manure mixture prevented the Bermuda grass from absorbing nutrients effectively, causing excess nutrients to be released into the Queechunk Canal. *Id*. Riverwatcher's expert also stated that spreading manure during a rain event would nearly always result in excess runoff. Moon Moo's NMP does not forbid such a practice. (R. 6, 7). Further, application of whey as a soil conditioner has been a traditional practice in New Union for decades. (R. 6).

It is also true that, because the Deep Quod River watershed is heavily farmed, nitrate advisories have been issued five times since 2002. (R. 7). These advisories predate Moon Moo's increase

in operations and use of whey on its farm. *Id.* Another expert testifying on Riverwatcher's behalf stated that it was impossible to say for sure that runoff from Moon Moo Farm was the "but for" cause of the 2013 nitrate advisory. *Id.*

## STANDARD OF REVIEW

The district court granted Moon Moo's motion for summary judgment. This Court reviews a district court's grant of summary judgment *de novo*, "viewing the evidence in the light most favorable to the non-moving party." *Roberts v. Printup*, 422 F.3d 1211, 1214 (10th Cir. 2005).

## SUMMARY OF THE ARGUMENT

Moon Moo Farm is not subject to NPDES permitting because it does not discharge pollutants into navigable waters of the United States via a point source. Moon Moo does not qualify as a point source because its discharges are agricultural stormwater runoff, which the CWA explicitly excludes from the definition of a point source.

The district court also correctly concluded that Moon Moo did not violate RCRA. RCRA's plain text decries Riverwatcher's assertion that application of soil amendments constitutes solid waste disposal. Congress did not intend to regulate the use of soil amendments under RCRA. Case law supports Moon Moo's belief that, by enhancing its farm's productive use, it was not engaging in waste disposal. Even if the soil amendments qualify as solid waste, Riverwatcher failed to produce sufficient evidence to tie recent nitrate advisories in Farmville to Moon Moo's conduct.

The Queechunk Canal is not a public trust navigable water because it is not navigable in its natural state and has no public

right of access. Consequently, the district court properly excluded evidence obtained through trespass. James's water sample is also inadmissible because it broke the evidentiary chain of custody.

# ARGUMENT

## I. MOON MOO FARM DOES NOT REQUIRE A PERMIT UNDER THE CLEAN WATER ACT NPDES PERMITTING PROGRAM BECAUSE IT IS NOT A POINT SOURCE OF POLLUTION UNDER THE STATUTE.

The Clean Water Act (CWA) generally prohibits the discharge of pollutants into navigable waters of the United States. 33 U.S.C. § 1311 (2012). However, the CWA allows for pollution from a point source when the pollution activity complies with the National Pollutant Discharge Elimination System (NPDES) permit program. *Id.* § 1342.

The CWA defines a "pollutant" to include "industrial, municipal, and agricultural waste discharged into water." *Id.* § 1362(6). The CWA defines a "point source" as:

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

*Id.* § 1362(14). The definition also states that a point source "does not include agricultural stormwater discharges." *Id.* The CWA does not define the terms "concentrated animal feeding operation" or "agricultural stormwater discharge." *See id.* § 1362.

Moon Moo Farm does not require a NPDES permit because it does not discharge pollutants into navigable waters of the United States via a point source. Instead, Moon Moo's discharges are agricultural stormwater runoff, which the CWA explicitly excludes from the definition of a point source. *Id.* § 1362(14).

### A. Moon Moo Farm is not a CAFO, which means it is not subject to NPDES permitting by virtue of a discharge from a CAFO manure land application area.

EPA's CAFO rule addresses pollution discharges resulting from land application activities by CAFOs. 40 C.F.R. § 122.23(e) (2014). The rule states the following:

> [t]he discharge of manure . . . to waters of the United States from a CAFO as a result of the application of that manure . . . by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural stormwater discharge as provided by 33 U.S.C. 1362(14).

*Id.* The rule then states that when discharges from CAFO land applications are conducted in accordance with specified nutrient management practices, the discharges are considered agricultural stormwater (thereby being exempt from NPDES permitting). *Id.*

According to section 122.23(b)(2), a CAFO is a particular type of animal feeding operation (AFO). *Id.* § 122.23(b)(2). An AFO is considered a CAFO when it either satisfies the criteria of a Medium or Large CAFO or when it is designated as a CAFO through a process provided by the regulation. *Id.* The criteria for a Large CAFO are based strictly on the number of animals. *Id.* § 122.23(b)(4). Moon Moo Farm is not a Large CAFO because its 350 cow dairy herd is far below the minimum 700 mature dairy cows or 1,000 other cattle required. Also, Moon Moo is not a designated CAFO because the farm has not been designated as a CAFO through the process outlined in section 122.23(c).

The criteria for a Medium CAFO are based both on the number of animals and one of the following conditions:

> Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
>
> Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or

> through the facility or otherwise come into direct contact with the animals confined in the operation.

*Id.* § 122.23(b)(6)(ii).

Moon Moo is not a Medium CAFO because it does not satisfy either of the two pollution conditions.[1] *Id.* § 122.23(b)(6)(ii). The second condition is not satisfied because there is no claim that "waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact" with Moon Moo's animals. *Id.* § 122.23(b)(6)(ii)(B).

The first condition requires that the AFO discharge pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device. This condition is not satisfied because the only man-made ditch identified is located exclusively on land outside the boundaries of Moon Moo's AFO. According to 40 CFR 122.23, an AFO is:

> a lot or facility . . . where the following conditions are met: (i) Animals . . . have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12–month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

*Id.* § 122.23(b)(1). Based on the plain meaning of the AFO definition, Moon Moo Farm contains an AFO (its dairy operation) as well as a 150-acre field of Bermuda grass that is not an AFO. (R. 5). The field does not meet the definition of an AFO because (1) animals are not stabled or confined on the field, and (2) crops and vegetation, specifically Bermuda grass, are sustained throughout the field during the normal growing season. *See id.* Because the only alleged ditch is located exclusively within the

1.In addition, the record is inconclusive as to whether Moon Moo's herd contains the requisite number of animals to qualify as a Medium CAFO. Moon Moo Farm currently has a 350 cow milking herd. (R. 5). A herd of milking cows consists of calves, immature females (heifers), and mature dairy cows. *Ag 101—Lifecycle Production Phases*, EPA, http://www.epa.gov/agriculture/ag101/dairyphases.html. The record does not indicate the specific composition of the herd, which means it has not been established that Moon Moo's milking herd consists of either the 200–699 mature dairy cows or 300–999 other cattle required for Moon Moo to be a Medium CAFO. 40 C.F.R. § 122.23(b)(6)(i)(A); *Id.* § 122.23(b)(6)(i)(C).

field, (R. 6), there is no evidence that the AFO itself has discharged pollutants through a man-made ditch, flushing system, or other similar man-made device as required by section 122.23(b)(6)(ii)(A).

