THE SOUTHVIEW FARM CASE:

A Giant Step to End Special Treatment For Agriculture Under Environmental Laws

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Agriculture is New York State's biggest business. However, while the family farm is deeply ingrained in our American tradition, today we see less and less farms. The farms that remain get bigger and bigger. As a result, there is a greater concentrations of livestock, and a greater concentration of animal manure.

Agriculture as a Source of Water Pollution

Yesterday's family farm was a well–oiled machine in ecological balance. Cows were pastured in the fields, and their manure spread to fertilize the ground. Today, large farms raise animals in factory–style operations. Often, they import feed because they do not have enough land to grow enough crops to feed their livestock. Almost by definition, that means that there are not enough fields to absorb nutrients from animal waste to keep the farms in ecological balance. Many large farms concentrate their manure in huge lagoons, and then spread or spray waste onto fields. Unless adequate measures are taken, a significant portion of this waste will run off into our nation's waters.

As a result, agriculture may be the largest source of water pollution in America. According to the United States Environmental Protection Agency ("EPA"), seventy–five percent of nitrogen and phosphorous in our surface waters come from animal waste and feed fertilizer.[(1)] Across America, rivers and lakes are polluted with nutrients from agricultural runoff. Various diseases and disasters have been blamed on animal waste.[(2)] According to the National Wildlife Federation:

For instance, the cryptosporidium (bacteria) outbreak in Milwaukee's drinking water system killed over 100 people and made over 400,000 people ill, and was most likely caused by dairy cattle waste. Another example is the outbreak of the micro–organism Pfiesteria in North Carolina, which is blamed for massive fish–kills in the lower Neuse River. The outbreak appears to have been caused by a polluted runoff containing animal waste from large farms.[(3)]

This past summer, animal waste at the Washington County Fair was blamed for two deaths. Hurricanes this past fall caused havoc with huge concentrations of animal wastes in North Carolina. According to the *New York Times*, "[i]n the hurricane, feces and urine soaked the terrain and flowed

into rivers from the overburdened waste pits that the industry calls lagoons."[4]

The *Times* also observed:

> Human waste in North Carolina and most of the nation must be captured in public sewers and private septic systems to prevent the spread of disease. But the state lets the waste of hogs, which carry many human diseases, be captured by nothing more than a œsspool.[5]

Special Treatment for Farmers Under Environmental Laws

Throughout the environmental laws, exceptions are provided to farmers, including not only water pollution laws, but also laws and regulations pertaining to solid waste, hazardous waste, environmental impact review, and other environmental concerns.[6] Under the "Right to Farm Law" passed by the New York State Legislature,[7] farmers that cause a nuisance on neighbor's properties, are immune from suit if the Commissioner of Agriculture and Markets (hardly an unbiased player) determines that the farm's methods are "sound agricultural practices." The author has unsuccessfully sought to challenge the New York Right to Farm Law,[8] although a similar challenge in Iowa was successful.[9] In fact, a neighbor who unsuccessfully sues a farm may have to pay a farmer's attorney's fees,[10] while other industries must deal with the traditional "American" rule on attorney's fees.

In general, the Clean Water Act only requires a permit for discharges from a "point source," which is defined as:

> any discernable, confined and discrete conveyance, included 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. [11] While industry needed permits under the National Pollution Discharge Elimination System ("NPDES") system to discharge from pipes or ditches, EPA and the New York State Department of Environmental Conservation ("DEC") had long taken the position that runoff from agriculture was not a point source regulated under the Clean Water Act. Environmental regulators pursued the "low-hanging fruit," regulating industry levels like 99.9 percent efficiency, and then continued to strive for that last one–tenth of one percent, rather than focusing on agricultural discharges that posed a far greater a problem. Surprisingly, until recently industry had not complained about this disparate treatment.

The Decision to Bring the Case

All this changed, however, with the Southview Farm case.[12] In that case, I represented the plaintiffs. Southview is a huge farm in Castile, Wyoming County, which at the time had over 1400 milking cows, and about 2,000 total cattle. It had gobbled up small farms around it, and had amassed thousands of acres of fields. Southview had a four-acre lagoon, where it stored six to eight million gallons of cow manure and urine. This was spread on fields in 5,000-gallon manure spreaders, or sprayed out of huge devices like a center pivot irrigator or a "hard hose traveler," which resemble giant lawn sprinklers. Southview is located just above Letchworth State Park, the "Grand Canyon of the East." Not surprisingly, the farm not only polluted groundwater, but also had caused offensive odors and water pollution in the area.

