Team No. 1

No. 14-1248

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant, and

DEEP QUOD RIVERWATCHER, INC., and DEAN JAMES,

Plaintiffs-Intervenors-Appellants,

v.

MOON MOO FARM, INC.,

***Defendant-Appellee*.**

Appeal from the United States District Court for New Union in No. 155-CV-2014, Judge Romulus N. Remus

---

Brief for the United States of America

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Opinions

Circuit Court Opinions

District Court Opinions

State Court Opinions

Statutes

Jurisdictional Statutes

Other

STATEMENT OF JURISDICTION

Appellant United States of America Environmental Protection Agency (EPA) seeks review of the final order of the United States District Court for New Union issued on September 15, 2014. The district court had proper jurisdiction to hear the case under 28 U.S.C. § 1331 (2012). The order of the district court is final, and jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 (2012).

QUESTIONS PRESENTED

I. Under the laws of New Union, does the Public Trust Doctrine apply to a man-made navigable waterway when a private party takes water from a navigable river used by the public and diverts it into a man-made canal which the party excludes from public use?

II. Under §§ 1319 and 1365 of the Clean Water Act, does the exclusionary remedy apply when a private party takes samples of discolored drinking water, and seeks to use those samples as evidence to stop a current violation of an agency regulation?

III. Under the Clean Water Act, does a farm without a NPDES permit unlawfully discharge when it applies manure and acid whey to land in a manner that intensifies nutrient runoff?

IV. Under § 6972 of the Resource Conservation and Recovery Act, is a dairy producer subject to citizen suit when it uses manure and acid whey as fertilizer in accordance with decades of tradition although the runoff contributes to high levels of nitrates in drinking water?

STATEMENT OF THE CASE

Dean James (James), a member of the Deep Quod Riverwatcher, Inc. (Riverwatcher), sought to file a citizen suit against Moon Moo Farm (Moon Moo) for violations of the Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA) after observing brown water flow from Moon Moo property into the Queechunk Canal. Record at 7. During the citizen suit waiting period, the United States Environmental Protection Agency (EPA) brought a civil enforcement action against Moon Moo in the United States District Court for New Union for violation of the CWA. R. at 7. The EPA sought injunctive relief and civil penalties. R. at 7. James and Riverwatcher intervened as plaintiffs in the EPA's suit pursuant to 33 U.S.C. § 1365

and alleged additional causes of action under the citizen suit provision of RCRA. R. at 7. Moon Moo asserted a counterclaim for trespass against James and Riverwatcher. R. at 7.

On June 1, 2014, the U.S. District Court for New Union declared evidence obtained by James inadmissible as evidence from a trespass. R. at 8. This lack of evidence and a finding that the manure mixture was agricultural stormwater runoff and not discharge from a CAFO precluded a finding that Moon Moo violated the CWA. R. at 8–9. The court also found that the manure mixture was not a discarded solid waste, and the evidence was insufficient to establish a RCRA imminent and substantial endangerment claim. R. at 10–11. Therefore, the court granted summary judgment for Moon Moo, dismissing the CWA and RCRA claims and awarding Moon Moo damages for trespass. R. at 7. The EPA, James, and Riverwatcher filed timely notices of appeal to the United States Court of Appeals for the Twelfth Circuit on all issues. R. at 1.

STATEMENT OF THE FACTS

Moon Moo is a dairy farm that houses 350 milk cows in a barn on its property. R. at 4. The cows' manure and liquid waste are collected from the barn through a series of drains and pipes. R. at 5. These pipes lead to an outdoor lagoon where the waste is stored for use as fertilizer. R. at 5. During the year, Moon Moo periodically pumps the manure from the lagoon and spreads it across 150 acres of farmland. R. at 5. Moon Moo grows Bermuda grass on the land. R. at 5. This Bermuda grass is later dried and harvested to use as silage on the farm. R. at 5.

State regulations require Moon Moo to submit a Nutrient Management Plan (NMP) to the Farmville Regional Office of the New Union Department of Agriculture (DOA). R. at 5. A NMP is required to disclose the expected application rate of manure and the expected rate of nutrient uptake by the crops in the field. R. at 5. The DOA has authority to review and reject a NMP that

is deemed insufficient, but it does not usually exercise this authority. R. at 5. Moon Moo submitted a NMP that was likely not reviewed and was not subject to public comment. R. at 5.

Moon Moo is located on the banks of the Deep Quod River. R. at 5. The Deep Quod River is a public source of drinking water for the people of Farmville and is regularly used for navigation by small boats. R. at 5. The Deep Quod River connects to the Mississippi River, which is a navigable-in-fact interstate body of water used for commerce. R. at 5. In the 1940s, a previous owner built the Queechunk Canal on what is now Moon Moo property. R at 5. The canal is 50 yards wide and three to four feet deep. R. at 5. The canal diverts a majority of the water from the Deep Quod River through Moon Moo's land. R. at 5. Since its construction, the canal is regularly used as a shortcut for travel up and down the Deep Quod River by small boats and canoes. R. at 5. Moon Moo posted "No Trespassing" signs along the canal. R. at 5.

Moon Moo has an ongoing relationship with the Chokos Greek Yogurt facility (Chokos). *See* R. at 5. Moon Moo provides milk to the facility and Chokos provides Moon Moo with acid whey, which is a byproduct of the yogurt production process. R. at 5. Moon Moo adds the acid whey to its lagoon and pumps the entire mixture onto its fields. R. at 5.

In 2013, Riverwatcher received complaints that the water in the Deep Quod River was brown and smelled of manure. R. at 6. At the same time, the Farmville Water Authority issued a nitrate advisory, warning that water from the River contained high levels of nitrate and was unsafe for infants to drink. R. at 6. Concerned, James traveled via jon boat into the Queechunk Canal where he observed Moon Moo spreading manure over its fields following a rain event. R. at 6. He then observed brown water flowing from the field into a drainage ditch that led to the Queechunk Canal. R. at 6. James photographed the spreading operations and the water flowing into the canal before taking a sample of the water from the drainage ditch for testing. R. at 6.

Those tests revealed that the water from the ditch contained high levels of nitrates and fecal coliforms. R. at 6. James and Riverwatcher promptly provided notice of intent to sue. R. at 7.

In support of its claims, Riverwatcher produced an affidavit by agronomist, Dr. Ella Mae, which claimed that the acid whey and manure mixture lowered the pH of soil. R. at 6. This lower pH prevented the Bermuda grass from taking up the nutrients in the manure. R. at 6. The excess nutrients were released into the environment as runoff during rain events. R. at 6. Dr. Mae stated that the application of the manure to the fields during a rain event would almost always result in excess runoff, like what occurred here. R. at 6. Moon Moo presented an affidavit from agronomist, Dr. Emmet Green. R. at 6. Dr. Green claimed that the application of manure to a field during a rain event was a common practice and not prohibited in Moon Moo's NMP. R. at 6–7. Further, while Moon Moo contributed to the nitrate advisory, it was impossible to determine if the farm was the "but for" cause of the advisory. R. at 7.

STANDARD OF REVIEW

This case comes before this Court on appeal from the district court's grant of summary judgment. Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Questions of law are reviewed *de novo* by this court. *Pierce v. Underwood*, 487 U.S. 552, 557 (1988). The district court is afforded no deference to its opinions and conclusions of law.

SUMMARY OF THE ARGUMENT

This suit was brought based upon evidence James obtained from the Queechunk Canal. The district court incorrectly determined that this evidence was inadmissible because the court misapplied the Public Trust Doctrine and the exclusionary remedy. Upon the finding that the evidence was inadmissible, the district court incorrectly issued summary judgment for Moon

Moo on the CWA claim. The district court correctly determined that the manure mixture applied to the crops is not a solid waste under RCRA, but erred in finding that if it were a solid waste Riverwatcher still cannot bring an imminent and substantial endangerment claim. This Court should affirm the holding that the mixture is not a solid waste under RCRA, but as to the other three issues, this court should reverse the district court's order.

