NO. 14-1248

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

(*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR NEW UNION.*
NO. 155-CV-2014)

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

ORAL ARGUMENT REQUESTED

TEAM 14
Attorneys for the Plaintiffs-Intervenors-Appellants

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JURISDICTIONAL STATEMENT

This case involves an appeal from a judgment of the United States District Court for New Union. R. at 1. The district court had proper subject matter jurisdiction over the case because the issues arose under the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq*, and federal district courts have original jurisdiction over any civil action arising under the laws of the United States. 28 U.S.C. § 1331 (2012). The United States Court of Appeals for the Twelfth Circuit has proper jurisdiction to hear appeals from any final decision of the United States District Court for New Union. 28 U.S.C. § 1291 (2012).

STATEMENT OF THE ISSUES

I. Whether a navigable canal that carries most of the flow of a natural, navigable water is public trust navigable water allowing for a public right of navigation under the public trust doctrine.

II. Whether evidence obtained tortiously, but by a private citizen, is admissible in a civil enforcement proceeding.

III. Whether runoff from a dairy's land application of liquid manure and acid whey is a discharge from a CAFO or a point source, subject to NPDES permitting liability under the CWA § 402, or whether such discharges are exempt as agricultural stormwater.

IV. In the alternative, whether land application of liquid manure and acid whey constitutes open dumping of a discarded solid waste under RCRA § 4005, and whether nitrate advisories caused in part by the discharge of such liquid manure and acid whey are sufficient to sustain a cause of action as imminent and substantial endangerment under RCRA § 7002.

STATEMENT OF THE CASE

This case involves the release of pollutants, specifically nitrates and fecal coliforms, into a navigable waterway of the State of New Union and the proper assignment of liability of such release under the Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA). The source of the pollutants is Moon Moo Farm through its land application of liquid

manure and acid whey. After an application of the mixture, the pollutants enter the environment through runoff into the publicly navigated Queechunk Canal and by leaching into groundwater. Queechunk Canal, which carries most of the flow of the Deep Quod River, carries the runoff pollutants from Moon Moo Farm directly into the Deep Quod, which then carries the polluted water through the City of Farmville, whereby the city extracts its drinking water.

The United States (on behalf of the United States Environmental Protection Agency) (collectively as "EPA") filed suit against Moon Moo Farm in an effort to control the pollution that Moon Moo Farm was releasing into the environment. Plaintiffs-Intervenors, an environmental organization known as Deep Quod Riverwatcher, together with its "Riverwatcher," Dean James (collectively "Riverwatcher"), intervened seeking the same result. Plaintiffs want Moon Moo Farm to control its pollution through compliance with a NPDES permit under the CWA. In the alternative, Riverwatcher asserts that Moon Moo Farm is liable under the open dumping and imminent and substantial endangerment provisions of RCRA. Additionally, Moon Moo Farm filed a counterclaim against Riverwatcher alleging that Dean James was trespassing when he obtained the evidence used to establish the CWA and RCRA violations, asserting that James' navigation of Queechunk Canal was a trespass.

The district court granted Moon Moo Farm's motion for summary judgment on all claims, including its counterclaim. The court held that because Queechunk Canal was not public trust navigable water, that Dean James obtained evidence of Moon Moo Farm's violations through trespass. Still, the court barred admission of the evidence holding that the exclusionary rule applied in this civil proceeding. As a result, the CWA and RCRA claims also failed.

Plaintiffs appeal from the granted motion for summary judgment because Queechunk Canal is public trust navigable water, thereby rendering the evidence obtained by Dean James

admissible. Based upon the admissible evidence, Moon Moo Farm is liable under the CWA NPDES permitting system and, in the alternative, under the open dumping and substantial endangerment provisions of RCRA.

STATEMENT OF FACTS

Moon Moo Farm Operation. Moon Moo Farm is a dairy farm operation of 350 head of milk cows, which are housed in a barn and not pastured. R. at 4. Moon Moo Farm collects the cows' manure and liquid waste through a series of drains and pipes from the barn, which run to an outdoor lagoon for storage and use as fertilizer. R. at 4, 5. This lagoon is designed to contain the manure produced by the dairy operation without overflowing during a 25–year storm event: an event statistically expected to occur no more than once every twenty-five years. R. at 5. Tractors spread the manure onto Moon Moo Farm's 150 acres of Bermuda grass. R. at 5.