In 1989, I got a call from a local resident who was concerned about pollution from Southview. I met with a group of Southview neighbors, and their chief concerns were the overwhelming (but intermittent) odors, which they characterized as much different than the typical farm smell (apparently due to chemical reactions in the lagoon), and contamination of their wells with nitrates above the standard of ten milligrams per liter set for drinking and ground water.[13]

The neighbors asked DEC for help, but they refused to act. The citizens asked the farm, which was a multi–million dollar business, to spend a few thousand dollars to buy water filters for their homes. However, the farmers, Richard Popp and James Vanarsdale, refused to pay the Culligan Man. They felt that in America they had the right to do whatever they wanted on their land. The problem was that, even if the farm could do whatever they wanted on their own property, they certainly could not do whatever they wanted on their neighbors' properties, and they were causing off–site pollution. If an industry like Eastman Kodak or General Electric took such an approach, people would think they were crazy. However, this was the prevailing feeling among the farmers. Such an unreasonable approach is how great lawsuits are made.

The neighbors were not a group of transplanted city dwellers. Most had lived in the Castile area all of their life. In fact one neighbor, Bill Fagan, was a dairy farmer himself with about thirty cows. Southview had exploded around them, and they were suffering from the resulting environmental impacts.

Unfortunately, the neighbors did not have the money to finance complex litigation, and I did not see a great likelihood of a huge jury verdict.[14] While Farmer Popp said that the only odor the citizens cared about was the "smell of money,"[15] nothing could be further than the truth. Neither the citizens nor I were in this for the money. In fact, I only pursued the case after I wore down from constant nagging from the group, who were frustrated with their reduced quality of life and environment. They couldn't drink their water or enjoy their properties, and they were concerned about their health and the beautiful rural environment they chose to live in. Since Southview would not voluntarily cooperate, litigation was the only option to get action.

Seldom does an environmental problem manifest itself in only one way. I asked the citizens whether the manure was also causing was surface pollution. They assured me that it was. So, I sent

them back to document the discharge of manure into local ditches and creeks, all of which eventually lead to the Genesee River canyon below. The Clean Water Act allows citizens to bring a citizen's suit for violation of the Act.[16] It occurred to me that if there were surface water discharges, Southview Farm needed a state pollution discharge elimination system ("SPDES") permit from DEC to satisfy the NPDES permit requirements under the Clean Water Act.[17] Otherwise, it was illegally discharging pollutants without a permit.

Proceeding under the Clean Water Act had two great advantages. First of all, attorney's fees are recoverable for a prevailing plaintiff.[18] This would provide financing (although after the fact) for legal services. Secondly, proceeding under a federal statute put the case into federal court. In Wyoming County, there are more cows than people, and I was not encouraged by the potential jury pool. Federal court in Rochester presented a much more even playing field.

The neighbors eventually produced documentation of numerous incidents of discharges to ditches and creeks leading to the Genesee River. Since we could proceed under the Clean Water Act in federal court an seek attorney's fees, I agreed to take the case on a contingent–fee basis.

Prosecution of the Southview Case

In May, 1990, we gave Southview the mandatory 60-day notice of violations under the Clean Water Act,[19] and also put farm on notice to our complaints about odors and the water pollution. Still, Southview would not agree to change its practices or address the contaminated wells, and DEC failed to take action. On January 21, 1991, we filed suit in Rochester in the United States District Court for the Western District of New York, complaining of violations of the Clean Water Act, as well as common law claims for negligence, trespass and private nuisance due to odors and pollution of the groundwater.

To my surprise, our suit quickly generated a lot of publicity.[20] Southview still refused to reach a reasonable compromise to alleviate the neighbors' legitimate concerns. The farm (with outside support from the Farm Bureau) waged a full-scale defense, and hired a large firm, Harris, Beach & Wilcox, to defend them.