The situation would be different if the AFO independently qualified as a CAFO because a CAFO is a point source, and it is well established that land appurtenant to a point source facility is part of the point source facility. *See* 40 C.F.R. § 122.2; *Alt v. EPA*, 979 F. Supp. 2d 701, 713 (N.D. W. Va. 2013). But unlike a CAFO, an AFO is not listed as a point source in the CWA and therefore is not a point source unless it has a "discernible, confined, and discrete conveyance." 33 U.S.C. § 1362 (2012). The ditch wholly within the field adjacent to the AFO cannot make Moon Moo's AFO a point source because land appurtenant to the AFO is not part of the AFO facility until the AFO independently qualifies as a point source. This means that for the dairy operation to meet the first pollution condition, the operation itself would need to discharge pollutants through a ditch. Because there is no evidence of a ditch from the production area, the dairy operation cannot be deemed a Medium CAFO because it does not satisfy either of the two conditions in section 122.23(b)(6)(ii).[2]

It might be argued that according to *Waterkeeper*, the discharges located in the field adjacent to the AFO are actually discharges from the AFO itself. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). *Waterkeeper* involved a challenge to EPA's CAFO rule, focusing in part on the rule's land application provisions (section 122.23(e)).[3] *Id.* at 506-11. Industry groups argued that the land application provisions in effect regulated "uncollected" discharges because the provisions would apply regardless of whether the discharges were ultimately channeled

2. The "production area" is defined by section 122.23(b)(8) to include the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas, each of which are defined by 122.23(b)(8).

3. The CAFO rule has been revised three times since the 2003 version challenged in *Waterkeeper*, but the land application provisions in 122.23 (e) that the court analyzed in *Waterkeeper* have remained the same. *Compare* 40 C.F.R. § 122.23(e) (2003), *and id.* § 122.23(e) (2006), *and id.* § 122.23(e) (2007), *and id.* § 122.23(e) (2008), *with id.* § 122.23(e) (2014). The part of 122.23(e) that has changed since 2003 is the addition of 122.23(e)(i) and 122.23(ii). *Compare id.* § 122.23(e) (2003), *with id.* § 122.23(e) (2014).

through a discrete conveyance. *See id.* at 510. According to the industry groups, regulation of these "uncollected" discharges would mean EPA was regulating a non-point source under NPDES, which is unauthorized under the CWA. *See id.* The Second Circuit rejected that argument, concluding, "regardless of whether or not runoff is collected at the land application area . . . 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.* The court explained that because the CAFO is both a point source and the "proximate cause" of the discharge, any discharge from the land application area can be classified as "a discharge from the CAFO that can be regulated as a point source discharge." *Id*; *see also Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002) (applying similar reasoning to a similar scenario).

*Waterkeeper* is inapplicable to the question of whether Moon Moo's AFO is a Medium CAFO by virtue of its land applications. In *Waterkeeper*, the court assumed that the animal production operations were CAFOs before considering whether uncollected discharges from those operations' land application activities could be regulated. *See id.* at 506-11. The court reached its conclusion on the uncollected discharge question by (1) observing that CAFOs themselves are point sources, and (2) reasoning that discharges from a CAFO's land application activities are essentially discharges from the CAFO itself. See *id. at* 510-11. Therefore, *Waterkeeper* cannot be used to determine whether the discharges located in the field adjacent to the AFO are discharges from the AFO itself without first answering the prerequisite question of whether Moon Moo operates a CAFO.

In summary, Moon Moo is not a Large CAFO because it does not contain the minimum number of animals required by section 122.23(b)(4). Moon Moo is not a designated CAFO because there is no evidence that it has been designated through the process outlined in section 122.23(c). Lastly, Moon Moo is not a Medium CAFO because any discharge of pollutants through a man-made ditch occurs on land that does not comprise an AFO. Because section 122.23 only applies to CAFOs and Moon Moo Farm is not a CAFO, Moon Moo is not subject to NPDES permitting for discharges from a CAFO manure land application area under section 122.23(e).

### B. Moon Moo Farm's land application discharges are exempt from NPDES permitting as agricultural stormwater discharges.

#### 1. As a Non-CAFO, Moon Moo's nutrient discharges from its manure application fields are agricultural stormwater discharges that are not subject to NPDES permitting.

The CWA states that agricultural stormwater discharges are not a point source of pollution, which means they are not subject to NPDES permitting. 33 U.S.C. § 1342, § 1362(14) (2012). But neither the CWA nor EPA regulations provide a general definition of an agricultural stormwater discharge.[4] This has led to confusion in the context of AFOs because discharges resulting from AFO activities can share characteristics of both a point source discharge (subject to NPDES permitting) and an agricultural stormwater discharge (not subject to NPDES permitting). EPA has clarified the boundaries between a point source discharge and a stormwater runoff discharge when a CAFO facility applies waste to land under its control. *See* 40 C.F.R. § 122.23(e) (2014). But EPA has not issued regulations that clarify the boundaries between point sources and agricultural stormwater in other contexts, such as for AFOs that do not qualify as CAFOs. In contexts other than land application activities from CAFOs, courts must interpret the plain meaning of agricultural stormwater runoff based on its "ordinary meaning in accordance with common usage." *Alt v. EPA*, 979 F. Supp. 2d 701, 710-11 (N.D. W. Va. 2013) (citing *BP v. Burton*, 549 U.S. 84, 91, 127 (2006)).