In 2010, Moon Moo Farm's cows began providing milk to Chokos Greek Yogurt processing facility in Farmville. R. at 5. Since 2012, Moon Moo Farm has accepted acid whey from the Chokos plant and added it to its manure lagoons and its land application mixture. R. at 5.

Moon Moo Farm Regulation. Moon Moo Farm is regulated as a "no-discharge" animal feeding operation, which means it does not have a direct discharge from its manure handling facilities to waters of the state in conditions up to and including a 25–year storm event. R. at 5. As a "no-discharge" facility, Moon Moo Farm must submit a Nutrient Management Plan (NMP) to the Farmville Regional Office of the State of New Union Department of Agriculture (DOA). R. at 5. The NMP sets forth seasonal manure application rates, together with a calculation of expected uptake of nutrients by the crops grown on the fields where the manure is spread. R. at 5. Moon Moo Farm has filed an NMP, and it has applied manure in accordance with its field plan at all relevant times. R. at 7, 9.

The New Union DOA has the authority to reject an NMP that it finds to be insufficient. R. at 5. However, the DOA does not ordinarily review submitted NMPs, nor does it allow for public comment. R. at 5. Though the State of New Union has the delegated authority to issue CWA discharge permits, Moon Moo Farm does not hold any permit pursuant to the National Pollutant Discharge Elimination System (NPDES) under the CWA § 402. R. at 5, 6.

Impacted Waters. Moon Moo Farm is located at a bend in the Deep Quod River, which is navigable by small boat both upstream and downstream of Queechunk Canal. R. at 5. The Deep Quod River flows year-round and runs into the Mississippi River, which is a navigable-in-fact interstate body of water that has long been used for commercial navigation. R. at 5. Because of these characteristics, the Deep Quod River is considered a "water of the United States." R. at 7.

During the 1940s, a previous owner of the dairy facility excavated a bypass canal, now known as Queechunk Canal, in the Deep Quod River. R. at 5. Most of the flow of the Deep Quod River is diverted into Queechunk Canal, which is fifty yards wide, three to four feet deep, and navigable by canoe or small boat. R. at 5. Moon Moo Farm owns the land on both sides of Queechunk Canal and has posted the Canal with "No Trespassing" signs. R. at 5. Despite these signs, the Canal is commonly used as a shortcut up and down the Deep Quod River. R. at 5.

Waterway Pollution. In 2013, Deep Quod Riverwatcher received complaints that the Deep Quod River smelled of manure and was an unusually turbid brown color. R. at 6. This was especially concerning because the City of Farmville, located downstream of Moon Moo Farm, uses the Deep Quod River as its source of drinking water. R. at 5.

In response to the complaints, Dean James made an investigatory patrol of the Deep Quod River on April 12, 2013. R. at 6. James navigated Queechunk Canal in a small, metal outboard craft, known as a "jon boat." R. at 6. He observed and photographed both Moon Moo Farm's

manure spreading operations and the discolored brown water flowing from the fields through a drainage ditch into the Canal. R. at 6. Between April 11 and 12, 2013, two inches of rain fell in the Farmville Region, a rain event far short of the 25–year storm event. R. at 6. James took samples of water flowing out of the ditch, which a water-testing laboratory found to contain highly elevated levels of nitrates and fecal coliforms, which are "pollutants" under the CWA. R. at 6, 7. Subsequently, the Farmville Water Authority issued a "nitrate" advisory for its consumers, warning that the nitrates made the water unsafe for infants. R. at 6. Customers were advised to give any infants bottled water. R. at 6. Dr. Susan Generis, an environmental health expert, stated that Moon Moo Farm's discharges contributed to this April 2013 advisory. R. at 7.

Scientific Findings. Dr. Ella Mae, an agronomist obtained by Riverwatcher, opines that adding acid whey from the Chokos plant lowered the pH of the liquid manure mixture, which in turn lowered the pH of the Bermuda fields. R. at 6. The pH of the mixture was a 6.1, a weak acid, which prevented the Bermuda grass from effectively taking up the nutrients in the manure. R. at 6. These unprocessed nutrients were then released into the environment, including the Deep Quod River, by leaching into the groundwater and through runoff during rain events. R. at 6.

SUMMARY OF THE ARGUMENT

The district court erred in holding that Queechunk Canal was not public trust navigable water of the State of New Union; that the exclusionary rule applied in this civil proceeding; that Moon Moo Farm was not liable under the CWA NPDES permitting scheme; and, in the alternative, that Moon Moo Farm was not liable under RCRA.