The case quickly turned into a great debate over whether or not there was a "point source" regulated under the Clean Water Act. Denying defendant's motion to dismiss, U.S. District Judge David Larimer held that "[t]he basic question in determining whether a point source exists is whether the pollutants were somehow channeled or collected," and the allegations of the Amended Complaint, which alleged that a lagoon leaked, manure was spread "in such large quantities that the ground could not absorb it, and ran in 'discreet rivulets' into an adjacent stream," and that some manure was spread "directly into [a] ditch," were "sufficient."[21] Judge Larimer also ruled that the plaintiffs had "alleged continuing violations" of the Clean Water Act sufficient to maintain a citizen's suit, as required by the Supreme Court in *Gwaltney of Smithfield v. Chesapeake Bay Foundation*.[22] He also decided to exercise pendent jurisdiction over our common law claims.[23]

On the point source issue, we had two basic arguments. First of all, we argued that on specific dates, plaintiffs had observed discharges of manure that were sufficiently channelized to

constitute a point source. Generally, this was manure spreaders or sprayers that collected manure and sprayed onto the ground until it ran its way into drain tiles (pipes) or ditches that lead to navigable waters. However, in some cases, manure was sprayed directly into ditches.

The second argument was that the farm itself was a concentrated animal feeding operation, defined by EPA regulations as an "animal feeding operation" ("AFO") which had sufficient animal units, as defined by EPA regulation[24] to equate to 1,000 head of cattle, which for cows was 700.[25] While there is a smaller threshold where there is a direct discharge, we did not try to use this alternative,[26] since there was no dispute that there were more than 700 dairy cows. The real issue was the correct interpretation of the definition of "animal feeding operation," which EPA regulations define as a "lot or facility" where:

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

(ii) Crops, vegetation forage growth, or post–harvest residues are not sustained in the normal growing season over any portion of the lot or facility.[27]

There was no dispute that the animals were kept in the barns for 45 days or more. The crux of the dispute was our contention that crops were "not sustained in the normal growing season over any portion of the lot or facility," so the farm also met the second part of the definition (the "vegetation criterion"). Southview Farm had plenty of crop fields. The problem was that cows were not in the area where the crops were grown. Our argument was that the mere fact that the farm grew crops did not take it out of the CAFO definition, since the phrase "lot or facility" in the regulation referred to the place where the animals were kept—not other portions of the farm.

Once Southview filed its Answer, it launched intense discovery proceedings in an effort to wear me down, since at the time I was basically a solo practitioner with a part–time associate. This was a mistake, since my natural tendency was to procrastinate and worry about other cases where I was facing pressing deadlines. However, the defendant's aggressive approach forced me to prosecute the case just as aggressively. I also decided the plaintiffs needed to retain a large firm of their own. I convinced Dan O'Brien from Woods, Gilman, Oviatt, Sturman & Clarke, a superb trial attorney from another big firm, to take the lead in the case. Dan handles a lot of environmental litigation. He also lives near Canandaigua Lake, so he had a special interest in water quality. Fortunately, Dan agreed to take the case on a contingent basis, also hoping for an award of attorney's fees.

Southview also brought in an ill–advised counterclaim against dairy farmer Bill Fagan. Today, such a claim could be defended under provisions subsequently enacted by the New York State Legislature to protect against SLAPP (Strategic Lawsuit Against Public Participation) suits.[28] At the time, that tool was not available. Eventually, however, the claim that the thirty cows had done as much damage as the 2,000 was dropped when the defendants realized how silly their claims were.

During the course of the proceedings, Southview made tremendous progress in its manure

management practices. Where at first it was keeping track of manure applications on spiral notebooks on a sporadic basis, by the end of the case the farm had consultants and computerized systems to guide it, and it had become dramatically more environmentally responsible.

The Trial

While Southview moved for summary judgment, Judge Larimer denied its motion.[29] On April 26, 1993, the case went to trial amidst great publicity, perhaps the most of any environmental trial that has taken place in Rochester. (Frankly, since so few environmental cases actually end up at trial, I can't think of any others of note.)

The trial lasted three weeks, and was quite colorful. Various plaintiffs testified to the loads of manure running off into ditches and streams. Two of the best witnesses for plaintiffs included two defense witnesses. The Commissioner of Agriculture and Markets testified (apparently at the insistence of the defendant, rather than their attorneys), and he actually backed up plaintiffs' contention that it was ill-advised for Southview to be spreading such large amounts of cow manure on frozen or snow-covered ground. Dan O'Brien had an amazing cross-examination of a Southview expert who tried to avoid a litany of statements that turned out to be direct quotes from articles he had written, and even his own resume. (Always beware of an expert whose resume exceeds 30 pages.)