The plain meaning of agricultural stormwater was analyzed in *Southview Farm. Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994). In *Southview Farm*, the Second Circuit assessed whether a reasonable jury could have

4. At most, EPA provides some examples of agricultural stormwater discharges in section 122.3(e) by saying that NPDES permits are not required for "any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23…." 40 C.F.R. § 122.3(e) (2014).

found that discharges from a CAFO's land application activities were exempted as agricultural stormwater.[5] *Id*. The court framed the issue as "not whether the discharges occurred during rainfall or were mixed with rain water run-off, but rather, whether the discharges were the result of precipitation [in which case they would be considered agricultural stormwater]." *Id.* at 120-21; *see also Alt*, 979 F. Supp. 2d 701 (citing *Southview Farm* when finding that a CAFO's non-land application discharge was exempted as agricultural stormwater because it resulted from precipitation). The court held that a reasonable jury could find that the CAFO discharges "were not the result of rain, but rather simply occurred on days when it rained," meaning the discharges fell outside of the agricultural exemption. *See Southview Farm*, 34 F.3d at 121. In reaching its decision, the court cited testimony from numerous eyewitnesses. One witness stated that after the farm spread manure, the manure "had pooled in the corner of their field right next to our property . . . larger than I had seen before, and it had been pooled there, and then it rained . . . [t]hen it drizzled into the ditch and through the drainage pipe." *Id.* Another witness stated that "a lot of manure [was] coming off the field through the areas where the banks had fallen away." *Id.*

Based on the ordinary meaning of the term agricultural stormwater runoff, as properly discerned by the Second Circuit in *Southview Farm*, Moon Moo's discharges are agricultural stormwater runoff because they resulted from precipitation events. In *Southview Farm*, the key testimony that permitted the Second Circuit to let the verdict against the CAFO stand stated that the manure itself was being directly discharged into waters of the United States. Witnesses saw pools of liquid manure standing in the field before it rained, and then after it rained said that "a lot of manure [was] coming off the field" in places where the banks had fallen away. *Id.* In other words, the discharges were found not to be "result of precipitation," but rather direct discharges of manure that occurred contemporaneously to a rain event. This direct discharge presumably resulted from soil erosion that created a conduit for the standing liquid manure to enter the

5. This was before EPA promulgated 40 C.F.R. § 122.23(e), which clarified when a CAFO's land application discharges are considered agricultural stormwater runoff.

nearby waters, as supported by the witness testimony of the manure "coming off the field through the areas where the banks had fallen away." *Id.*

In contrast, there is no evidence of direct manure discharges here. James states that he observed and photographed "manure spreading operations taking place" during a rain event. (R. 6). He also observed and photographed "discolored brown water flowing from the fields," which laboratory tests found to have elevated levels of nitrates and fecal coliforms. *Id.* But James simply describes a paradigm example of agricultural stormwater runoff resulting from precipitation. Brown colored water is exactly what one would expect to be draining from a dirt field after a rain event. James's observation that manure spreading operations were occurring on the same day as the brown discharges might help to identify the source of the pollution in the stormwater runoff (manure spreading operations). But unlike the witnesses in *Southview Farm*, James never stated that he actually saw manure collecting on the field or directly discharging into the river. Absent any evidence to the contrary, common sense dictates that the precipitation event between April 11 and 12 caused nutrients from Moon Moo's land application activities to be discharged into the canal. Therefore, based on the ordinary meaning of agricultural stormwater discharge, the discharges from Moon Moo Farm are exempt from NPDES permitting.

### 2. Even if Moon Moo were assumed to be a CAFO, nutrient discharges from its manure application fields would be agricultural stormwater discharges exempt from NPDES permitting.

As stated above, section 122.23(e) of the CAFO rule states that discharges resulting from land application activities by a CAFO to land under its control are subject to NPDES permitting requirements unless they qualify as agricultural stormwater discharges. 40 C.F.R. § 122.23(e) (2014). Section 122.23(e) then states:

> where the manure . . . has been applied in accordance with site specific nutrient management practices that ensure

> appropriate agricultural utilization of the nutrients in the manure . . . as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure . . . from land areas under the control of a CAFO is an agricultural stormwater discharge.

*Id.* It might appear on first glance that CAFO land application activities can only qualify as agricultural stormwater discharges if they meet the criteria described in section 122.23(e). However, a further reading reveals otherwise. Immediately following the text quoted above, 122.23(e)(1) states:

> [f]or unpermitted *Large CAFOs*, a precipitation-related discharge of manure . . . from land areas under the control of a CAFO *shall* be considered an agricultural stormwater discharge *only* where [it] . . . has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure . . . as specified in § 122.42(e)(1)(vi) through (ix).[6]

*Id.* § 122.23(e)(1) (emphasis added).

Section 122.23(e)(1) makes it clear that for Large CAFOs, there is only one way that land application discharges can be considered agricultural stormwater discharges: when the CAFO conducts land application activities "in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients. . .as specified in § 122.42(e)(1)(vi)-(ix)." *Id.* But for Medium CAFOs, there is no parallel to section 122.23(e)(1); there is only the main text of section 122.23(e). When the main text of 122.23(e) is read alongside of 122.23(e)(1), the inescapable conclusion is that for Medium CAFOs, land application activities conducted in accordance with site specific nutrient management practices

6. "Unpermitted" means the CAFO is not subject to NPDES permitting by virtue of discharges outside of those exempt as agricultural stormwater. If a CAFO is subject to NPDES permitting (either due to non-land application discharges or land application discharges that don't qualify for the agricultural stormwater exemption), then it must submit an NMP satisfying additional criteria beyond what is provided by § 122.42(e)(1)(vi)-(ix), and the NMP would be subject to the public comment process. *See* 40 C.F.R. § 122.42(e) (2014); *id.* § 124.10.

conforming to § 122.42(e)(1)(vi)-(ix) will guarantee that the discharges are considered agricultural stormwater, but it is not the exclusive way for discharges to be considered agricultural stormwater.

If Moon Moo Farm was found to be a CAFO, it could only be a Medium CAFO because its 350 cow dairy herd is far below the minimum 700 mature dairy cows or 1,000 other cattle required to be a Large CAFO. *See id.* § 122.23(b)(4). Therefore, Moon Moo would not be required to show that its land application activities are conducted in accordance with site specific nutrient management practices that conform to § 122.42(e)(1)(vi)-(ix). *Id.* § 122.23(e).

Other than the guarantee provided when a CAFO ensures "appropriate agricultural utilization of the nutrients," section 122.23(e) does not indicate when discharges from Medium CAFO land application activities qualify as agricultural stormwater runoff. Furthermore, the CWA does not define agricultural stormwater runoff. When statutes and regulations are silent as to the meaning of a term, courts must give the term its "ordinary meaning in accordance with common usage." *Alt v. EPA*, 979 F. Supp. 2d 701, 710-11 (N.D. W. Va. 2013) (citing *BP v. Burton*, 549 U.S. 84, 91, 127 (2006)).

Assuming that Moon Moo was a Medium CAFO, the analysis for whether its land application discharges would be exempt as agricultural stormwater runoff is the same as the non-CAFO plain meaning analysis conducted in section I.B.1 above. Based on the ordinary meaning of agricultural stormwater discharge and the analysis conducted above, the discharges from Moon Moo Farm would be exempt from NPDES permitting.

### 3. Neither the levels of nitrates and fecal coliforms nor the discharge of the stormwater through a drainage ditch change the conclusion that Moon Moo's nutrient discharges are agricultural stormwater discharges not subject to NPDES permitting.