The district court erred in holding that the evidence obtained by Dean James was inadmissible for two reasons. First, Queechunk Canal is public trust navigable water of the State of New Union because it is navigable-in-fact and diverts most of the flow of the Deep Quod

River. Thus, the evidence obtained by Dean James while navigating Queechunk Canal could not have been obtained through trespass. Second, even if Queechunk Canal is not public trust water, the exclusionary rule does not preclude the evidence from admission. The exclusionary rule does not apply in this civil proceeding because the rule only applies to governmental action—Dean James was not a governmental actor. Moreover, the deterrent effect of the application of the exclusionary rule in this case pales in comparison to the heavy societal costs resulting from the rule's application. Therefore, the evidence of Moon Moo Farm's pollution obtained by Dean James while navigating Queechunk Canal is admissible.

The district court further erred in holding that Moon Moo Farm was not liable under the CWA NPDES permitting requirement. The CWA § 402 mandates that point sources, including concentrated animal feeding operations (CAFO), which discharge pollutants into navigable waters are required to obtain a NPDES permit. Moon Moo Farm meets the definition of a CAFO, and it is therefore subject to NPDES permitting. Furthermore, Moon Moo Farm's discharges are not exempt as agricultural stormwater by virtue of the addition of acid whey to the manure and because the discharges are not *primarily* caused by precipitation. Consequently, Moon Moo Farm is subject to NPDES permitting under the CWA § 402.

Lastly, the district court erred in finding that Moon Moo Farm was not liable under RCRA §§ 4005, 7002. Moon Moo Farm's land application of liquid manure and acid whey constitutes open dumping of solid waste, which is prohibited by RCRA § 4005. In addition, the disposal of the solid waste creates liability as an imminent and substantial endangerment under RCRA § 7002, due to the nitrate advisories from the Deep Quod River. Accordingly, this court should hold there was sufficient evidence to establish liability under CWA § 402 and, in the alternative, under RCRA §§ 4005, 7002.

STANDARD OF REVIEW

The district court granted Moon Moo Farm's motion for summary judgment on all claims, including its counterclaim. R. at 12. This Court reviews a district court's decision to grant a motion for summary judgment *de novo*. *Pierson v. Quad/Graphics Printing Corp.*, 749 F.3d 530, 535 (6th Cir. 2014). Summary judgment is appropriate when the moving party can "'show[] that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of a law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

ARGUMENT

I. QUEECHUNK CANAL IS PUBLIC TRUST NAVIGABLE WATER OF THE STATE OF NEW UNION, ALLOWING FOR A PUBLIC RIGHT OF NAVIGATION DESPITE MOON MOO FARM'S OWNERSHIP OF ITS BANKS AND ITS ARTIFICIAL CONSTRUCTION.

Queechunk Canal is public trust navigable water of the State of New Union. Public trust navigable waters are those that are held in trust for the public because of the "necessity of preserving to the public the use of navigable waters from private interruption and encroachment." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436 (1892). In light of the preservation of the public's use in *navigable waters*, it is well-established precedent amongst the states that public trust navigable waters are those that are "navigable-in-fact" and are therefore subject to a public right of navigation. Furthermore, private ownership of a body of water's banks is immaterial to its classification as public trust navigable water because the states retain a right, and are burdened with the obligation, to regulate the use of navigable water for the public. Essentially, a riparian owner takes divested title to the banks, and sometimes bed, of public trust navigable water subject to states' trust to ensure the superior right of public navigation.

The public trust doctrine seeks to ensure that America's navigable waterways remain "common highways, and forever free," for the benefit of the people. Northwest Ordinance of

1787 (adopted by the First Congress in 1 Stat. at 52) (1789). Classifying the long-time publicly navigated Queechunk Canal as private property undermines this country's established practice of holding such navigable waters in trust for a public right of navigation. Thus, this Court should reverse the lower court and hold that Queechunk Canal is public trust navigable water of the State of New Union subject to a public right of navigation.

A. QUEECHUNK CANAL IS PUBLIC TRUST NAVIGABLE WATER BECAUSE IT IS NAVIGABLE-IN-FACT AND DIVERTS THE DEEP QUOD RIVER, A NATURAL, NAVIGABLE WATERWAY.