We were unable to secure a farm management expert from New York State. They all seem to have connections with Cornell and the New York agricultural establishment. We did, however, retain a top–notch expert—Dale Baker, from State College, Pennsylvania. Dale's basic conclusion was pretty obvious—Southview was spreading too much manure on the fields for the crops and soil to absorb. Unfortunately, his strong Missouri accent made him difficult to understand as a witness. During his pre–trial deposition, a post–a–note he had attached to some of our pleadings in his file ("need proof of this") proved embarrassing, but this never even came up at trial.

Likewise, our geologist, Jeff Chiarenzelli, had a simplistic conclusion—cow manure goes downhill, or if you're talking about ground water, downgradient. As a result, our clients' wells were contaminated. Plus, there were no other major upgradient sources of nitrates.

There was a lot of tension during the trial. Judge Larimer was perturbed at all the pre–trial publicity, particularly the local newspaper's huge spread on the front of the Business section of the Sunday paper on the day before the trial began,[30] and an editorial during the trial.[31] A whistleblower employee who was supposed to testify against the farm reportedly attempted suicide, so we did not call him.

Judge Larimer was fairly strict in his charge to the jury. Under Gwaltney,[32] to proceed with a citizen's suit, there must be some likelihood of repetition of a violation. Judge Larimer strictly interpreted this as meaning that a violation must be likely to occur on the very same field. Thus, if a violation happened on field number 93, there had to be a likelihood that it would be repeated on field 93, and not one of the multitude of other fields at Southview. While we did not agree with this strict interpretation, fortunately a number of the violations happened on the same field—field

number 104 near Letchworth State Park, which the plaintiffs referred to as the "Violation Field." Judge Larimer also refused to charge the jury that Southview was or could be a CAFO, since there was no dispute that crops were grown at the farm.

On May 19, 1993, on the third day of deliberation, the jury ultimately ruled in our favor for five of the eleven illegal discharges we had alleged. Again, it wasn't enough for them to find an illegal discharge—they also had to find a likelihood of repetition on that very same field. However, while the jury found against us on nuisance and negligence, but in our favor on trespass, it awarded only nominal damages—$1,000 each for four families, $100 for the fifth family, and only $1 for dairy farmer Bill Fagan. Judge Larimer had charged the jury that while both groundwater contamination and unreasonable odors were actionable under negligence and nuisance theories, only the water contamination, could be a trespass. Accordingly, everyone interpreted the verdict as the jury's way of saying that they rejected the odor claim, but endorsed the well contamination theory.

However, Southview filed a motion for judgment notwithstanding the verdict. To our surprise, by a 39–page decision, Judge Larimer granted the motion setting aside the Clean Water Act verdict. He found the evidence was insufficient to support violations observed by plaintiffs Bly and Karcheski on July 12 and August 12, 1989. He found two other violations, which occurred on rainy days on September 26, 1990 and April 15, 1991, to be agricultural storm water discharges exempt from the definition of "point source." As to the remaining July 13, 1989 discharge, while Bly and Karcheski had testified to seeing manure flow into a ditch that led to a stream, Judge Larimer held there was insufficient evidence to prove a point source, because the manure reached the stream in "too diffuse a manner to create a point source discharge."[33] However, Judge Larimer rejected the defendants' contention that our experts' testimony was insufficient, and let the trespass verdict stand. Nonetheless, by a separate Decision, Judge Larimer later refused to issue an injunction to stop the trespass.[34]

The Appeal

Naturally, we appealed to the Second Circuit. (In truth, it wasn't clear we could have financed it without collecting the measly $4,101 verdict.) We were fortunate that, at the eleventh hour, EPA got interested in the case, and the Department of Justice filed an amicus brief, claiming that Southview was a CAFO that automatically required a permit.