First, the district court improperly excluded evidence after concluding that the Public Trust Doctrine does not apply to man-made bodies of water, and therefore, James was trespassing when he traveled on the Queechunk Canal. The court erred in this finding because the Queechunk Canal is covered by the Public Trust Doctrine. The Public Trust Doctrine gives the public a right to use navigable water. The Queechunk Canal is navigable because it is susceptible to navigation for trade and travel under the navigable-in-fact test. Even if this Court finds the canal does not satisfy the navigable-in-fact test, the connection between the Queechunk Canal and the Deep Quod River necessitates a finding that the Queechunk Canal is navigable.

Additionally, the Public Trust Doctrine must apply to man-made canals. To hold otherwise would mean a private party may take water in the Deep Quod River that is subject to the public's use and exclude others, thereby circumventing the law. Further, other states already apply the doctrine to man-made bodies of water and do so as a necessary adaptation of the doctrine that follows its historical purpose. Lastly, the district court incorrectly relied on the holding in *Kaiser Aetna*, which has no relevance to the present case because it dealt with the application of well-established Hawaiian property law to fish ponds. Therefore, the district court erred in finding the evidence obtained by James inadmissible because the Queechunk Canal is governed by the Public Trust Doctrine.

Second, even if this Court determines the Public Trust Doctrine does not apply, the district court still erred in excluding the evidence under the exclusionary remedy. The exclusionary remedy does not apply to a purely civil enforcement proceeding, nor does it apply to a search conducted by a private party. Under cases relied upon by the court, the exclusionary remedy will apply in a civil case if a party is seeking penalties for *past* violations of an agency regulation. The CWA requires that civil enforcement actions be brought only against a party that *is in* violation of the CWA, thus precluding the application of the exclusionary remedy in this case. Furthermore, the exclusionary remedy does not apply to the government's use of evidence gathered by a private party. James is a private party. Therefore, the exclusionary remedy cannot apply to the evidence obtained by James, and the court below erred in excluding the evidence.

Third, given the admissibility of the discharge evidence, Moon Moo satisfies the regulatory definition of a "Medium CAFO." Because Moon Moo is a CAFO, its land application discharge is designated as from the CAFO and is subject to CWA regulation. Additionally, the district court improperly determined that even if Moon Moo was a CAFO, its compliance with a NMP exempts the discharge as agricultural stormwater. In reaching this decision, the district court improperly applied distinguishable case law and read explicit exemption requirements out of the regulation. Moon Moo cannot rely on compliance with a NMP to satisfy the regulatory exemption because the NMP was wholly inadequate in light of its application practices. Therefore, the district court erred in granting summary judgment on this issue.

If, contrary to the evidence and applicable law, this Court finds that Moon Moo is not a CAFO, then the runoff discharge is not regulated under the CWA. Without classification as a CAFO, there is no default regulation of land application and no need for an adequate NMP to satisfy the general statutory exemption. In this situation, the EPA concedes that the discharge is

"precipitation-related," and thus not subject to CWA regulation under the plain meaning of "agricultural stormwater discharge." This conclusion is proper regardless of the fact that the discharge flows through a ditch, traditionally defined as a point source.

Fourth, the district court properly determined that Moon Moo is not subject to RCRA Subchapter D regulation because the land application mixture does not constitute a "solid waste." While the application did not satisfy the NMP requirements for CWA purposes, Moon Moo used the mixture for its intended purpose as a fertilizer and soil conditioner, thus exempting it from classification as a RCRA solid waste. Alternatively, because Moon Moo immediately reused the mixture in a continuous process as the generating industry, the mixture is specifically exempt from solid waste classification under the category of "other discarded materials." Based on the application of these exemptions, the district court correctly issued summary judgment for Moon Moo on the grounds that the mixture was not a solid waste.

On the other hand, the district court improperly determined that the mixture did not present an imminent and substantial endangerment. Although the presence of solid waste is required for the ultimate relief requested, the district court's analysis of the "imminent and substantial endangerment" element was flawed. The nitrate advisory and subsequent warning did not change the imminent nature of the endangerment in light of the broad meaning given by courts to the language of the statute. Furthermore, based on the deference accorded to public health under the regulatory scheme, the highly elevated level of nitrates constitute a substantial endangerment. Lastly, Congress' use of the word "contribute" instead of "cause" renders Moon Moo's argument that it was not the "but for cause" of the nitrate advisory unpersuasive, as Congress did not intend to require but for legal causation. Therefore, the district court erred in its analysis of the imminent and substantial endangerment element.

ARGUMENT

I. This Court Should Reverse the District Court Finding That the Discharge Evidence Is Inadmissible Because the Water in the Queechunk Canal Is Navigable and the Public Has a Right to Use the Water.

The discharge evidence obtained by James from the Queechunk Canal is admissible because as a matter of law, a person cannot trespass on a body of water that is navigable and open to public use under the Public Trust Doctrine. *See Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 452–53 (1892). Under the Public Trust Doctrine a bed of water is owned by a state or private party subject to the public's right to use the water for navigation. *Id.* at 455–56. Here, the doctrine will apply if the Queechunk Canal is a navigable water of New Union, and the scope of the doctrine as applied in New Union is sufficiently broad to apply to a man-made canal. *See* Record at 9. The EPA can establish that the Queechunk Canal is a navigable water of New Union, and public policy demands that the scope of the Public Trust Doctrine in New Union encompass the man-made canal. Therefore, under the Public Trust Doctrine, Moon Moo cannot establish its trespass claim, and the evidence obtained from the Queechunk Canal is admissible.

A. The Queechunk Canal Is a Navigable Water of New Union Based on the Navigable-in-Fact Test and Its Connection to Other Navigable Waters.

The EPA can establish that the Queechunk Canal is a navigable water of New Union because the Queechunk Canal is susceptible in its ordinary condition of being used for trade and travel. *Daniel Ball*, 77 U.S. 557, 563 (1871). Whether a particular body of water is a navigable water of the state is an issue of fact. *United States v. Utah*, 283 U.S. 64, 83 (1931). This issue is settled by determining if the water, in its actual navigable capacity, is navigable-in-fact. *See Ball*, 77 U.S. at 563. A body of water is navigable-in-fact when it is "used, or [is] susceptible to use, in [its] ordinary condition, as [a] highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *Id.* Under this test, actual use is

not required, but will be evidence of navigability. *Utah*, 283 U.S. at 82. Only the fact that a river is susceptible to use for trade and travel is crucial. *See id*. Susceptibility of a body of water to travel is established based on the characteristics of that particular body of water. *See id*. at 80–81. These characteristics include depth and width of the water, as well as the ability for a boat to use the water for travel and trade. *See id*. at 76, 81.

In *Utah*, a case similar to this one, the Supreme Court of the United States analyzed the characteristics of three bodies of water and determined each was a navigable-in-fact water of the state. *Id.* The Court began by examining characteristics of three rivers to determine their susceptibility to trade and travel. *See id*. Sections of each river had a depth of less than four feet and a width of only a few hundred feet. *See id*. at 78–79. Rapids made each river difficult, if not impossible, to travel by boat. *Id*. at 79. The only evidence of travel through the rapids and down each river was by raft. *See id*. The Court held that despite the rivers' shallow depths, varied widths, and difficult travel, sections of each river were susceptible to trade and travel and were thus navigable. *Id*. at 89.

Similarly, the Queechunk Canal ranges in depth from three to four feet and has a width of 150 feet. R. at 5. Further, the Queechunk Canal contains no rapids and is regularly traveled by small boat. R. at 5. Based on these facts, the Queechunk Canal is more susceptible to trade and travel than each of the three rivers in *Utah.* The Queechunk Canal has similar depth and width to the *Utah* rivers, and allows for travel in a way that is more concrete and practical than the travel allowed on the rivers in *Utah*. Therefore, based on the Supreme Court's analysis in a similar case, this Court should find that the Queechunk Canal is a navigable water of New Union.