Riverwatcher claims that the samples they took from Moon Moo's ditch had highly elevated levels of nitrates and fecal coliforms. (R. 6). Dr. Mae asserts that the manure's acidity discouraged nutrient absorption and that "land application of manure during a rain event is a very poor management practice" that will almost always result in "excess runoff of nutrients from fields." *Id.* Riverwatcher's reliance on these facts is misplaced. The purpose of the agricultural stormwater exemption is to exclude certain sources of *pollution* from NPDES permitting coverage. This means pollution (whether from excess runoff of nutrients or other sources) is expected in any exempt discharge, otherwise there would be no need to invoke the exemption.

There is no basis for taking the magnitude of Moon Moo's discharge into account for situations outside of a Large CAFO covered by section 122.23(e)(1). 40 C.F.R. § 122.23 (e)(1) (2014). Whether a discharge falls within the ordinary meaning of agricultural stormwater depends on whether it results from precipitation, not on its magnitude. *Southview Farm*, 34 F.3d at 121.

Lastly, the existence of a ditch as the mechanism for transferring Moon Moo's agricultural stormwater discharges into waters of the United States has no bearing on the discharges' status as agricultural stormwater discharges. Agricultural stormwater discharges are those resulting from precipitation, and they are still exempt "even when those discharges came from what would otherwise be point sources." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005); *see also Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994); *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013) (illustrating that discharges from CAFOs, which are statutorily defined as point sources, are considered agricultural stormwater runoff when they result from precipitation). Because the discharges here result from precipitation and are therefore

exempt stormwater discharges, it is irrelevant that a ditch is the mechanism for transferring Moon Moo's discharges into waters of the United States.

#### 4. Moon Moo's application of manure in accordance with its nutrient management plan (NMP) provides additional support that its discharges are exempt as agricultural stormwater.

New Union regulates Moon Moo Farm as a "no-discharge" AFO. (R. 5). Being a "no-discharge" operation means Moon Moo should not normally have direct manure discharges. *Id.* Per its regulatory requirements, Moon Moo submitted a nutrient management plan (NMP) to the New Union Department of Agriculture (DOA). *Id.* The NMP provided planned seasonal manure application rates and a calculation of expected uptake of nutrients by the crops grown on the fields where the manure was spread. *Id.* Moon Moo's manure land applications have been conducted in accordance with its NMP at all times relevant to this case. (R. 6).

As explained above in sections I.A and I.B.2, Moon Moo need not submit an NMP for its land application discharges to be classified as agricultural stormwater under 40 C.F.R. § 122.23(e) because (1) it is not a CAFO, and (2) even if it were a CAFO, it would be an unpermitted Medium CAFO, and only unpermitted Large CAFOs are limited to an NMP as the exclusive option for receiving the agricultural stormwater exemption. Instead, Moon Moo's discharges are exempt if they fall within the plain meaning of an agricultural stormwater discharge (which they do).

But the New Union DOA's acceptance of Moon Moo's NMP does provide additional support that Moon Moo's land applications are agricultural stormwater discharges. This is because Moon Moo submitted its NMP as a no-discharge operation under New Union's regulatory scheme, which means land applications in accordance with the NMP should not result in direct manure discharges. If Moon Moo's land applications do not result in direct manure discharges, then their discharges with excess nutrients must be the result of precipitation and fall within the plain meaning of agricultural stormwater discharges.

*Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994); *see also Alt v. EPA*, 979 F. Supp. 2d 701, 711 (N.D. W. Va. 2013) (interpreting the plain meaning of stormwater discharges to be "precipitation-related discharges"). Therefore, New Union's acceptance of Moon Moo's NMP supports the district court's conclusion that Moon Moo's discharges result from precipitation and are exempt from NPDES permitting as agricultural stormwater discharges.

## II. MOON MOO FARM'S APPLICATION OF SOIL AMENDMENTS DOES NOT VIOLATE RCRA BECAUSE THE MANURE AND WHEY NEITHER CONSTITUTE SOLID WASTE NOR REPRESENT AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HUMAN HEALTH OR THE ENVRIONMENT

Congress drafted the Resource Conservation and Recovery Act (RCRA) in 1976 to deal with escalating waste disposal problems throughout the United States. Congress also expressly noted its desire to create "a national system to insure the safe management of hazardous waste." *American Mining Congress v. EPA,* 824 F.2d 1177, 1179 (D.C. Cir. 1987) (herein *AMC I*) (citing H.R. REP. NO. 94-1491, at 3 (1976), 42 U.S.C. § 6901 et seq., 1976). Congress intended RCRA to apply to both hazardous and non-hazardous solid wastes; RCRA does not, however, apply to every potential environmental harm. RCRA entered a regulatory universe already populated by the Clean Water Act (33 U.S.C. § 1251 et seq., 1972) and Clean Air Act (42 U.S.C. § 7401 et seq., 1970). RCRA Subtitle D, which deals with nonhazardous solid waste disposal, defines solid waste as:

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

42 U.S.C. § 6903(27) (2012) (emphasis added).[7] Riverwatcher asserts that Moon Moo violated several open dumping provisions and created an "imminent and substantial endangerment to human health." (R. 10). Both claims first require Riverwatcher to establish that the material at issue qualifies as solid waste, specifically as "other discarded material" from "agricultural operations." *Id*.

Since Moon Moo's land application of whey and manure does not qualify as solid waste disposal, the district court properly dismissed both claims. Even if Moon Moo disposed of solid waste, Riverwatcher failed to connect Moon Moo's practices to any "imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B) (2012).

### A. Moon Moo Farm's soil amendments do not qualify as discarded material.[8]

RCRA's definition of solid waste includes both specific categories (e.g., "garbage, refuse," and "sludge") and more general descriptions (e.g., "other discarded material") 42 U.S.C. § 6903(27) (2012). While it might appear that the inclusion of "other discarded material" makes the definition broad in scope, Congress in fact defined solid waste narrowly. Based on the doctrine of *ejusdem generis*, a general category that appears immediately following an enumerated list should apply only to "things of the same general class as those enumerated." *AMC I*, 824 F.2d at 1189. Riverwatcher asserts that the manure and whey constitute other discarded material. (R. 11). To determine whether a material has been discarded, courts consider the statute's plain text, legislative history, and the operator's purpose. *See Safe Air v. Meyer*, 373 F.3d 1035 (9th Cir. 2004).