To our delight, the Second Circuit reversed, and reinstated the jury's verdict.[35] With respect to the July 13, 1989 violation, the Court noted that plaintiffs Bly and Karcheski "observed the manure collecting in the slew or swail and flowing into the ditch which in turn flowed off of the Southview property into the Letchworth State Park property, and, in turn, joined a stream that ultimately flowed into the Genesee River."[36] The Court held that "the swail coupled with the pipe under the stonewall leading into the ditch that leads into the stream was in and of itself a point source," so that "liquid manure was collected and channelized through the ditch or depression in the swail of field 104 and thence into the ditch leading to the stream on the boundary of the Southview property."[37] Further, the Court agreed that "the manure spreading vehicles themselves were point sources," since "collection of liquid manure into tankers and their discharge on fields from which

the manure directly flows into navigable waters are point sources under the case law."[38] Likewise, the Court reinstated the verdict for the July 12 and August 22, 1989 violations, which District Judge Larimer had held were based upon "'sheer surmise and conjecture,'" but the appellate court found were based on a "strong circumstantial case."[39]

With respect to the discharges on September 26, 1990 and April 15, 1991 found by Judge Larimer to be exempt as "agricultural storm water discharges," the Court again reinstated the verdict, finding that "the real issue is not whether the discharges occurred during rainfall or were mixed with rainwater run–off, but rather, whether the discharges were the result of precipitation."[40] The Second Circuit held that "all discharges eventually mix with precipitation run–off in ditches on streams or navigable waters so the fact that the discharge might have been mixed with run–off cannot be determinative," and upheld the jury's verdict that the two discharges "were not the result of rain, but rather simply occurred on days when it rained."[41]

In addition, the Court held that Southview was a CAFO, and therefore the "operation in and of itself as a point source within the Clean Water Act and not subject to any agricultural exemptionthereto."[42] The Court reviewed the applicable regulation, and found that while the "district court held that Southview was not an AFO because crops are grown on fields adjacent to the feed lot in which milking cows are penned... [it] misreads the regulations." Id. at 123. Rather, the Second Circuit interpreted the regulation so that:

> A lot or facility is an AFO when it confines and maintains animals on a lot which does not contain vegetation in the normal growing season. The vegetation criterion applies to the lot or facility in which the animals are confined.[43]

Thus, the mere fact that Southview grew crops in other areas outside of where the animals were kept did not exempt it from the definition of AFO. Since Southview kept more than 700 mature dairy cattle in its barns, it qualified as a CAFO. Accordingly, the Court granted judgment as a matter of law:

Because there are no disputed material facts with respect to whether Southview's feed lot is CAFO, this Court may determine as a matter of law that Southview operates a CAFO, which in turn may be defined as a point source and hence is not to be treated as an agricultural non-point source operation . . . . [44]

The Court adopted the rationale applied by the Department of Justice in its amicus brief, which was as follows:

> First, the fact that vegetation can be sustained in the area in which the animals are confined suggests a lower density of animals in that area or otherwise they would eat or trample all of the vegetation. Second, the vegetation itself is helpful in absorbing and reducing the amount of pollution.[45

Southview moved unsuccessfully for a re–hearing en banc, and then sought certiorari from the U.S. Supreme Court, with new co–counsel, Mayer, Brown & Platt from Chicago (who we found out, to our dismay, sponsored events that honored the Court). It seemed that everyone and their brother jumped in as amicus on behalf of Southview, including not only various agricultural trade groups and Dairylea, but even State of New York, represented by Dennis Vacco. Surprisingly, we could not find any environmental group to jump in on our side. Fortunately, the Supreme Court denied certiorari, and the Second Circuit ruling prevailed.[46]

Final Settlement of the Case

We still needed a remedy for the Clean Water Act violations, which could include not only attorneys' fees, but also fines payable to the United States Treasury, and injunctive relief.[47] On remand from the Second Circuit, we moved for attorney's fees, and asked Judge Larimer to impose fines and order that it comply with "best management practices." Eventually, we settled the case on the following terms, which were endorsed by a Court Order dated December 22, 1995:

* Donation by Southview of $15,000 to the Dairy Farms Sustainability Project at Cornell University.
* No penalties.
* Attorney's fees in the amount of $210,000 to the plaintiffs' attorneys.
* Southview agreed to employ best management practices: Maintenance of buffer strips; perimeter chiseling contemporaneously with the completion of liquid manure applications; discontinuation of spreading liquid manure during heavy rainfall events; compliance with a spill control plan; incorporation of liquid manure as soon as reasonably possible except where applied to growing crops such as hay and corn, and in the fall only at field perimeters; no spreading on frozen ground except in cases of emergency.
* A dispute resolution mechanism.