Queechunk Canal is public trust navigable water of the State of New Union. Public trust navigable waters are waters that are "held in trust for the people of the state, that they may enjoy the *navigation* of the waters . . . freed from the obstruction or interference of private parties." *Ill. Cent.*, 146 U.S. at 452 (emphasis added). In the seminal case of navigability jurisprudence, *The Daniel Ball* Court stated that bodies of water "must be regarded as public navigable [waters] in law which are navigable-in-fact" and bodies of water are navigable-in-fact if they are "used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." 77 U.S. 557, 563 (1870).

Furthermore, if the construction of an artificial waterway is achieved "in part by means of diversion or destruction of a pre-existing natural navigable waterway" then "the artificially developed waterway system become[s] part of the 'navigable waterways of the United States' and subject to the use of all citizens of the United States." *Vaughn v. Vermillion Corp.*, 444 U.S. 206, 208 (1979) (indicating that if a canal's diversion of a navigable waterway is proven, then it could serve as a defense to an injunction that prohibited public access to a privately owned, artificial canal system). Queechunk Canal is public trust navigable water allowing for a public right of navigation for three reasons: (1) Because the public trust doctrine is a matter of state law,

this Court is bound to determine what the highest court of New Union would hold; (2) States hold that man-made canals *are* public trust navigable waters if they are navigable-in-fact; and (3) Queechunk Canal is navigable-in-fact.

First, in determining whether Queechunk Canal is public trust navigable water, this Court is compelled to determine what the highest court of the State of New Union would hold. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts are bound by decisions of the state's highest court regarding issues of substantive state law). "[T]he public trust doctrine remains a matter of state law." *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). The states "retain residual power to determine the scope of the public trust over waters within their borders . . . ." *Id.* at 1235. Not only is the public trust doctrine a state law matter, but under 28 U.S.C. § 1367(a), this Court has supplemental jurisdiction over trespass claims—which are also matters of state law—because the facts constituting such claims are inextricably bound with the occurrences giving rise to the substantive federal claims.

Additionally, "[a] federal court exercising supplemental jurisdiction over state law claims is bound to apply the law of the forum state . . . ." *Kendel v. Local 17-A United Food & Commercial Workers*, 512 F. App'x 472, 478 (6th Cir. 2013) (quoting *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 741 (6th Cir.1999)). Since there are no applicable New Union decisions addressing the scope of public trust navigation rights,[1] this Court should "examine the reasoning of courts in other jurisdictions addressing the same issue . . . ." *Pisciotta v. Old Nat'l*

[1] "I have been unable to find (and counsel have cited) no New Union decisions addressing the scope of public trust navigation rights generally, or the more specific question posed by this case of whether such rights can attach to man-made bodies of water that happen to be navigable." R. at 9.

Bancorp, 499 F.3d 629, 635 (7th Cir. 2007) (Federal court looking to other states' treatment of issue in absence of applicable state substantive law).

In determining how the highest court in a state would rule when there is an absence of state law on the issue, courts look to the practices of other states that have addressed the issue. *See Wade v. Danek Med., Inc.*, 182 F.3d 281, 286 (4th Cir. 1999) ("In the absence of any relevant Virginia law, we naturally look to the practices of other states in predicting how the Virginia Supreme Court would rule."); *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 311 (5th Cir. 2010) ("The Texas Supreme Court has not resolved this question. Nor does it appear that any Texas court has resolved this issue in a published opinion. Thus, we consult decisions from other jurisdictions . . . in making this *Erie* guess.").

Second, man-made canals can be public trust navigable waters. Although the contours of the public trust may vary from state to state, states have held that man-made bodies of water are public trust navigable waters if they are navigable-in-fact. For example, North and South Carolina have held, while applying a navigable-in-fact test, that canals which were privately constructed to connect with a navigable river, had the capacity for navigation, and had been navigated for the past fifteen to twenty years for commercial and non-commercial purposes, were navigable waters subject to a public right of navigation. *See Fish House, Inc. v. Clarke*, 204 N.C. App. 130 (N.C. Ct. App. 2010); *Hughes v. Nelson*, 303 S.C. 102 (S.C. Ct. App. 1990). Wisconsin has also held that man-made bodies of water are subject to a state's public trust doctrine if they are navigable-in-fact. *See Klingeisen v. State Dep't of Natural Res.*, 163 Wis. 2d 921, 932 (Wis. Ct. App. 1991) (holding that the Wisconsin Department of Natural Resources had jurisdictional authority to order a boathouse to be removed from a man-made channel because "the channels were constructed and were filled by the natural, navigable waters of Green Bay" so "the owners

kept title to the land under the navigable waters with notice of the public trust and subject to the burdens created by it."). The *Klingeisen* court held that the man-made channel was subject to such regulatory authority and public right of access because "[n]avigability in fact [was] the basis for the state's regulatory and enforcement jurisdiction." *Id.* at 931.