In *Safe Air v. Meyer*, the Ninth Circuit analyzed whether blue grass residue left on a field and then burned after the harvest qualified as a solid waste. *Meyer*, 373 F.3d at 1037. This practice is known as "open field burning." *Id*. The remaining ash restored necessary nutrients to the soil, fertilized future crops,

7. Riverwatcher does not allege that Moon Moo has disposed of hazardous waste, governed by RCRA Subtitle C. (R. 10).

8. If Moon Moo qualifies as a point source under the CWA, RCRA expressly excludes it from regulation under Subtitle D. 42 U.S.C. § 6903(27).

and reduced the need for artificial pesticides by deterring insects. *Id*. at 1044. Open field burning enabled productive use of the fields for a much longer period of time. *Id*. As described below, the *Meyer* court's approach demonstrates analysis of the term "discarded material" consistent with the statutory text, Congress' intent, and consideration of operator purpose.

### 1. The plain meaning of "other discarded materials" does not encompass manure and whey applied to the land for a beneficial purpose.

Under traditional cannons of statutory construction, courts should first look to the statutory language selected by Congress. *CBS v. FCC*, 453 U.S. 367, 377 (1981). The statute's meaning relies foremost on the common meaning of its words; "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Meyer*, 373 F.3d at 1041 (internal citation omitted). This begins with the understanding that "the legislative purpose is expressed by the ordinary meaning of the words used." *Sec. Indus. Ass'n v. Bd. of Governors*, 468 U.S. 137, 149 (1984). Since Congress did not define "other discarded material," courts should look to the plain meaning and dictionary definition of "discarded." *Meyer*, 373 F.3d at 1041. Discarded imparts an understanding that the material has been "disposed of, thrown away or abandoned." *AMC I*, 824 F.2d at 1183 (internal citation omitted).

The common meaning of discarded comports with the waste disposal problems that inspired Congress to enact RCRA. The *AMC I* court looked both to plain meaning and Congress's intent to determine that material has not been discarded when intended for "immediate reuse." *Id*. at 1184-85. The D.C. Circuit summarized Congress's intent as "extend[ing] EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." *Id*. at 1190. Materials "destined for beneficial reuse" play no role in the waste disposal problem that inspired RCRA. *Id*. at 1186. This framework does not encompass beneficial use of manure and whey. Common sense dictates that the use of soil amendments to increase crop yields does not

equate to waste disposal under the common meaning of the term "discarded."

### 2. Congress intended RCRA to apply primarily to truly discarded material, especially waste in landfills.

Especially in context of contemporaneous environmental regulation, Congress sought to "eliminate[ ] the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes." H.R. REP. NO. 94-1491, at 4 (1976). Since RCRA's initial enactment:

> neither Congress, nor EPA's implementing regulations, ever contemplated that application of manure and other solid amendments to agricultural fields would be considered a solid waste disposal practice subject to regulation under RCRA.

(R. 10). When promulgating RCRA, Congress referred to the "'rising tide' in scrap, discarded, and waste materials" as well as the need "to provide for proper and economical solid waste disposal practices." *AMC I*, 824 F.2d at 1179 (quoting 42 U.S.C. § 6901(a)(2) and (a)(4)). Reuse of animal manure and whey as soil amendments does not implicate the concerns that motivated Congress to enact RCRA.

An accompanying House Report describes RCRA as "a multi-faceted approach toward solving the problems associated with the 3-4 billion tons of discarded materials generated each year." H.R. REP. NO. 94-1491, at 2 (1976). Congress sought to spur "[a]n increase in reclamation and reuse practices." *Id*. at 3. Application of soil amendments represents the very type of recycling practice that Congress sought to encourage. The same report indicates that "[a]gricultural wastes which are returned to the soil as fertilizers . . . are not considered discarded materials in the sense of this legislation." *Id*. Moon Moo's conduct already qualifies as the type of reuse and reclamation practice Congress sought to encourage by promulgating RCRA.

### 3. Moon Moo's purpose in applying whey and manure to the fields pursuant to a valid Nutrient Management Plan indicates that the soil amendments are not discarded.

Finally, courts consider "whether the party intended to throw the material away or put it to a beneficial use." *Safe Food & Fertilizer v. EPA,* 350 F.3d 1263, 1269 (D.C. Cir. 2003). This process has been described as "a functional inquiry," focused on "defendants' use of the animal waste products rather than the agriculture waste definition." *Water Keeper Alliance, Inc. v. Smithfield Foods, Inc*., 2001 U.S. Dist. LEXIS 21314, at *12 (E.D.N.C. Sept. 20, 2001). The same is true even if the material is destined for reuse in a different industry. *Safe Food*, 350 F.3d at 1268. The fact that Moon Moo acquires its whey from Chokos without cost does not impact the analysis of Moon Moo's intent in applying the whey to its fields. Moon Moo's primary purpose in returning the mixture to the soil is to improve the soil condition. (R. 6). Use of soil amendments supports Moon Moo's increase in operations to accommodate Chokos' heightened demand. (R. 5).

As far as whey, "land application of whey as a soil conditioner was a longstanding practice that has been traditional in New Union since the 1940s." (R. 6). Moon Moo's use comports with farming practices in place long before RCRA. Even though Chokos provides the whey at no cost, that does not mean Moon Moo intends to discard it. (R. 5). In fact, it is inconceivable that Moon Moo would accept Chokos's whey for mere disposal if it did not serve a beneficial purpose to Moon Moo. The operator in *Meyer* also did not receive payment for the grass residue, but that did not transform beneficial use into waste disposal. *See generally Meyer*, 373 F.3d 1035. Although Chokos does not receive money for its whey, it benefits from Moon Moo's increased capacity.

In addition to RCRA's plain language and Congress's intent, *Meyer* looked at the operator's intent. *Meyer*, 373 F.3d at 1045. There, blue grass residue was an "integral component in the open burning process" that provided many benefits. *Id*. at 1043. Similarly, Moon Moo applies whey and manure as part of its Nutrient Management Plan (NMP). (R. 5–6). Existence of an NMP reinforces the validity of an operator's beneficial use. In *Oklahoma*, the operator complied with an Animal Waste

Management Plan (AWMP) when applying poultry litter as a soil amendment. *Oklahoma v. Tyson Foods, Inc*., 2010 U.S. Dist. LEXIS 14941, at *21-22 (N.D. Okla. Feb. 17, 2010). Existing regulations showed that Oklahoma endorsed the beneficial use. *Oklahoma*, at *42.