The navigability analysis is not changed by the fact that the definition of navigable-in-fact requires a body of water to be susceptible to travel "in its ordinary condition." *Ball*, 77 U.S.

at 563. Recent case law has interpreted the term "ordinary condition" to mean "water that flows without diminution or obstruction." *Fish House, Inc. v. Clarke*, 693 S.E. 2d 208, 212 (N.C. Ct. App. 2010). Here, there is no obstruction to water flow in the canal. R. at 5. Therefore, this phrase does not impact the navigable-in-fact analysis as it applies to man-made bodies of water.

Although the navigable-in-fact test is sufficient to show navigability in this case, the Queechunk Canal may also be deemed navigable based on its connection to the Deep Quod River. R. at 5. The Supreme Court of the United States has held that a body of water will be regarded as navigable if it forms a highway for commerce by uniting with other navigable waters. *Ball*, 77 U.S. at 563–64. In *Ball*, the Court held that the Grand River was navigable because it connected to Lake Michigan, a navigable water. *Id*. at 564. Although that case applied to a river, it is applicable to canals which are built in connection to a navigable river. *See State ex rel. Lyon v. Colombia Water Power Co.*, 63 S.E. 884, 887 (S.C. 1909). In *Lyon*, the court examined an artificial canal. *See id*. The canal could be navigated by small boats. *See id*. Based on its ability to be navigated and its connection to two navigable rivers, the court held the canal was a navigable body of water. *See id*. Here, the Queechunk Canal is capable of navigation. R. at 5. Small boats regularly travel the canal. R. at 5. Both ends of the canal connect to the Deep Quod River. R. at 5. The Deep Quod River is navigable by small boat and forms a highway for commerce in its connection to the Mississippi River. R. at 5. Therefore, if this Court finds that the Queechunk Canal is not navigable on its own, the canal should still be found navigable based on its connection to the Deep Quod River.

B. The Public Trust Doctrine Applies to the Man-Made Queechunk Canal Because Public Policy and Other State Laws Preclude a Private Party From Taking Waters Regularly Used by the Public for Solely Personal Use.

The Queechunk Canal is governed by the Public Trust Doctrine because to hold otherwise would be contrary to the purpose of the doctrine, public policy, and recent case law.

Under the Public Trust Doctrine, a state owns property beneath a navigable water in fee simple, but that ownership is held in trust for the public's use. *Ill. Cent. R.R. Co.*, 146 U.S. at 452. A state may divest itself of ownership in favor of private parties. *Barney v. Keokuk*, 94 U.S. 324, 338 (1876). When a private party takes ownership of a waterway, that ownership remains subject to the public right to use the water on top of the land. *Brigham Oil & Gas, L.P. v. N.D. Bd. Of Univ. & Sch. Lands*, 866 F. Supp. 2d 1082, 1084 (D.N.D 2012). The Public Trust Doctrine is a state governed doctrine, so each state determines the scope of the doctrine within its borders. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). This Court, in recognition of the importance of the public's right to navigable waters, should find that the doctrine applies to the man-made Queechunk Canal in the State of New Union.

Throughout its history, the Public Trust Doctrine has evolved and its application to a man-made canal is a natural growth of the doctrine. The concept of the Public Trust Doctrine was adopted from English common law and originally only applied to waters which ebbed and flowed with the tide. *See Ill. Cent. R.R. Co.*, 146 U.S. at 457; *Barney*, 94 U.S. at 338. This narrow definition allowed many waters within the United States to escape regulation under the doctrine, so courts expanded its application to all navigable fresh bodies of water. *See Barney*, 94 U.S. at 338. This allowed rivers to fall within the scope of the Public Trust Doctrine and ensured that parties which had historically used a river could continue that use. *See id*. Not allowing the public to use its rivers would have been contrary to the purpose for which the Doctrine was established. *See id*.

Today, the creation of man-made bodies of water necessitates a similar adaptation of the Public Trust Doctrine. If this Court does not adapt the Public Trust Doctrine and apply it to man-made bodies of water, then private parties may take water that has historically been public trust

waters from rivers and exclude the public from use. In the present case, the Queechunk Canal receives all of its water from the Deep Quod River. R. at 5. The public uses the Deep Quod River for drinking and navigation. R. at 5. By finding that the Queechunk Canal is not subject to the Public Trust Doctrine, this Court would be allowing Moon Moo to convert water subject to public use into private water. It is bad policy to allow a private party to divert water that is open to public use onto private property and thereby give the landowner the right to exclude others from use by simply rerouting the river water. Rather than negate over 100 years of public policy, this Court should find that the Queechunk Canal is subject to the Public Trust Doctrine.

This public policy argument is furthered based on the fact that a party that owns land surrounding a public trust navigable water may not act in a manner adverse to the public's use. A landowner who owns land on which there is a public trust navigable river of the state cannot exercise his rights as a riparian landowner in a manner that is contrary to the public's interest to use the water. *See Ill. Cent. R.R. Co.*, 144 U.S. at 446. Assuming the Deep Quod River is a navigable fresh body of water and is thereby subject to the Public Trust Doctrine, Moon Moo is utilizing its right to the water as a riparian landowner in a manner that is contrary to the public's interest by attempting to exclude the public from use once the public water is in the Queechunk Canal. *See id.* 455–56; R. at 5, 7. The exclusion of the public from its waters goes against both the rule governing riparian landowner rights and public policy.

Aside from the policy reasons listed above, this Court should follow the multiple other states that have applied the Public Trust Doctrine to man-made bodies of water. *See, e.g.*, *Fish*, 693 S.E.2d at 212; *Newcomb v. County of Carteret*, 701 S.E.2d 325, 336-37 (N.C. Ct. App. 2010); *Hughes v. Nelson*, 399 S.E.2d 24, 25 (S.C. Ct. App. 1990). In *Fish*, the plaintiff alleged that a neighbor trespassed on his property when the neighbor sailed a small boat down a man-

made canal located solely on the plaintiff's property. *See id*. at 210. In its analysis, the court stated that the fact that a body of water was natural or man-made had no effect on the Public Trust Doctrine analysis. *See id.* at 212. Rather, the only relevant consideration was whether the body of water was capable of navigation. *See id*. The court then concluded that the canal could be navigated, so it was a public trust navigable water of North Carolina. *Id*. This case is almost identical to *Fish*. Both cases deal with a trespass claim, on a man-made canal, located wholly on one party's property. R. at 5. Further, small boats can navigate both canals. R. at 5. Based on these similarities, this Court should follow the lead of the court in *Fish* and other state courts and find that the Public Trust Doctrine applies to the man-made Queechunk Canal.

Finally, the district court finding that *Kaiser Aetna* precludes the application of the Public Trust Doctrine to a man-made body of water was incorrect. R. at 9. In *Kaiser Aetna*, the Supreme Court of the United States determined that a private pond, located on private property in Hawaii, did not become water subject to the public's right to use when the pond was connected to a public bay. 444 U.S. 164, 179–80 (1979). The district court erred in construing this case as prohibiting application of the Public Trust Doctrine to a man-made body of water because the holding in *Kaiser Aetna* is specific to Hawaii property law. Under Hawaiian law, fishponds are historically private property. *See id.* at 166–67. Rights to the ponds are recognized to the same extent as rights to dry land, meaning the pond and its water is owned in fee simple and the owner has the right to exclude others from use. *See id*. Rivers do not have the same special characteristics and exemptions from public right to use as the Hawaiian fishponds. *See Barney*, 94 U.S. at 338. Rivers and other bodies of freshwater, such as the water that flows through the Queechunk Canal, have historically been public trust navigable waters of the states. *See id*. Therefore, reliance on *Kaiser Aetna* was misplaced and this Court should find that the

Queechunk Canal is a public trust navigable water of New Union. Therefore, as a matter of law James did not trespass and the evidence is admissible.

II. The District Court Erred in Its Application of the Exclusionary Remedy Because the Exclusionary Remedy Does Not Apply to Civil Enforcement Actions or Evidence Obtained by a Private Party.