At long last, the Southview case was over. The farm had made great improvements, and had agreed upon a framework to operate in an environmentally responsible manner.

Reaction to the Southview Decision

The Southview decision sent shock waves through the agricultural community. There were moves in the new Republican Congress to amend the Clean Water Act to overrule the Second Circuit, but backlash from anti–environmental moves by the new Congress quickly stopped all of that.

The good news was that the decision helped farms across the country wake up to environmental concerns. In the next few years, similar problems in places like North Carolina, where pig farms were polluting waterways, made big news and added fuel to the fire. As a result, not only did many farmers start doing a better job, but a new cottage industry sprung up across the country—consultants designing nutrient management plans to control pollution at farms.

In the past year, EPA and DEC finally acted—five years after the Second Circuit ruling. On

March 9, 1999, EPA and the U.S. Department of Agriculture released their Unified National Strategy for Animal Feeding Operations, which is available on the EPA Web Site.[48] Under the Strategy, while there would be a voluntary program for most AFOs (which do not qualify asCAFOs), all CAFOs had to be permitted.[49] Round I of the Strategy calls for general permits to all CAFOs by January 2000. This program would be administered by states that have been delegated authority to administer the Clean Water Act, like New York. Under EPA plan, a "General Permit should require facilities to develop and implement CNMPs [Comprehensive Nutrient Management Plans] on a schedule identified in the permit, develop record keeping procedures, routinely monitor, and otherwise report on the implementation of the CNMP and compliance with the permit," and should also allow public access to information.[50] EPA only suggests individual permits "for exceptionally large operations, new operations or those undergoing significant expansion, operations with historical compliance problems, or operations with significant environmental concerns."[51] Later, the EPA plans to re–visit and possibly revise the CAFO regulations. The key to the program is the Comprehensive Nutrient Management Plan that each CAFO should develop.

In June, 1999, DEC came out with its own CAFO regulatory plan, the product of a work group that had strong agricultural representation, but only the Citizens Campaign for the Environment on behalf of environmentalists. DEC came up with a general permit that basically tracks the EPA program. Details, including three fact sheets and the general permit, all of which are available on the DEC Web Site.[52]

CAFOs qualify for a general permit, effective from July 1, 1999 to June 30, 2004, which prohibits any discharge except in the case of the "25–year 24–hour storm," and imposes a number of generic best management practices. Under the permit, an Agricultural Waste Management Waste Plan ("AWMP") must be developed for existing CAFOs within 18 (at least 1000 animal units) and 24 months (300 to 1000 animal units), and immediately for new CAFOs. The AWMP must be prepared by a certified planner, who must go through prescribed training.[53] A list of certified planners is available through the DEC Web Site. In order to qualify for the general permit, an existing CAFO must submit a notice of intent by January 1, 2000, in which it supplies information about the facility. A separate Agricultural Waste Management Plan certification must be submitted and signed by the owner/operator, as well as a certified planner, once the plan is completed.

Conclusion

There is no doubt that agriculture and environmental regulators have made a lot of progress. Agriculture has been actively addressing pollution from animal waste, and the general permit plan requirements, as well as the best management practices, are a major positive step. However, all involved should redouble their efforts. In reality, agriculture is getting off easy. Industries like Kodak and General Electric would be overjoyed to be given a general permit that merely requires them to come up with a plan to use best management practices to reduce pollution, and not be subject to any specific discharge limits. The general permit program is a great first step, but environmental regulators need to go the distance to make sure the largest contributor to water pollution works as hard as industry does to reduce water pollution.

Last summer, I took my young son to Charlotte Beach in Rochester to go swimming in Lake Ontario. However, we couldn't go in the water because the beach was closed. Why? Of course, nutrients from run off from farms into the Genesee River had polluted it long before it got to the industrialized Rochester area. This is hardly an unusual occurrence. Let's hope that someday the beach will be open every time we go.