Moon Moo Farm submitted its NMP to the New Union Department of Agriculture (DOA), which has authority to reject NMPs (R. 5). The NMP details the rate at which Moon Moo may apply the amendments to its fields and outlines the projected nutrient uptake of the crops. *Id*. Even if some aspect of the material is not fully used, that does not transform it into discarded material. *Oklahoma*, at *43. Animal waste can become discarded when applied in excessive quantities; however, Riverwatcher has not shown that Moon Moo excessively applied soil amendments. *See Water Keeper Alliance*, 2001 U.S. Dist. LEXIS 21314. To the contrary, Moon Moo applies the whey and cow manure to its fields in compliance with its NMP. (R. 6).[9]

Farmers commonly use animal manure as a soil amendment or share it with others for that purpose. *Oklahoma*, at *20. Congress acknowledged this practice and explicitly excluded "agricultural wastes, including manures . . . returned to the soil as fertilizers or soil conditioners" from RCRA. 40 C.F.R. § 257.1(c)(1); *see* H.R. REP. NO. 94-1491, at 3. Oklahoma argued that poultry waste applied to fields qualified as "other discarded material" from agricultural operations, despite its many beneficial uses. *Oklahoma*, at *40-1. Poultry litter constituted "an agricultural commodity for which there [was] both a market and a market value" as opposed to unwanted waste. *Id*. at *33.

In another manure case, the plaintiffs alleged that manure "applied to agricultural fields at above-argonomic levels and leaked from lagoons storing manure" qualified as discarded. *Cmty. Ass'n for the Restoration of the Env't v. George & Margaret LLC*, 964 F. Supp. 2d 1151, 1154 (E.D. Wash. 2013). This resulted in high levels of nitrates in drinking water. *Id*. at 1154. The court looked to *Meyer* and cited the ordinary meaning of discarded, "to

9. Riverwatcher contends that Moon Moo's NMP is not subject to public comment, however, any dispute with the NMP should be pursued through administrative process at the DOA and not in this proceeding. Further, RCRA does not speak to any specific criteria for valid NMPs.

cast aside; reject; abandon; give up." *Id.* at 1156 (internal citation omitted). Another key factor was "whether that product 'has served its intended purpose and is no longer wanted by the consumer.'" *Ecological Rights Found. v. Pacific Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (citing H.R. REP. NO. 94-1491, at 2).

Even if Moon Moo's soil amendments qualify as solid waste, Moon Moo has not violated RCRA's open dumping provisions because those "criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." 40 C.F.R. § 257.1(c)(1). Moon Moo has not applied its soil amendments in excessive quantities, and has complied with a valid NMP at all times. (R. 6). Moon Moo's good faith compliance evidences its intent to improve its farm.

### B. Moon Moo Farm's untested contribution to elevated nitrate levels does not rise to the level of an "imminent and substantial" threat to human health.

Riverwatcher next asserts that Moon Moo disposed of solid waste so as to create an "imminent and substantial endangerment to human health or the environment." (R. 11) (citing 42 U.S.C. § 6972(a)(1)(B) (2012)). The endangerment alleged relies on Farmville Water Authority (FWA)'s decision to issue a drinking water advisory due to "highly elevated levels of nitrates and fecal coliforms." (R. 6). FWA warned residents that nitrate levels "made the Farmville municipal water supply unsafe for drinking by infants" and recommended that infants receive bottled water. *Id.* Even though RCRA embodies a forgiving standard, Riverwatcher failed either to link Moon Moo's conduct to the advisory or to establish a sufficient threat of actual harm to community residents.

#### 1. Riverwatcher has not established a sufficient causal link between Moon Moo's activities and the nitrate advisories.

The district court properly granted summary judgment in Moon Moo's favor because Riverwatcher failed to establish a causal link between Moon Moo and the nitrate advisories. In fact,

"Riverwatcher's own expert conceded that Moon Moo Farm's practices are not the 'but-for' cause of the nitrate advisories." (R. 11). The Farmville Water Authority issued similar advisories "in 2002, 2006, 2007, 2009, and 2010, before the increase in Moon Moo Farm's operations." (R. 7). These advisories also predate Moon Moo's acceptance of whey from Chokos. (R. 5). Moon Moo's conduct has not altered the length of time between advisories, which ranges from one to four years. (R. 7). Moon Moo's increased capacity appears to have no impact at all on the issuance of nitrate advisories in Farmville or their frequency. Furthermore, "the Deep Quod watershed is heavily farmed." *Id*. No other parties potentially responsible for nitrate pollution have been joined to this suit. Without these parties, it is unlikely that any judgment against Moon Moo would substantially impact nitrate levels in the watershed.

In *Steilacoom Lake Improvement Club, Inc. v. Washington*, the Ninth Circuit held that elevated phosphorous levels in a lake that lead to water quality violations did not pose an imminent danger to resident health or the environment. 138 Fed. Appx. 929, 932 (9th Cir. 2005). Similarly to Riverwatcher, the *Steilacoom* plaintiffs failed to establish a causal link between the defendant's conduct and phosphorous level in the lake. *Id*. at 932. Plaintiffs would need to establish "how much excess phosphorous is contributed by any of the many other watershed property owners" to establish causation. *Id*. Riverwatcher has not even identified other possible contributors to nitrate levels in the watershed.

**2. Nitrate advisories create no imminent risk of harm in Farmville.**

Although RCRA's standard extends to conduct that "may" present a risk to human health or the environment, the potential harm must be imminent. This does not require a showing of actual harm, but requires "a threat which is present *now*." *Price v. United States Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (emphasis original). Under RCRA's imminence requirement the mere fact of contamination does not establish causation. In *Scotchtown Holdings, LLC v. Goshen*, a New York district court noted that "courts often dismiss RCRA claims where,

notwithstanding the existence of hazardous substances in a water supply, the specific factual circumstances at issue prevent humans from actually drinking contaminated water." 2009 U.S. Dist. LEXIS 1656, at *8 (S.D.N.Y. Jan. 5, 2009). The FWA's advisement to use bottled water for infants sufficiently protects human health and neutralizes the risk of actual harm.

The Fourth Circuit similarly denied a RCRA claim based on hazardous substances found in groundwater and wells near a manufacturing facility. *Leister v. Black & Decker (U.S.), Inc.*, 1997 U.S. App. LEXIS 16961, at *8 (4th Cir. Jul. 8, 1997). Although the contaminants unmistakably posed a serious threat, Black & Decker previously entered into a consent order to install a filtration mechanism. *Id.* at *4. As a result, the court found no risk of imminent exposure, and concluded that relief under RCRA was not warranted. *Id.* at *8. Even alternatives far less sophisticated than installing a filtration mechanism can adequately curtail the risk.