Although the finding that the Public Trust Doctrine applies to the Queechunk Canal will deem the evidence admissible, the evidence is also admissible because the exclusionary remedy does not apply. The exclusionary remedy is a judicially created remedy enacted to deter police misconduct and unreasonable invasions to privacy in the collection of evidence. *United States v. Leon*, 468 U.S. 897, 906 (1984). It is usually applied in the criminal context, and its application to civil proceedings is rare. *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1041-42 (1984). In civil proceedings, the exclusionary remedy may apply to actions brought to assess penalties for past violations of agency regulations. *Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986). This application of the remedy in the civil context retains the exceptions found in the criminal context. *See id*. In the present case, the EPA can establish that this is not an action to assess penalties for past violations, and even if it was an action for a past violation, the private party search doctrine precludes the remedy's application. Therefore, the EPA can establish that the evidence obtained by James is admissible and should be considered in order to withstand summary judgment on the CWA claim.

A. The Exclusionary Remedy Does Not Apply Because This Is a Purely Civil Enforcement Proceeding.

The exclusionary remedy does not apply because the EPA is not seeking penalties for past violations of EPA regulations. In some civil enforcement cases, courts have held that the exclusionary remedy does not apply to enforcement actions brought solely to correct violations of agency regulations. *See, e.g., Brock*, 800 F.2d at 1334; *Trinity Indus. v. OSHRC*, 16 F.3d

1455, 1462 (6th Cir. 1994). On the other hand, the remedy will apply where the object of the case is to assess penalties against a party for *past violations*. *See Brock*, 800 F.2d at 1334. Penalties are defined as damages sought by a party to punish a crime "after it occurs." *Id*. Therefore, if an agency seeks damages for a past violation, then the exclusionary remedy may be applied.

In the present case, the EPA and Riverwatcher brought suit against Moon Moo seeking civil penalties and injunctive relief. R. at 4. Under the CWA, the EPA may commence a civil action against a private party for any violation for which it is authorized to issue a compliance order. 33 U.S.C. § 1319(b). The EPA is authorized to issue a compliance order whenever the EPA finds that a party "is in violation" of an EPA regulation. 33 U.S.C. § 1319(a). In addition, Riverwatcher brought suit under the citizen suit provision of the CWA. R. at 4. The citizen suit provision allows a citizen to commence a civil action against another party who is alleged to "to be in violation" of EPA regulations. 33 U.S.C. § 1365(a). The language "in violation" in both the government action and citizen suit provisions precludes the EPA and Riverwatcher from seeking penalties to punish a party for "past violations." Penalties sought for *past violations* are required for the application of the exclusionary remedy. *Brock*, 800 F.2d at 1334. Therefore, because this is an enforcement action brought under the CWA to correct a current violation, this Court should find that the exclusionary remedy does not apply.

In addition, the Supreme Court of the United States has frequently rejected the application of the exclusionary remedy in civil cases. In *Leon*, the Supreme Court stated that it had evaluated the remedy in contexts other than criminal litigation, and found that in the civil context the remedy should not be applied because it will not achieve police deterrence. *See Leon*, 468 U.S. at 909. Without police deterrence there is no purpose to the exclusionary remedy. *See id*. Further, the Court in *Lopez-Mendoza*, seemed to anticipate the present situation when it stated

that no one would argue that the exclusionary remedy should be applied to prevent an agency from ordering corrective action to clean-up a dangerous leak. *See Lopez-Mendoza*, 468 U.S. at 1046–47. This is based on the idea that the remedy should not be applied when an agency seeks to correct unsafe or unhealthy conditions that violate agency regulations. *See Brock*, 800 F.2d at 1334. In the present case, the application of the exclusionary remedy would not deter police misconduct because there are no police involved. *See* R. at 6. Additionally, the EPA brought this suit to correct an ongoing addition of dangerous waste into the Queechunk Canal, which is the situation anticipated in *Lopez-Mendoza*. R. at 7. Therefore, case law suggests that the exclusionary remedy should not be applied to the present civil action.

B. The Exclusionary Remedy Does Not Apply Because the Alleged Violation Was the Result of a Private Party Search.

Although statutory language and case law supports the finding that the exclusionary remedy does not apply to the present case, the fact that a private party was the alleged violator also precludes the application of the remedy. The purpose of the exclusionary remedy is to protect people against sovereign authority, not private parties. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). In *Burdeau*, a man's private papers were taken from a safe in his office. *Id*. at 473. The papers were taken by a private party, who turned the papers over to the government for use as evidence. *See id*. at 473–474. The Supreme Court found that the exclusionary remedy applied only to governmental violations of the 4th Amendment. *Id*. at 475. The fact that a private party acted on its own accord to obtain evidence and then gave that evidence to prosecutors did not warrant the exclusionary remedy because the government did not commit a wrong. *See id.*

Similarly, Moon Moo claims that evidence of the discharge taken from the Queechunk Canal was wrongfully obtained by trespass. R. at 9. The alleged trespasser is James, a private party. R. at 6. James obtained the evidence on his own accord and allowed the evidence to be

used by the EPA in this civil enforcement action. R. at 6. The EPA committed no wrong in obtaining the evidence. R. at 6. Therefore, under the private party rule established by the Supreme Court, the evidence obtained by James is not subject to the exclusionary remedy.

This private party exception to the exclusionary remedy applies no matter if the private party is acting intentionally, deliberately, reasonably, or unreasonably. *United States v. Jacobsen*, 466 U.S. 109, 115 (1984). As a result, if the Queechunk Canal was private and James saw the "No Trespass" signs and disregarded them, the evidence is still admissible. Therefore, the court erred in its application of the exclusionary remedy.

III. Moon Moo's Land Application Discharge Is Unlawful in the Absence of a NPDES Permit Because It Originates from a CAFO and Is Not Excluded Under the Agricultural Stormwater Exemption.

Based on evidence improperly excluded by the district court, Moon Moo is a CAFO because it satisfies the applicable regulatory definition. As a result, the land application of manure by the farm is explicitly designated as from the CAFO, and is thus subject to NPDES permit requirements under the CWA. Given the CAFO land application, Moon Moo's inadequate NMP bars the discharge from exemption as agricultural stormwater. Classification as a CAFO is tied to the existence of a discharge, meaning that failure to classify Moon Moo as a CAFO should only arise from an improper exclusion of evidence. However, if this Court incorrectly finds that Moon Moo is not a CAFO while simultaneously allowing evidence of the discharge, the inadequacy of the NMP is no longer relevant, and the discharge will be excluded from CWA regulation under the generally applicable agricultural stormwater exemption.

A. Moon Moo Satisfies the Regulatory Definition of a CAFO Because It Stables the Requisite Number of Animals and Discharges Pollutants from a Man-Made Ditch.

Moon Moo's discharge of manure into the Queechunk Canal brings it under the definition of a "Medium CAFO." Although the CWA designates that the term "point source"

includes a CAFO, it does not provide a definition for the term. 33 U.S.C. § 1362(14) (2012). Instead, the relevant definition is provided by EPA regulations. *See* 40 C.F.R. § 122.23 (2012). A preliminary requirement for any CAFO is qualification as an animal feeding operation (AFO). *See id.* § 122.23(b). An AFO is a lot or facility where (i) Animals are stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period, and (ii) crops and vegetation are not sustained in the normal growing season over the area in which the animals are confined. *Id.* § 122.23(b)(i)–(ii). Here, the cows are housed in a barn and are not pastured. R. at 4. This means that the cows remain confined during the regular operation of the farm, and they do not come in contact with any vegetation. R. at 4. Based on this evidence satisfying both criteria, the district court correctly determined that Moon Moo is an AFO. R. at 8.