Third, Queechunk Canal is navigable-in-fact. Much like the man-made canals and channels in the cases mentioned above, Queechunk Canal has supported public navigation since its excavation in the 1940s. R. at 5. The Canal is commonly used as a shortcut up and down the Deep Quod River, which is a natural, navigable waterway that flows year-round and runs into the Mississippi River. R. at 5. Furthermore, Queechunk Canal diverts *most of the flow* of the Deep Quod River. R. at 5. Coupled, these facts indicate that Queechunk Canal also flows year-round, and commercial activity would be impacted on the Mississippi River if the public did not have their continued right of navigation on the Canal. Lastly, the Canal, which also carries the City of Farmville's drinking water, is regularly traveled and can be navigated by a canoe or other small boat, which are customary modes of travel on water. R. at 5. Queechunk Canal is navigable-in-fact and is thus public trust navigable water of the State of New Union.

Finally, any reliance on the lower court's holding that Queechunk Canal cannot be considered public trust navigable water because it is man-made is ill founded. First, as already discussed, an absence of state law while a federal court is sitting in supplemental jurisdiction, compels the court to decide what the highest court of the state would rule by looking to other states. However, the lower court looked to the Supreme Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in concluding that there is no public right of navigation in a man-made water body. R. at 9. Moreover, *Kaiser* "address[es] the laws of the United States regarding the general public use of navigable waters in the context of interstate commerce" and

does not address "the rights enjoyed by the citizens of [New Union] under the Public Trust Doctrine." *Fish House*, 204 N.C. App. at 133-34 (distinguishing *Kaiser* from the state law public trust doctrine). Further, even if *Kaiser* did govern the public trust right to navigation on Queechunk Canal, it still does not stand for the proposition that the lower court cites. On the same day the Court decided *Kaiser*, it decided its companion case, *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979). In *Vaughn*, the Court indicated that where the construction of a private, man-made waterway destroys or diverts a natural, navigable waterway, then that waterway *could* be subject to a public right of navigation. 444 U.S. at 208-09 (emphasis added). Read together, these cases establish that the Court did not hold in *Kaiser* that there is no public right of navigation in a man-made water body.

In short, the states' sole inquiry in impressing a public right of navigation on these man-made canals and channels was not whether the body of water at issue is natural or man-made, or who owns the banks, but whether the body of water was navigable-in-fact. This inquiry is consistent with the public trust doctrine's sole purpose: to ensure the public a right of navigation on *navigable waters*, free from private interference. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). This Court, in deciding what the State of New Union's highest court would rule, should follow the rationale and guidance of the decisions cited above and hold that Queechunk Canal is public trust navigable water that allows for a public right of navigation.

B. MOON MOO FARM'S OWNERSHIP OF THE BANK OF QUEECHUNK CANAL IS IMMATERIAL TO ITS CLASSIFICATION AS PUBLIC TRUST NAVIGABLE WATER BECAUSE THE STATE MAY NOT RELINQUISH ITS TRUST OVER NAVIGABLE WATERS.

While a state may delegate to and allow private parties to use lands under navigable waters, the obligation to hold such waters in trust for public navigation remains. Although it is the states' power to "recognize private rights in [public trust lands] as they see fit," *Phillips Petroleum Co.*

v. Mississippi, 484 U.S. 469, 475 (1988), the state cannot permanently delegate away its obligation to regulate the *use of the water* as needed to serve the public interest. *See Ill. Cent.*, 146 U.S. at 453 ("The control of the state for the purposes of the trust can never be lost . . . ."). The Supreme Court considered the states' power to hold navigable waters in trust for public navigation so paramount, that it likened it to the general police power held by the states:

> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace . . . .

Id. at 453-54.

Accordingly, under the public trust doctrine, the state may convey title to lands beneath navigable waters, but it must retain sufficient control to assure the purpose of the trust—the public's right of navigation—is not impaired. A private party may own the banks and bed of a navigable waterway, but if that waterway is navigable-in-fact, it is subject to the superior trust of the state to hold such waters for a public right of navigation. *Ill. Cent.*, 146 U.S. at 453-54. Since the states still maintain the right to shape the contours of its public trust doctrine, this Court should still apply substantive state law to decide whether private ownership of banks and beds of navigable-in-fact waters is a material factor or not, and in the absence of New Union law, this Court is to look to other states' treatment of this issue to determine what the highest court of New Union would hold. *See Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007).