In *Davies v. Nat'l Coop. Refinery Ass'n*, the alleged endangerment consisted of hydrocarbon pollution in well water that supplied a local radio station. 963 F. Supp. 990, 992 (D. Kan. 1997). Experts calculated "the carcinogenic health risk to individuals exposed to water from the old and new wells, respectively, to be 650 and 219 times greater than acceptable." *Id.* at 996. Evidence did not "establish or address the likelihood that any person will actually be exposed to" the contaminated water. *Id.* at 999. The court opined, "plaintiffs have been warned of the danger and are able to occupy the property without serious risk to their health by using an alternative water supply." *Id.* RCRA's purpose of avoiding harm to human health does not transform it into a broad remedial statute. Since Farmville residents can avoid any possible health hazard by using bottled water for infants, no imminent risk of harm exists. The FWA has issued nitrate advisories multiple times in the past. The record does not indicate any instance where the FWA failed to alert residents to possible risks posed by elevated nitrate levels.

The risk to Farmville residents is also far less serious than other instances where courts have denied relief under RCRA. Courts generally conclude that an endangerment is substantial when it is "serious." *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 259 (2d Cir. 2005); *see also Price*, 39 F.3d 1011. In

*Interfaith*, a concrete risk of actual exposure informed the court's conclusion that the risk was serious. *Interfaith*, 399 F.3d at 261. Amounts of hexavalent chromium indisputably attributable to Honeywell "exceeded all applicable . . . contamination standards for soil, groundwater, surface water, and river sediments adjacent to the Site." *Id*. Containment measures exhibited damage and leaks, and Interfaith also produced "evidence of human trespass . . . including holes and damage to the Site's fence and . . . discarded food and wrappers, toys, fishing poles and equipment, and graffiti." *Id*. at 262. Both the seriousness of the harm and potential for actual exposure differ significantly from the FWA's nitrate advisories. The nitrate advisory impacts a small, readily identifiable subset of Farmville's population—infants less than two years of age. This allows the FWA to warn affected individuals before any actual exposure takes place. Unlike attempting to close off an area to trespassers, provision of bottled water is an alternative guaranteed to prevent exposure.

Since Riverwatcher failed to establish a causal link between Moon Moo's application of soil amendments and the nitrate advisory, and failed to establish that the threat is both imminent and substantial, the district court properly granted summary judgment in Moon Moo's favor. Even if the danger were imminent and substantial, Riverwatcher has not shown that injunctive relief against Moon Moo would have any impact on nitrate levels in the Deep Quod watershed.

## III. THE QUEECHUNK CANAL IS NOT A PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION BECAUSE IT IS NOT A WATER IN ITS NATURAL STATE AND HAS NO PUBLIC RIGHT OF ACCESS.

The Commerce Clause of the United States Constitution gives the federal government power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Early on, the Supreme Court held that the government's power to regulate commerce included regulation of activities related to navigation. *Gibbons v. Ogden*, 22 U.S. 1, 3 (1824). After *Gibbons*, the question became the scope of navigability. The navigability test in *The Daniel Ball*,

decided by the Supreme Court in 1870, remains the standard used by the federal government to determine navigability for Commerce Clause purposes. There, the court held that "rivers 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." *The Daniel Ball*, 77 U.S. 557, 563 (1870). The court subsequently expanded the scope of navigability to include waters that have been improved to allow for navigability. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407 (1940).

However, an important distinction exists between a river's navigability for Commerce Clause purposes and its navigability for title purposes because the Commerce Clause "speaks in terms of power, not of property." *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956). This means that a water body's navigability simply gives the federal government regulatory power over the water. Title of the beds and banks of navigable waters, however, rests in the states as sovereigns. *Shively v. Bowlby*, 152 U.S. 1, 31 (1894).[10] In order for a water body to be navigable for state title purposes, the water body must have been navigable at the time of statehood, based on the "natural and ordinary condition of the water." *PPL Montana*, 132 S. Ct. at 1228. Upon admission to the Union, title passes to the state, "as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce." *United States v. State of Oregon*, 295 U.S. 1, 14 (1935).

10. This rule originates from English common law. PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1226 (2012). After the American Revolution, the newly formed United States adopted the same rule: "the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842). The same principle was true for each state thereafter admitted to the Union because the states are coequal sovereigns under the Constitution. Lessee of Pollard v. Hagan, 44 U.S. 212, 231 (1845). This principle came to be known as the equal footing doctrine. Id. at 216.

The Queechunk Canal was constructed in the 1940s by the previous owner of Moon Moo's property. (R. 5). New Union became a state before that time. (R. 4). Since New Union became a state before the Queechunk Canal existed, the bed and banks of the current canal cannot be owned by the State of New Union. In these instances, as the Supreme Court stated, "if they were not then navigable, the title to the river beds remained in the United States." *United States v. State of Utah*, 283 U.S. 64, 75 (1931).

### A. The Queechunk Canal is not a navigable water body because it is not in its natural state and is not used for commercial purposes.

The long held test for navigability of waterways is that "rivers 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." *The Daniel Ball*, 77 U.S. at 563.

The Queechunk Canal, as a man-made canal, cannot be considered navigable under the *Daniel Ball* test because it is not a water body in its ordinary condition. The farm's previous owner created the entire canal where there was none before. In addition, there is no evidence that the canal has ever been used commercially. It was constructed to alleviate flooding at the nearby bend in the Deep Quod River. (R. at 5). The canal's creator used private resources to protect his property against flood damage. The canal's creator never intended that it be used for commerce and, in fact, prominently posted signs declaring no trespassing. *Id.*

Because the canal is not a navigable waterway, the public trust doctrine does not apply. Therefore, no public right of navigation exists on the Queechunk Canal, and James committed trespass when he entered the canal.

### B. Even if the Queechunk Canal were navigable, there is no public right of access because the canal was privately constructed.

The private construction of the Queechunk Canal exempts it from being subject to a public right of access. Furthermore, while

the federal government has authority over navigable waters for commerce purposes, that authority does not entitle it to control the water for title purposes. This establishes only the right to control use of navigable waters in the United States. As the Supreme Court held in *Twin City Power Co.*:

> '[t]he interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' or 'a superior navigation easement.'