Additionally, an AFO must qualify as either a "Large CAFO" or a "Medium CAFO" to receive treatment as a point source under the CWA. *See* 40 C.F.R. § 122.23(b)(2). A Medium CAFO requires 200 to 699 mature dairy cows. *Id.* § 122.23(b)(6)(i)(A). The district court correctly held that Moon Moo's 350 head of milk cows satisfy this requirement. R. at 4, 8. In order to qualify as a Medium CAFO, the farm must also meet one of two conditions regarding the discharge itself. *See* 40 C.F.R. § 122.23(b)(6)(ii)(A)–(B). Relevant here is condition (A), which requires that "[p]ollutants are discharged into waters of the United States through a man-made ditch . . . ." *Id.* § 122.23(b)(6)(ii)(A).The district court improperly determined that certain evidence regarding the discharge from Moon Moo's ditch was inadmissible. R. at 9. This decision prevented the court from engaging in sufficient analysis of condition (A).

Condition (A) requires that Moon Moo be classified as a Medium CAFO. It is undisputed that Moon Moo's runoff constitutes a "pollutant" in the form of nitrates, chemical waste, fecal coliform, and suspended solids. *See* 33 U.S.C. § 1362(6); R. at 7. Additionally, while

"discharge" typically has an expansive meaning, the CWA specifies that the term will only take on the broader meaning when it is used without qualification. 33 U.S.C. § 1362(16). Here, "discharge" is limited by the remainder of condition (A); that the pollutants must be discharged into waters of the United States through a man-made ditch. 40 C.F.R. § 122.23(b)(6)(ii)(A). This condition is expressed without any reference to the necessity of a point source. The discharge must simply come from a "man-made ditch." *Id.* Here, James observed and photographed runoff flowing into the Queechunk Canal through a drainage ditch. R. at 6. The parties did not appear to dispute whether this ditch was man-made, and at a minimum, any dispute would be a question of fact best left to a jury. *See* R. at 8.

Additionally, whether the Queechunk Canal is itself a "water of the United States" is immaterial based on the contrasting language of the conditions. Condition (B) requires that the pollutants be discharged *directly* into waters of the United States, whereas condition (A) contains no such language requiring direct discharge. *See* 40 C.F.R. § 122.23(b)(6)(ii)(A)–(B). The EPA varied this language to emphasize that condition (A) simply requires an ultimate conveyance into a water of the United States, as opposed to a "direct discharge." Therefore, condition (A) is satisfied because it is undisputed that pollutants discharged into the Queechunk Canal flow into the Deep Quod River, which is a water of the United States. R. at 7.

Moon Moo constitutes a medium CAFO because the preceding evidence indicates that it satisfies both the number of animals and discharge requirements of the regulatory definition. *See* 40 C.F.R. §122.23(b)(6).

B. Moon Moo's Discharge as a Result of Its Land Application of Manure Is Subject to CWA Regulation Because It Is From a CAFO and Is Not an Exempt Agricultural Stormwater Discharge

Moon Moo's land application discharge is subject to NPDES permit requirements because EPA regulations explicitly link the discharge to the CAFO, which is a point source. The

CWA prohibits the addition of any pollutant to navigable waters *from* a point source without a NPDES permit. 33 U.S.C. § 1362(12)(A). Additionally, the CWA expressly includes CAFOs within the definition of point source, while simultaneously excluding agricultural stormwater discharges. *Id.* at § 1362(14). Because the observed discharges occurred in close temporal proximity to a storm event, Moon Moo argues that the discharge falls within the agricultural stormwater exemption. R. at 8. Given that Moon Moo qualifies as a Medium CAFO, the key issue is whether the runoff discharge is *from* the CAFO, or is instead an exempt agricultural stormwater discharge.

1. Moon Moo's Land Application Discharge is Subject to NPDES Permit Requirements Because the Regulatory Default Requires That It be Designated as From a CAFO.

The district court failed to correctly resolve the conflict between the CWA's simultaneous inclusion of CAFO and exclusion of agricultural stormwater discharge in the definition of point source. In the CWA, Congress did not define the scope of CAFO discharges, nor the term agricultural stormwater. *Alt v. EPA*, 979 F. Supp. 2d 701, 707 (N.D. W. Va. 2013). The EPA recognized that situations would arise in which the application of these terms may be inherently at odds. In response to this potential conflict, the EPA promulgated the 2003 "CAFO rule" which, within the context of "land application discharges," delineates between discharges from the CAFO and those that are exempt agricultural stormwater discharges. *See* 40 C.F.R. § 122.23(e). The rule essentially functions as a sorting provision. *See id.*

Generally, the sorting provision specifies that a discharge as a result of the application of manure by the CAFO to "land application areas" under its control is a discharge from that CAFO subject to NPDES permit requirements. *Id.* The rationale behind the default regulation of land application is that pipes and other manure-spreading equipment which originate the discharge are properly considered as part of the CAFO. *See* NPDES and Effluent Limitation Guidelines and

Standards for CAFOs, 68 Fed. Reg. 7176-01 at 7196 (February 12, 2003) (to be codified at 40 C.F.R. parts 9, 122, 123, and 412). Because the CWA is sufficiently ambiguous, EPA's decision to regulate land application discharges is a permissible construction of the statute, and is entitled to *Chevron* deference. *See Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 507 (2d Cir. 2005) (applying *Chevron* deference to the sorting provision) (citing) *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

"Land application area" is land under the control of an AFO owner or operator to which manure from the production area is or may be applied. 40 C.F.R. § 122.23(b)(3). Here, the field in question plainly satisfies this definition because it is part of Moon Moo's operations, and Moon Moo spreads the liquid manure and whey mixture onto the field. R. at 5. Therefore, the discharge from the land application area is generally subject to NPDES permit requirements under the sorting provision. *See* 40 C.F.R. § 122.23(e); 33 U.S.C. § 1362(14).

2. The Agricultural Stormwater Exemption Does Not Apply Because Moon Moo's Inadequate NMP Failed to Ensure Appropriate Agricultural Utilization of Nutrients.

The district court improperly determined that the discharge was exempt agricultural stormwater by misapplying case law and failing to recognize the totality of the context-specific exemption. The agricultural stormwater exemption only applies to land application discharges when (1) a precipitation-related discharge occurs and (2) the manure has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure. 40 C.F.R. § 122.23(e). The EPA does not dispute that Moon Moo's discharges were precipitation-related, meaning that the only disputed element is the adequacy of Moon Moo's NMP. *See* R. at 6. The district court misconstrued case law in applying the exemption and never addressed the real issue of the adequacy of Moon Moo's NMP.

First, the district court's reliance on *Alt v. EPA* was unfounded. *Alt* dealt with a precipitation-related discharge from an area of the CAFO facility which was not a land application area. *See* 979 F. Supp. 2d at 704. The court in *Alt* applied the agricultural stormwater exemption and found that the discharge was not subject to NPDES permit requirements. *Id.* at 715. Unlike in the land application context, there are no EPA regulations defining agricultural stormwater in the context of other areas of a CAFO. With no statutory or regulatory definition upon which to rely, the court's analysis in *Alt* necessarily confined itself to the plain language of "agricultural stormwater discharge." *Id.* at 707 (citing *Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 121 (2d Cir. 1994) (holding that the plain meaning of agricultural stormwater discharge is discharge primarily caused by precipitation)). The *Alt* court's analysis of the agricultural stormwater exemption is limited to situations in which the exemption remains undefined, as opposed to the sorting provision's express definition. 40 C.F.R. § 122.23(e).

Second, Moon Moo mistakenly relies on its compliance with an inadequate NMP. *See* R. at 8. While compliance with a NMP is a general prerequisite for satisfying the exemption, the NMP must also comply with several regulatory requirements. *See* 40 C.F.R. § 122.23(e). The requirement most relevant to the present case states that the CAFO must apply manure in accordance with site-specific practices "that ensure appropriate agricultural utilization of the nutrients in the manure." 40 C.F.R. §122.42(e)(1)(viii). However, despite the plain language of the regulation, the district court's analysis is utterly devoid of any discussion of this requirement.