In light of this inalienable power and responsibility of the state to hold navigable waters in trust for public navigation, a number of states have held that even if the state allows for private ownership of beds and banks of navigable waters, the state still holds such waters in trust for public navigation. For example, Montana, pursuant to its public trust doctrine, holds navigable

waters in trust for public navigation and recreation, despite private ownership of the banks of such waters. *See Mont. Coal. for Stream Access, Inc. v. Curran*, 210 Mont. 38, 53 (1984) ("In sum, we hold that, under the public trust doctrine . . . any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership . . . ."). Much like Queechunk Canal, the stream at issue in *Curran* ran directly across private property, and Montana recognized private ownership of the stream's banks. *Id.* at 40. However, pursuant to a state's burden to hold *navigable waters* in trust for public navigation, Montana held that private ownership of the banks of the stream was immaterial; thus, the property owner could not bar public access to the stream at issue. *Id.* at 53.

Wyoming has taken a similar view. *See Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961) ("Irrespective of the ownership of the bed or channel of waters . . . the public has the right to use public waters of this State . . . and that use may not be interfered with or curtailed by any landowner."). This principle is consistent with the Supreme Court's interpretation of the public trust doctrine, in that states may not abandon their trust over navigable waters. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453-54 (1892).

Because New Union cannot abdicate its sovereign power and duty to hold navigable water in trust for a public right of navigation, Moon Moo Farm's ownership of Queechunk Canal's banks is immaterial to its classification as public trust navigable water. Therefore, Queechunk Canal is public trust navigable water of the State of New Union, and as such, Dean James was not trespassing when he obtained the evidence at issue. Moreover, Moon Moo Farm's counterclaim for trespass fails as a matter of law because Dean James could not possibly trespass on public waters. This Court should reverse the lower court's holding and rule that Queechunk Canal is public trust navigable water of the State of New Union.

II. EVEN IF QUEECHUNK CANAL IS NOT PUBLIC TRUST NAVIGABLE WATER, EVIDENCE OBTAINED THROUGH TORTIOUS MEANS IS ADMISSIBLE IN THIS CIVIL PROCEEDING.

Even if this Court considers Queechunk Canal to be private property, the exclusionary rule of the Fourth Amendment does not apply in this civil proceeding; thus, the evidence obtained by Dean James is still admissible. The primary purpose of the exclusionary rule "is to deter future unlawful police conduct." *United States v. Janis*, 428 U.S. 433, 446 (1976). So, the exclusionary rule of the Fourth Amendment only applies to governmental action, not the private acts of citizens. *United States v. Lee*, 723 F.3d 134, 144 n.3 (2d Cir. 2013) (citing *Burdeau v. McDowell*, 256 U.S. 465 (1921)). Further, when determining whether to apply the exclusionary rule in a civil proceeding, courts are to weigh societal costs of application of the rule against the deterrent effect of application. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984) (citing *Janis*, 428 U.S. at 454). The exclusionary rule cannot apply in this civil proceeding because Dean James was a private actor, not a governmental actor, and the minimal deterrent effect pales in comparison to the heavy societal costs of applying the rule. Accordingly, this Court should reverse the lower court's holding and rule that the exclusionary rule *does not apply* in this civil proceeding.

A. EVIDENCE OBTAINED TORTIOUSLY IS STILL ADMISSIBLE IN THIS CIVIL PROCEEDING BECAUSE THE EXCLUSIONARY RULE DOES NOT APPLY.

A determination of whether the exclusionary rule should be applied in a civil proceeding, involves weighing "the likely social benefits of excluding unlawfully seized evidence against the likely costs." *Lopez-Mendoza*, 468 U.S. at 1041 (citing *Janis*, 428 U.S. at 446). Since the primary purpose of the exclusionary rule is to deter future unlawful police conduct, courts are to weigh the deterrent effect of application of the rule against the societal costs. *Id.* This Court should not apply the exclusionary rule in this civil proceeding, not only because the "Fourth Amendment only 'applies to governmental action' and does not apply to private searches of one

private citizen by another," *Lee*, 723 F.3d at 144 n.3, but also because it would be a departure from well-settled law to do so.