1. *EPA, Agricultural Sources of Contamination, www.epa.gov/grtlakes/seahome/groundwater/scr/ag.ht.*
2. *EPA, Animal Feeding Operations (AFOs), www.epa.gov/owm/afo.htm.*
3. *National Wildlife Confederation, Impacts of Polluted Runoff on Our Nation's Waters, www.nwf.org/water/facts/impacts.html.*
4. *Kilborn, "Hurricane Reveals Flaws in Farm Law as Animal Waste Threatens N. Carolina Water," New York Times, October 17, 1999.*
5. *Id.*
6. *A discussion of the various exceptions for farmers was prepared by the Agriculture and Rural Issues Committee of the Environmental Law Section of the New York State Bar Association, and is on the web at www.nysba.org/sections/environ/committees/agriculturerural/ag.outline.exemptions.html.*
7. *Agriculture and Markets Law §308.*
8. *Pure Air and Water of Chemung County, Inc. v. Davidsen, __A.D.2d ____, 668 N.Y.S.2d 248 (3d Dep't 1998), app. dis'd 91 N.Y.2d 955, 671 N.Y.S. 2d 716 (1998); Pure Air and Water of Chemung County, Inc. v. Davidsen, Albany County Index No. 2690-97 (May 25, 1999, Keegan, J.).*
9. *Bormann v. Board of Supervisors in and for Kossuth County, Iowa, 584 N.W.2d 309 (Iowa 1998), cert. den'd 119 S.Ct.1096 (1999).*
10. *Agriculture and Markets Law §308-a.*
11. *Clean Water Act §502(14), 33 U.S.C. §1362 (14).*
12. *Concerned Area Residents For the Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994), cert. den'd 514 U.S. 1082, 115 S.Ct. 1793 (1995).*
13. *40 C.F.R. §141.11(b) (public drinking water standard, which was not directly applicable, since no public water supply was involved); 6 N.Y.C.R.R. §703.5 (groundwater).*
14. *While our Complaint asked for $3 million in compensatory damages and $1 million in punitive damages, in retrospect these demands were ill-advised. More realistic demands, such as the $25,000 per family we eventually asked from the jury in our closing statement, would have been better advised. News reports seemed to always refer to the case as a "$4 million lawsuit."*
15. *Lively, "A big stink in dairyland," Democrat & Chronicle, April 25, 1993.*
16. *Clean Water Act §505(a), 33 U.S.C. §1365(a).*
17. *Clean Water Act §301(a), 33 U.S.C. §1311(a).*
18. *Clean Water Act §505(d), 33 U.S.C. §1365(d).*
19. *Clean Water Act §505(b)(1)(A), 33 U.S.C. §1365(b)(1)(A).*
20. *Bickel, "Castile Family's Suit Says Farm Pollutes," Democrat and Chronicle, January 24, 1991.*
21. *Concerned Area Residents for the Environment v. Southview Farm, Civil Action No. 91-6031L, Decision and Order filed August 29, 1991 (Larimer, U.S.D.J.). I received the Decision when I checked my mail at my office on my wedding day (not planning to be back for ten days), so it added to my enjoyment of the day.*
22. *Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 108 S.Ct. 376 (1987).*
23. *28 U.S.C. §1367(a).*
24. *40 CFR §122.23(b)(3).*
25. *Appendix B to 40 CFR Part 122, section (a).*
26. *If an AFO has at least 300 animal units, and either "pollutants are discharged into navigable waters through a manmade ditch, flushing system or other similar man-made device; or pollutants are directly discharged 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," except for discharges of the "25-year, 24-hour storm event," it is automatically classified as a CAFO. Appendix B to 40 CFR Part 122, section (b).*
27. *40 C.F.R. §122.23(b)(1).*