As a CAFO, Moon Moo is not entitled to rely on the agricultural stormwater exemption because its land application practices were wholly inadequate in light of EPA regulations. Moon Moo's NMP was insufficient with regard to this requirement for several reasons. First, the NMP failed to adequately utilize nutrients because it permitted land application during a rain event. R.

at 7. The inadequacy is highlighted by Dr. Mae's affidavit stating that, "land application of manure during a rain event is a very poor management practice and will nearly always result in excess runoff of nutrients from fields." R. at 6. While the EPA recognizes that some runoff of nutrients may occur during rainfall events, this runoff will only be exempt when the application occurs in a way that minimizes the subsequent discharge of pollutants to waters of the United States. 68 Fed. Reg. at 7198. By authorizing land application during rain events, Moon Moo's NMP, contrary to the purpose and language of the program, exacerbated the runoff of nutrients. R. at 6. Therefore, despite Moon Moo's adherence to its NMP, the inadequacy of the plan itself bars the discharge from qualification under the exemption. *See* 40 C.F.R. § 122.23(e).

Additionally, the over-application of acid whey did not constitute a practice that ensured appropriate agricultural utilization of the nutrients. Dr. Mae found that adding acid whey to the liquid manure lowered the pH (increased acidity) of the manure and thereby lowered the pH of the soil. R. at 6. The soil's lower pH prevented the Bermuda grass crop from effectively taking up the nutrients in the manure, thereby increasing the pollutants discharged. R. at 6. While acid whey could be applied in such quantities as to utilize nutrient uptake and minimize excess nutrient runoff, Moon Moo's NMP failed to serve as an effective limit, and the addition of whey augmented the discharge. As such, the plan itself does not satisfy the appropriate utilization of the nutrients requirement of the exemption. 40 C.F.R. §§ 122.23(e), 122.42(e)(1)(viii).

New Union's acceptance of Moon Moo's NMP does not prevent the EPA from challenging the adequacy of the plan. Instead, the EPA expects authorized states to evaluate an unpermitted CAFO's NMP using standards established by the Director. *See* Revised NPDES Permit Regulation and Effluent Limitations Guidelines for CAFO in Response to the Waterkeeper Decision 73 Fed. Reg. 70418–01 at 70436 (to be codified at 40 C.F.R. parts 9, 122,

412). Here, it appears that New Union not only failed to apply technical standards in its oversight, but consistently does not review NMPs. *See* R. at 5. Additionally, unlike the challenge of a state-approved NPDES permit, there is no relevant time limit for the EPA to challenge an insufficient NMP. *See* 33 U.S.C. § 1342(d)(4). Also, the EPA specified in the preamble to the 2008 rule that a party who finds an unpermitted CAFO's NMP to be insufficient can file suit under the CWA alleging that the CAFO is discharging without a permit. 73 Fed. Reg. at 70437; 33 U.S.C. § 1365(a). The present suit is a proper exercise of this safeguard, and comports with the EPA's regulatory role under the CWA. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 856 (8th Cir. 2013) ("the CWA is a program of state and federal cooperation, but state discretion is exercised against a backdrop of significant EPA authority over state-run NPDES programs").

Moon Moo attempts to mitigate the inadequacy of its NMP by submitting evidence of the longstanding practice of land application of whey as a soil conditioner. R. at 6. However, Moon Moo's reliance on general custom is misguided based on the site-specific nature of the NMP. *See* 40 C.F.R. §122.23(e). Furthermore, Moon Moo's argument resembles an attempt to avoid liability by disclaiming fault. This argument runs counter to the notion that liability under the Clean Water Act is a form of strict liability. *Stoddard v. Western Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). The alleged good faith reliance of the farm is immaterial so long as the NMP itself is inadequate and the discharge unlawful. *See id.* Finally, the farm and the district court's reading of the § 122.23(e) sorting provision renders it meaningless in the context of a water-quality regime. Under Moon Moo's argument, a CAFO owner may escape liability for any precipitation-related discharge so long as they create and follow a NMP, regardless of the terms of the plan. This type of circumvention was not intended by Congress and is not permitted

under EPA's regulations. *See* 33 U.S.C. § 1251(a) (expressing Congress' objective to restore and maintain the chemical, physical, and biological integrity of the Nation's waters).

The EPA's permissible construction of the CWA designates Moon Moo's discharge into the Queechunk Canal as being from a CAFO, and thus unlawful in the absence of a NPDES permit. At a minimum, a reasonable jury could conclude that the farm engaged in practices that actually enhanced the runoff of nutrients, precluding it from taking advantage of the stormwater exemption. *See Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 744 (5th Cir. 2011) (holding that a discharge from land application not in compliance with site-specific practices is an unpermitted discharge in violation of the CWA). Accordingly, this Court should reverse the district court's improper grant of summary judgment.

C. If Moon Moo Is Not a CAFO, the Discharge Into the Queechunk Canal Is Not Unlawful Because It Would be Exempt Under the Generally Applicable Agricultural Stormwater Exemption.

A precipitation-related agricultural discharge that is *not* from a CAFO is not regulated under the CWA. *See* 33 U.S.C. § 1362(14). However, Riverwatcher argues that even if Moon Moo is not a CAFO, the discharge from the drainage ditch is regulated under the CWA. R. at 7. The only way for this Court to decide that Moon Moo is not a CAFO is if this Court improperly excludes evidence regarding the discharge. If this occurs, Riverwatcher would be unable to utilize evidence concerning the ditch in pursuing its alternate theory. Essentially, because the farm's qualification as a Medium CAFO is tied to the discharge itself, exclusion would likely preclude CWA litigation entirely.

However, if this Court incorrectly holds that Moon Moo is not a CAFO, while simultaneously allowing evidence of the discharge, existing case law suggests that it is not subject to regulation under the CWA. First, it is necessary to clarify the regulatory implications of a failure to classify the farm as a CAFO. The express regulation of land application discharge

under the 40 C.F.R. § 122.23(e) sorting provision is directly tied to the existence of a CAFO. Therefore, if Moon Moo is not a CAFO, the sorting provision and its default CWA regulation no longer apply. Also, the context-specific definition of "agricultural storm water discharge" contained in the sorting provision, and the related NMP requirements, would be equally inapplicable in the absence of a CAFO land application. *Id.* In fact, the only relevance of the NMP if Moon Moo is not a CAFO is that it serves as evidence that the discharge is "agricultural" in nature, a fact which the EPA does not contest.

Notwithstanding this distinction, the agricultural stormwater exemption applies outside of the CAFO context. *See* 33 U.S.C. § 1362(14). While the holding in *Alt* is not relevant to discharges from the land application area of a CAFO, it is applicable to the agricultural stormwater exemption generally. *See* 979 F. Supp. 2d at 710; *Waterkeeper Alliance, Inc.*, 399 F.3d at 507 (holding that the CWA exempts agricultural stormwater discharges from regulation even when those discharges come from what would otherwise be point sources). *Alt* involved precipitation-related runoff of manure and litter discharged through man-made ditches. *See* 979 F. Supp. 2d at 704–05. Although *Alt* involved a CAFO, the discharge did not originate from the land application area, so the court's analysis drew upon the plain meaning of agricultural stormwater. *See id.* at 710. The court held that because precipitation washed the manure and litter from the farmyard to navigable waters, the discharge was exempt as agricultural stormwater. *Id.* at 715. The court reached this decision in spite of the fact that the runoff flowed through a ditch, which is traditionally defined as a point source under the CWA. *Id.* at 715; 33 U.S.C. § 1362(14).

If this Court excludes Moon Moo from classification as a CAFO, the analysis in *Alt* becomes applicable. Similar to *Alt*, Moon Moo's discharge through a man-made ditch was precipitation-related. R. at 6. Congress mandated comprehensive regulations of other forms of

industrial and municipal stormwater run-off, which indicates that Congress wanted to make it clear that agriculture was not included in this new program. *Southview Farm*, 34 F.3d at 114. The EPA acknowledges this congressional intent through its traditional exemption of precipitation-related agricultural runoff not originating from a CAFO's land application. *See* § 122.3(e). If this Court improperly finds that Moon Moo is not a CAFO, the EPA will defer to its traditional exemption of non-CAFO agricultural runoff, regardless of whether the runoff is channeled through a ditch.