The exclusionary rule *only* applies to governmental action—not private action. The exclusionary rule does not apply to evidence obtained by a private actor because "the Fourth and Fourteenth Amendments do not require in civil cases that the exclusionary rule be extended to situations where private parties seek to introduce evidence obtained through unauthorized searches made by state officials." *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348 (7th Cir. 1975). Further, "[i]t has long been settled that the Fourth Amendment protection against unlawful searches and seizures *applies only to governmental action*. [There is] no other rule, constitutional, statutory or judicial, which would compel the rejection of logically relevant evidence obtained by a private person through an unauthorized search and seizure." *Id.* at 348-49 (internal citation omitted) (emphasis added).[2]

The private actor's conduct in obtaining the evidence at issue in *Honeycutt*, is analogous to Dean James' actions in the present case. In *Honeycutt*, a photographer, on behalf of an insurance agency, took photographs inside a house and obtained evidence that the fires in question were started from the interior of the house. *Id.* at 343-44. The owner of the house wished to suppress the evidence by invoking the exclusionary rule; however, the court ruled that because "a number of considerations may well have led [the photographer] to the honest but incorrect belief that his intrusion was authorized" that the evidence should be admitted. *Id.*

[2] The court's holding in *Honeycutt*—the exclusionary rule does not apply in civil proceedings—was reinforced in a CERCLA proceeding. *See Nutrasweet Co. v. X-L Eng'g Corp.*, 926 F. Supp. 767 (N.D. Ill. 1996) (citing *Honeycutt*, 510 F.2d at 348) (holding that admission of evidence obtained by a warrantless investigation of contaminated property did not violate property owners' Fourth Amendment rights because the exclusionary rule does not apply in civil proceedings).

As with the photographer in *Honeycutt*, Dean James is not a governmental actor and had an honest belief that he had authority to navigate Queechunk Canal. His alleged trespass was a private action whereby he was acting on behalf of himself and Deep Quod Riverwatcher. James also had the honest but incorrect belief that his intrusion was authorized. Although "No Trespassing" signs are posted, Queechunk Canal is commonly used as a shortcut up and down the Deep Quod River, without interference from Moon Moo Farm. R. at 5. In fact, the Canal was constructed approximately seventy years ago; hence, James was relying on many years of public navigation on Queechunk Canal, despite the "No Trespassing" signs. James' action is analogous to the photographer's honest but mistaken belief that his entry into the house—or in James' case, navigation of Queechunk Canal—was authorized because he had been granted entrance on prior occasions. In light of these facts, and because the exclusionary rule only applies to governmental action, and no other law compels this court to reject logically relevant evidence, the evidence obtained by James should be admissible.

Another reason this Court should not apply the exclusionary rule in this case is that "the societal costs of the [application of] the exclusionary rule far outweigh any possible benefits to deterrence . . . ." *Nix v. Williams*, 467 U.S. 431, 446 (1984); *see also Garcia-Torres v. Holder*, 660 F.3d 333, 335-36 (8th Cir. 2011) (weighing the deterrent effect against the societal costs to determine whether the exclusionary rule should be applied in a civil proceeding) (citing *Lopez-Mendoza*, 468 U.S. at 1040-50). The societal costs of applying the exclusionary rule in the instant case are a continued pollution of New Union's water, including the City of Farmville's drinking water, and a preclusion of the issuance of subsequent citations with enhanced penalties to ensure compliance with the CWA and RCRA. *See Donovan v. Fed. Clearing Die Casting Co.*, 695 F.2d 1020, 1024 (7th Cir. 1982) (citing the inability to issue subsequent violations with

enhanced penalties as a societal harm resulting from application of the exclusionary rule in a civil proceeding). However, the deterrent effect of application of the exclusionary rule is minimal at best. The deterrent effect would be to prevent private citizens from navigating Queechunk Canal to collect evidence of pollution; however, there are, and have been, prominent deterrents posted along the Canal for decades, and private citizens still navigate the Canal without interference from Moon Moo Farm. Application of the exclusionary rule in this particular case carries little if any deterrent effect, and thus would do nothing to advance the objective of the rule.

Moreover, except in one specified instance—OSHA proceedings, which are not applicable here—no court has applied the exclusionary rule in a civil proceeding. *See Smith Steel Casting Co. v. Brock*, 800 F.2d 1329, 1334 (5th Cir. 1986); *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 1455, 1461-62 (6th Cir. 1994). *But see Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340 (7th Cir. 1975) (Seventh Circuit holding that the exclusionary rule *does not apply* in civil proceedings, which was subsequently reaffirmed in a CERCLA proceeding). This Court should not rely on the two decisions that the lower court cited to hold that the exclusionary rule should apply in this proceeding. First, the two decisions cited were narrow holdings that applied solely to the Secretary's actions in OSHA proceedings. Second, *Smith Steel* and *Trinity* were an application of the exclusionary rule to a governmental action, *in contrast to a private action*, as in Dean James' navigation of Queechunk Canal.