28. *New York Civil Rights Law §§70-a, 76-a; CPLR §3211(g).Concerned Area Residents for the Environment v. Southview Farm, 834 F. Supp. 1410 (W.D.N.Y. 1993).*
29. *Lively, "A big stink in dairyland," Democrat & Chronicle, April 25, 1993.*
30. *"More than a bad smell; Manure needs management - especially on large farms," Democrat & Chronicle, April 30, 1993.*
31. *Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 108 S.Ct. 376 (1987).*
32. *Concerned Area Residents for the Environment v. Southview Farm, Civil Action No. 91-6031L, Decision and Order filed October 19, 1993 (Larimer, U.S.D.J.) at 28-29.*
33. *Concerned Area Residents for the Environment v. Southview Farm, Civil Action No. 91-6031L, Decision and Order filed March 22, 1994 (Larimer, U.S.D.J.).*
34. *Concerned Area Residents For the Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994).*
36. *34 F.3d at 118.*
37. *Id. at 118.*
38. *Id. at 118.*
39. *Id. at 119.*
40. *Id. at 120-121.*
41. *Id. at 121.*
42. *Id. at 123.*
43. *Id. at 123.*
44. *Id. at 123.*
45. *Id. at 123.*
46. *Concerned Area Residents For the Environment v. Southview Farm, 514 U.S. 1082, 115 S.Ct. 1793 (1995).*
47. *Clean Water Act §505(a), 33 U.S.C. §1365(a).*
48. *EPA and USDA, Unified National Strategy for Animal Feeding Operations, www.epa.gov/owm/finafost.htm.*
49. *Id.*
50. *Id..*
51. *Id.*
52. *CAFOs Information Package, www.dec.state.ny.us/website/dow/mainpage.htm.*
53. *DEC, CAFO Fact Sheet No. 2, Agricultural Waste Management Plans, Qualifications for Planners, www.dec.state.ny.us/website/dow/mainpage.htm.*

ABOUT THE AUTHOR

Alan Knauf concentrates his law practice in environmental, municipal, land use and real estate law, and civil litigation and appeals. He represents municipalities, citizens, landowners and businesses on issues including hazardous waste and petroleum spill cleanup, brownfield development, environmental impact review, water pollution and wetlands, zoning and planning, project siting, alternative energy, municipal law, and commercial real estate. Mr. Knauf is attorney for the Town of Huron in Wayne County, New York. He is listed in Best Lawyers in America "Lawyer of the Year" in Rochester for Environmental Litigation, and Land Use and Zoning Law, and is also listed for Land Use and Zoning Litigation. He is also listed with Superlawyer in the areas of Environmental Law, Environmental Litigation and Real Estate Law.

Mr. Knauf has been counsel on over 100 reported decisions. Some of the notable precedents he helped establish include:

Norse Energy Corp. USA v. Town of Dryden, 108 A.D.3d 25, 964 N.Y.S.2d 714 (3d Dep't 2013), aff'd 23 N.Y.3d 728, 992 N.Y.S.2d 710 (2010) where he represented Dryden Resources Awareness Coalition, and the Third Department upheld local zoning legislation banning hydrofracking.

Lighthouse Pointe Property Associates LLC v. New York State Department of Environmental Conservation, 14 N.Y.3d 161, 897 N.Y.S.2d 693 (2010), where the Court of Appeals overruled DEC's interpretation of the definition of "brownfield site," allowing the Lighthouse sites to enter the Brownfield Cleanup Program, and opening up the program to voluntary remediation of sites across the state.

Concerned Area Residents of the Environment v. Southview Farm, 34 F.3d 114 (d Cir. 1994), cert den'd 514 U.S. 1082, 115 S.Ct. 1793 (1995), establishing that concentrated animal feeding operations required permits for manure discharges under the Clean Water Act, resulting in widespread implementation of comprehensive nutrient management plans at farms across America, and reduced water pollution.

Snyder v. Newcomb, 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993), which established a private right of action to bring a direct action against the insurer of a petroleum discharger under the New York Oil Spill Act.

Mr. Knauf is a former Chair of the Environmental Law Section of the New York State Bar Association, and a member of the Section on Environment, Energy and Resources of the American Bar Association. He was founding Chairperson of the Environmental Law Committee of the Monroe County Bar Association and has returned as the current Co-Chair. He is also former Chairman of the Real Estate Council of the Monroe County Bar Association, and Chairman of the Center for Environmental Information, Inc. Mr. Knauf has taught Environmental Law at the Rochester Institute of Technology and the University of Rochester, and is a frequent lecturer at continuing education programs.

Mr. Knauf received a B.S.C.E. in Environmental Engineering from M.I.T. and a J.D. from the University of Michigan, where he was the President of the Law School Student Senate. He is admitted to the bars of New York, Florida, the U.S. Supreme Court, and various other federal courts.