*United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956). In *Kaiser Aetna*, owners of an artificially constructed marina, Kuapa Pond, sought to deny public access. When owners made the necessary improvements to create a fully functioning marina, it was declared to be navigable by the Army Corps of Engineers. The Ninth Circuit held that the federal navigation servitude obligated the marina to allow public access since the marina became navigable. *Kaiser Aetna v. United States*, 444 U.S. 164, 166 (1979). The Supreme Court reversed the Ninth Circuit and held that while "it is true that Kuapa Pond may fit within definitions of 'navigability' articulated in past decisions of this Court . . . it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude." *Kaiser Aetna,* 444 U.S. at 171. The Court found that the concept of navigability had been used only to:

> define the scope of Congress's regulatory authority under the Interstate Commerce Clause, to determine the extent of the authority of the Corps of Engineers . . . and to establish the limits of the jurisdiction of federal courts conferred by Art. III, § 2, of the United States Constitution over admiralty and maritime cases.

*Id*. The Court went on to say that creating a public right of access after private owners improved Kuapa Pond would constitute a taking contrary to the Fifth Amendment.

Like in *Kaiser Aetna*, Moon Moo owns a privately constructed water body that, but for private investment, would not be navigable. "If a waterway is a 'navigable water of the United States,' the federal government has the power to subject it to exclusive federal regulation, at least with respect to navigation issues." Richard J. Pierce, Jr., *What Is a Navigable Water? Canoes Count but Kayaks Do Not*, 53 SYRACUSE L. REV. 1067, 1070 (2003). The federal government certainly has power to regulate aspects of the canal, including Coast Guard jurisdiction over navigation safety, Army Corps of Engineers authority to regulate structural and obstruction issues, and Federal Energy Regulatory Commission authority to regulate dams. *Id*.

Even if the Queechunk Canal can be considered federally navigable, the government cannot compel it to open the canal to public navigation without affecting a taking. A private party developed the canal for the sole purpose of alleviating flooding at the bend of the Deep Quod River, where a large portion of Moon Moo Farm is located. (R. 5). This flood reduction mechanism served to help protect the farm's property from damage. The Fifth Amendment to the United Sates Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Fifth Amendment prohibits granting public access to the Queechunk Canal without just compensation. In this case, there is no evidence that Moon Moo's owners received just compensation for a public right of access on the canal. To allow a public right of access contravene *Kaiser Aetna*, intended to protect private property owners against unconstitutional government takings.

In conclusion, Moon Moo argues that the Queechunk Canal is not subject to public trust navigation because it is not a navigable waterway. Even if the court can find navigability, while the federal government clearly has some regulatory power over the Queechunk Canal, it does not have the right to declare the canal navigable for public access purposes. Without just compensation, opening the Queechunk Canal to public access is an unconstitutional taking contrary to the Fifth Amendment.

## IV. BECAUSE THE QUEECHUNK CANAL DOES NOT HAVE A PUBLIC RIGHT OF ACCESS, AND BECAUSE OF A BREAK IN THE EVIDENTIARY CHAIN OF CUSTODY, EVIDENCE OBTAINED THROUGH TRESPASS AND WITHOUT A WARRANT IS INADMISSIBLE.

Moon Moo rejects the authenticity of evidence presented by James and EPA. As the Ninth Circuit held in *Black*, a court reviews a lower court's decision to admit certain evidence for abuse of discretion. *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir. 1985). The same circuit previously held that the proponent bears the burden of establishing chain of custody, to the satisfaction of the trial judge. *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960). Riverwatcher has not established "sufficient proof so that a reasonable juror could find that the [evidence is] in 'substantially the same condition' as when" first obtained. *United States v. Harrington*, 923 F.2d 1371, 1374 (9th Cir. 1991). Courts consider the nature of the article, circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with it. *Gallego*, 276 F.2d at 917. Moon Moo points specifically to the circumstances surrounding preservation and custody as well as the likelihood of tampering.

### A. Evidence is inadmissible because of a break in the chain of custody.

Rule 901 of the Federal Rules of Evidence states, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This rule applies equally in civil cases. Fed. R. Evid. 101. The above rule, better known as the "chain of custody" rule "is but a variation of the principle that real evidence must be authenticated prior to its admission into evidence." *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982). "The purpose of this threshold requirement is to establish that the item to be introduced is what it purports to be." *Id*. The Second Circuit held that the object must be shown to be in substantially the same condition as when the crime was

committed before it can be admitted as evidence. *United States v. S.B. Penick & Co.*, 136 F.2d 413, 415 (2d Cir. 1943). "This can be accomplished by showing a 'chain of custody,' which indirectly establishes the identity and integrity of the evidence by tracing its continuous whereabouts. Or such evidence may be visually identified by witnesses." *United States v. Zink*, 612 F.2d 511, 514 (10th Cir. 1980). The *Howard-Arias* court developed the idea further, holding that a missing link in the chain of evidence does not necessarily preclude the evidence as long as there is sufficient proof that the evidence is what it purports to be and has not been altered. *Howard-Arias*, 679 F.2d at 366. Resolution of this question rests with the sound discretion of the trial judge. *Id.*

The record shows that James collected samples and submitted them to a lab. (R. at 6). However, there is no verification that the samples from the river are substantially the same as the samples Riverwatcher sought to admit. While a break in the chain of custody does not necessarily bar admission of evidence, there must be sufficient proof that the evidence is what it purports to be. *Howard-Arias*, 679 F. 2d. at 366. Since the proponent bears the burden of proof, James must verify that the evidence has not been tampered with in any way. This proof does not exist and the trial court, after James failed to produce this evidence, properly excluded the evidence. Moon Moo also contends that James had a motive to tamper with the evidence.

The fact that evidence may be identified by witnesses is not a valid defense here for two reasons. First, one witness could undoubtedly be a staff member from the laboratory that analyzed the samples; however, the court cannot be sure that the samples tested in the lab were taken directly from the canal without tampering. Second, one of the witnesses, James, is the same person who collected the evidence and has a clear motive to be untruthful. James's affiliation with an environmental group, and the fact that he is party to this litigation, is a reasonable motive for tampering with any alleged samples collected from the Queechunk Canal. As the Deep Quod Riverwatcher, it is reasonably assumed that his goal to ensure that the river's water remains clean. This directive serves enough of a motive to stop a perceived threat to the river by hindering the operations of nearby agriculture.

In summary, the water samples collected by James are not admissible because the chain of causation was broken with no verification that the proffered evidence is what it purports to be.

## CONCLUSION

Moon Moo Farm does not require a NPDES permit because it is a CAFO. Even if it were, its discharges qualify as exempt agricultural stormwater discharges. Moon Moo's application of soil amendments does not violate RCRA because the amendments are not solid waste. Moon Moo's conduct also has not created an imminent and substantial endangerment to human health. The district court properly awarded damages for and excluded evidence procured by trespass on Moon Moo's private property. Therefore this Court should AFFIRM the district court's grant of summary judgment to Moon Moo Farm and denial of summary judgment to both Riverwatcher and EPA.