IV. Moon Moo Is Not Subject to Citizen Suit Under RCRA Because the Manure and Whey Mixture Is Not a Solid Waste.

Moon Moo is not subject to citizen suit under RCRA because the manure and whey mixture is not a solid waste. Even though it is not a solid waste, the mixture does present an imminent and substantial endangerment. RCRA Subchapter D regulates the disposal of solid wastes to encourage environmentally sound practices and maximization of resource recovery. 42 U.S.C. § 6941 (2012). Thus, Subchapter D focuses on *conservation* in order to deal with the waste disposal problem caused by vast quantities of solid waste. *Id.* §§ 6941; 6941a. Subchapter D regulates parties who (1) dispose of (2) a solid waste (3) in a non-sanitary landfill. *Id.* § 6945(a). Only the solid waste element is at issue on this appeal. *See* R. at 10. Subchapter D may be enforced by a private citizen in two ways. Under Subparagraph (A) a person may bring suit against any person alleged to be in violation for any reason. Under Subparagraph (B) a person may bring suit for any violation which may also present an imminent and substantial endangerment to health or the environment. *Id.* § 6972(a)(1)(A), (B).

A. The Manure and Whey Mixture Does Not Constitute a Solid Waste Under RCRA Subchapter D Because It Is a Fertilizer That Is Put to Beneficial Reuse.

The mixture is not a solid waste under either the fertilizer exemption, or the non-discard determination of a beneficial reuse. RCRA defines a solid waste as "any garbage refuse, sludge

from a waste treatment plant…and other discarded material." 42 U.S.C. § 6903(27). Generally, solid waste is not meant to include fertilizers or other materials which are reused in a way that is environmentally sound and preserves energy. *See id.* § 6941. Regulations specifically exempt manure returned to the soil as fertilizer or soil conditioner from solid waste classification. 40 C.F.R. § 257.1(c)(1) (2013). Here, the use of the mixture would constitute use as a fertilizer or soil conditioner. Alternatively, courts have interpreted a similar exemption for "other discarded material" when materials are beneficially reused. *See, e.g.*, *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003). Here, the manure and whey mixture was also beneficially reused as fertilizer. R. at 5. Therefore, the whey and manure mixture is exempt from solid waste classification under both theories.

1. The Manure and Whey Mixture Is Not a Solid Waste Because It Is Exempt as Fertilizer.

The manure and whey mixture is not a solid waste because it is specifically excluded as a fertilizer. To be a solid waste, a material must fit within RCRA's definition of solid waste and not be excluded by regulation. Subsection (c) specifically excludes "agricultural wastes, including manures . . . returned to the soil as fertilizers or soil conditioners" from solid waste classification. 40 C.F.R. § 257.1(c)(1). Although this is not a "blanket animal waste exception," it certainly includes animal waste that is intended to be "fertilizer" and is in fact used for that purpose. *Water Keeper Alliance v. Smithfield Foods, Inc.*, 2001 WL 1715730, No. 4:01-CV-H(3), at *4 (E.D.N.C. Sept. 20, 2001).

Here, Moon Moo stored manure for use as fertilizer. R. at 5. Moon Moo accepted acid whey from Chokos and added it to the manure. R. at 5. Dr. Green stated that whey application to land as a soil conditioner has been a normal practice in New Union since the 1940's. R. at 6. Following with this normal practice, Moon Moo created the NMP to shape guidelines for

fertilizing its fields. Although the NMP was ultimately inadequate, the NMP is a creature of CWA regulation and not RCRA solid waste classification. Therefore, Moon Moo used the mixture as a fertilizer exempt from solid waste classification.

Since the existence of a solid waste is a prerequisite for further regulation under RCRA, Riverwatcher's other RCRA claims are irrelevant because this is not a solid waste. Therefore, this Court should affirm the finding that Moon Moo is not liable under Subchapter D because the mixture is not a solid waste.

2. The Manure and Whey Mixture Is Not "Discarded" Because It Was Put to a Beneficial Reuse.

Even if the manure and whey mixture does not qualify for the general fertilizer exemption, it is still not a solid waste because it is not discarded. RCRA's definition of solid waste includes "other discarded material," but never defines the word "discarded." *See* 42 U.S.C. § 6903. Following congressional intent, courts give "discard" its ordinary meaning as "cast aside; reject; abandon; give up." *See, e.g.*, *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1041 (9th Cir. 2004); *Am. Petroleum Inst. v. U.S. EPA*, 216 F.3d 50, 55–56 (D.C. Cir. 2000). Ultimately, the key to classification is whether the material has served its intended purpose and is no longer wanted by the consumer. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2012) (quoting H.R. Rep. No. 94-1491, at 2–3 (1976), reprinted in 1976 U.S.C.C.A.N. 6238, 6239). To address this issue, courts have formulated three factors to determine if a material was "discarded": (1) the material is destined for reuse in a continuous process by the generating industry; (2) the reuse is immediate; and (3) the party is not a salvager or reclaimer. *Safe Air*, 373 F.3d at 1045. This is known as the beneficial reuse exemption. *Id.*

First, the manure and whey mixture was destined for a beneficial reuse in a continuous process by the generating industry. When material is destined for immediate reuse in another

phase of the generating industry's ongoing production process, then it is not discarded and thus exempt from solid waste classification. *Am. Mining Cong. v. U.S. EPA* (AMC I), 824 F.2d 1177, 1185 (D.C. Cir. 1987). An "ongoing process" is a use by the generating industry which provides an alternative to disposal by reusing valuable resources. *Id*. In *Oklahoma v. Tyson Foods, Inc.*, the defendant used poultry litter to fertilize grass for its livestock. 2010 U.S. Dist. LEXIS 14941, No. 05-CV-0329-GKF-PJC, at *34 (N.D. Okla. May 10, 2010). It was a normal practice to apply poultry litter to fields as fertilizer or soil amendment, and the plaintiff's expert acknowledged that poultry litter can benefit grass if there is a nitrogen deficiency in the soil. *Id.* at *36, *38. The court found as a matter of law that the poultry litter was not discarded because it was used in a continuous process by the generating industry as a soil amendment. *Id.* at *40–45.

Here, Moon Moo applied the manure and whey mixture to its Bermuda grass fields. R. at 5. Moon Moo used the grass to feed livestock. R. at 5. Land application of whey as a soil conditioner has been traditional practice in New Union since the 1940's. R. at 6. Identical to *Tyson Foods*, Moon Moo used the manure and whey mixture as a soil conditioner in accordance with tradition. 2010 U.S. Dist. LEXIS at *40–45. According to *Tyson Foods* and *AMC* I, this is a continuous process by the generating industry because Moon Moo utilizes the mixture as a soil conditioner in its dairy production as an alternative to disposing of the mixture. Therefore, Moon Moo Farm satisfies the first factor.

Second, the mixture is reused immediately, as opposed to being stored for *potential* reuse. When a material is stored in a surface impoundment as part of the waste disposal process and has only the potential of being reused later, then it is not afforded the beneficial reuse exemption. *Am. Mining Cong. v. U.S. EPA* (AMC II), 907 F.2d 1179, 1186 (D.C. Cir. 1990). In *AMC* II, defendants stored wastewater from the smelting processes in surface impoundments before

disposal. *Id.* at 1186. Defendants claimed that the sludge created by the wastewater was not discarded because it may at some time be reused. *Id.* at 1186. The court disagreed and found that for a material to be beneficially reused, it must be immediately reused. *Id.* at 1187.

Here, the manure and whey mixture is held in a lagoon. R. at 4–5. Moon Moo periodically spreads the mixture across its 150 acres. R. at 5. Unlike *AMC* II, the lagoon is not a disposal center, and the mixture is presently intended for use as a fertilizer. *Compare* R. at 5, *with AMC* II, 907 F.2d at 1186. Therefore, Moon Moo satisfies this factor because it did immediately reuse the manure and whey mixture.

Finally, the mixture is being reused by its original owner or a closely-related party, not a salvager or reclaimer. When a material which is otherwise discarded is reused by a salvager or reclaimer, it remains classified as a solid waste. *See U.S. v. ILCO, Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993). A material is "reclaimed" if it is processed to recover a usable product. *Id.* In *ILCO*, a smelting company purchased used car batteries. *Id*. at 1128. The company reprocessed lead from the batteries to produce ingots. *Id*. at 1129. ILCO claimed that this was a reuse. *Id*. at 1131. The court disagreed because ILCO merely purchased what would otherwise be solid waste and reprocessed it. *Id*. In short, the court said that a reclamation was not a reuse. *See id.*

Here, milk does not undergo a separate process to produce whey. *See* R. at 5. Whey is a part of milk that separates during the fermentation stage of dairy production. Gregory D. Miller, et. al., *Handbook of Dairy Foods and Nutrition* 39 (3d ed. 2006). Moon Moo provides milk for the Chokos Greek Yogurt facility which then produces yogurt and acid whey. *See* R. at 5. Chokos gives the acid whey to Moon Moo. R. at 5. Moon Moo then adds the acid whey to its manure and uses the mixture to fertilize Bermuda grass that feeds its cows. R. at 5.

Unlike *ILCO*, this case is not a proprietary reclamation. *See* 996 F.2d at 1128. Moon Moo and Chokos are co-producers in the dairy industry. *See* R. at 5. The beneficial reuse exemption only requires that a product is reused within the generating industry, but does not prohibit co-producers. *See AMC* I, 824 F.2d at 1186 (emphasizing the ongoing process in general); *ILCO*, 996 F.2d at 1132 (finding that *reclaimed* materials through a special process are not "reused"). This case is more like *Tyson Foods* where a farm took chicken litter from its poultry production and used it to fertilize grass used for dairy production. *See* 2009 LEXIS 14941, at *36. Here, the milk given by Moon Moo produced two useful products: yogurt and whey. R. at 5. Chokos gave the whey back to Moon Moo as an alternative to waste disposal and to benefit the overall dairy production. Therefore, the reuse of whey comports with the rules set out in *AMC* I and *ILCO*.

This Court should affirm the lower court's order granting summary judgment on Riverwatcher's claim for Subchapter D because the manure and whey mixture is not a solid waste under the fertilizer exemption, nor discarded because of its beneficial reuse.

B. Although the Manure and Whey Mixture Is Not a Solid Waste, the Mixture Does Present an Imminent and Substantial Endangerment.

The manure and whey mixture constitutes an imminent and substantial endangerment when added to local waters. RCRA allows citizen suit for injunctive relief when any past or present generator has contributed or is contributing to the disposal of a solid waste which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B) (2012). While the mixture is not a solid waste and an injunction is not ultimately available, the endangerment element is otherwise fulfilled because the harm caused is both imminent and substantial. Further, Moon Moo was a contributor as required by this citizen suit provision. Therefore, to ensure proper future application, this Court should reject the district court's finding as to endangerment and contribution.

1. The Harm Posed by the Addition of the Mixture to Local Waters Is an Imminent Endangerment Because It Immediately Threatens Public Health.

Based on the liberal construction of "imminent," the elevated levels of nitrates constitute and imminent endangerment. An "endangerment" is a threatened or potential harm and does not require proof of actual harm. *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 211 (2d Cir. 2009) (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991)). When a danger threatens to occur immediately, whether the impact is felt now or later, then the danger is "imminent." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 485–86 (1996). Congress intentionally made the imminent and substantial language expansive to give the courts "the authority to grant equitable relief to the extent necessary to eliminate *any risk* posed by [] waste." *Burlington N. & Santa Fe R.R. v. Grant* (BNSF), 505 F.3d 1013, 1019 (10th Cir. 2007) (quoting *Dague*, 935 F.2d at 1355) (emphasis in original) (threat to site still imminent even though contaminants were removed when the source was still nearby and could transmit more contaminants). Consequently, courts place an emphasis on the words "may present." *See, e.g., Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006) (the threat of mercury to water was imminent when it threatened fish in the river).

Here, the manure and whey mixture produced runoff with high levels of nitrates and fecal coliforms which ran into the Queechunk Canal. R. at 6. The Queechunk Canal connects with the Deep Quod River, which is a source of public drinking water. R. at 5. The Farmville Water Authority issued a nitrate advisory for drinking water customers warning them of dangers for infants. R. at 6. Therefore, the endangerment is imminent because the threat presently exists.

2. The Harm Is Substantial Because Infants Are Exposed to the Risk of Harm in the Event That Remedial Action Is Not Taken.

The harm is substantial because Farmville's drinking water source is compromised with high levels of nitrates. An endangerment is "substantial" when it is serious and there is

reasonable cause for concern that someone may be exposed to risk of harm by release, or threatened release in the event remedial action is not taken. *BNSF*, 505 F.3d at 1021. Courts have been reluctant to quantify the amount of risk which makes an endangerment "substantial" or "serious." *Maine People's Alliance*, 471 F.3d at 287 (citation omitted). However, if an error is to be made in applying the endangerment standard, "the error must be made in favor of protecting public health, welfare, and the environment." *BNSF*, 505 F.3d at 1020 (citation omitted).

In *Maine People's Alliance*, a chemical plant deposited mercury laden waste into the river. 471 F.3d at 280. The mercury levels downriver were five times the levels in comparable rivers. *Id.* at 281. Although no harm was known to be manifested to humans at the time, experts testified that the potential harm to public health through the drinking water could be great. *Id.* at 282. The court thus concluded that the endangerment was substantial. *Id.* at 296.

Here, Moon Moo created runoff with highly elevated levels of nitrates and fecal coliforms. R. at 6. The nitrate levels downstream were high enough to warrant a nitrate advisory. R. at 6. The nitrate levels presently pose a serious danger to infants who drink the water. R. at 6. The threat to the people of Farmville through its public drinking water is substantial because clean drinking water is an important aspect of public health and welfare. *Maine People's Alliance*, 471 F.2d at 288; Clean Drinking Water Act, 42 U.S.C. § 300g (2012). Therefore, a threat to that drinking water is necessarily serious.

3. Moon Moo is a Contributor to the Endangerment Because It Contributes Nitrates to the River.

Based on the inclusive language of the imminent and substantial endangerment provision, Moon Moo is a contributor. RCRA's citizen suit provision provides liability for any person, "who has contributed" to disposal of solid waste which may present an imminent and substantial endangerment. 42 U.S.C. § 6972(a)(1)(B). Congress chose to use the word "contributed" rather

than "caused." Therefore, a person need not be the sole cause of the endangerment, but merely a contributor of it. *Maine People's Alliance*, 471 F.3d at 288.

In *Maine People's Alliance*, the defendant was only one of many contributors. *Id.* at 280. Nevertheless, the defendant was liable for an imminent and substantial endangerment because it was one of them. *Id.* at 288. Here, Dr. Mae testified that it is impossible to tell if Moon Moo is the but for contributor to the nitrate levels. R. at 7. However, the test is not but for causation. Moon Moo did release water with highly elevated nitrate and fecal coliform levels. R. at 6. Under the expansive application of RCRA and precedent of *Maine People's Alliance*, Moon Moo is a contributor under the imminent and substantial endangerment provision. *See* 471 F.3d at 282. Therefore, this Court should reject the district court's finding as to the endangerment and contributor elements of the imminent and substantial citizen suit. Although the district court was correct in finding that the ultimate relief sought is not available because there is no solid waste to begin with, the other elements are nevertheless fulfilled.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court holdings regarding the first three issues because the Queechunk Canal is covered by the Public Trust Doctrine, the exclusionary remedy does not apply, and the discharge is subject to CWA regulation. Therefore, summary judgment on the CWA claim was improper. However, this Court should affirm the summary judgment on the RCRA claim because the mixture is not a solid waste, but should reject the lower court's analysis of the imminent and substantial endangerment claim.