At its core, the exclusionary rule cannot be applied in this civil proceeding because Dean James is not a governmental actor and the societal costs of the rule's application far outweigh its deterrent effect. If this Court were to rule that the exclusionary rule were applicable in this civil proceeding, such a ruling would contradict well-established law. Therefore, this Court should

rule that the exclusionary rule does not apply in this civil enforcement proceeding. Consequently, the evidence establishing the CWA and RCRA violations is admissible.

III. MOON MOO FARM IS SUBJECT TO NPDES PERMITTING UNDER THE CWA BECAUSE IT MEETS THE REGULATORY DEFINITION OF A CAFO OR, IN THE ALTERNATIVE, BECAUSE ITS LAND APPLICATION DISCHARGES ARE POINT SOURCES AND BECAUSE SUCH DISCHARGES ARE NOT EXEMPT AS AGRICULTURAL STORMWATER.

Moon Moo Farm is subject to NPDES permitting as a medium CAFO based upon the size and activity of its operation. As a medium CAFO, it is subject to NPDES permitting liability under the CWA because its land application runoff constitutes a discharge. In the alternative, Moon Moo Farm is also subject to NPDES permitting because its land application runoff through the drainage ditch is a point source in and of itself. Contrary to the lower court's holding, Moon Moo Farm is not entitled to the agricultural stormwater exemption because of the acid whey component of its land application mixture. Therefore, this Court should hold that Moon Moo Farm's land application runoff subjects it to NPDES permitting as a CAFO and as a point source that discharges into navigable water.

A. MOON MOO FARM REQUIRES NPDES PERMITTING BECAUSE IT IS A CAFO AND, IN THE ALTERNATIVE, BECAUSE ITS LAND APPLICATION RUNOFF IS A POINT SOURCE.

The CWA prohibits "the discharge of any pollutant by any person" unless done in accordance with the NPDES permitting program. 33 U.S.C. §§ 1311, 1342 (2012). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). A "point source" is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged." *Id.* § 1362(14).

The CWA expressly includes a concentrated animal feeding operation (CAFO) within the definition of a point source. A CAFO is an animal feeding operation (AFO) that is defined as a large or medium CAFO or is designated a CAFO by the proper authority. 40 C.F.R. § 122.23(b)(2) (2014). An AFO is a lot or facility that meets two criteria:

> (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.

Id. § 122.23(b)(1). A medium CAFO is an AFO with a requisite number of animals[3] that also discharges pollutants "into waters of the United States through a man-made ditch, flushing system, or other similar man-made device." *Id.* § 122.23(b)(6)(ii).[4]

The Second Circuit interpreted these regulations as they relate to a dairy farm. *See Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 118 (2d Cir. 1994) (holding that a dairy farm constituted both a CAFO and a point source within the meaning of the CWA). For purposes of designating a facility as an AFO, the court stated that the vegetation requirement is to be analyzed with respect to where the animals are confined. *Id.* at 123. Therefore, it is immaterial that crops were grown on the same acreage but outside of the animal confinement area. *Id.* The court also held that "liquid-manure-spreading vehicles themselves may be treated as point sources because 33 U.S.C. § 1362(14) defines a point source to include a 'container' or 'rolling stock.'" *Id*. at 118. Lastly, the court noted that the observance of liquid manure flowing into and through a swale, then through a drain tile leading to a stream that led directly into a jurisdictional water, constituted "discharge." *Id.* at 117; *see also Waterkeeper*

[3] *See* App'x; 40 C.F.R. § 122.23(b)(6).
[4] There is a second way to satisfy the activity requirement, 40 C.F.R. § 122.23(b)(6)(ii)(B), but neither party is making a claim based on such activity. R. at 8.

Alliance v. EPA, 399 F.3d 486, 510 (2d Cir. 2005) (holding that "any land application discharge that is not agricultural stormwater is, definitionally [sic], a discharge 'from' a CAFO that can be regulated as a point source discharge.").

The Ninth Circuit has reached the same conclusion in holding that a dairy was a CAFO and its land application runoff was also a discharge from a point source into navigable waters. *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 65 F. Supp. 2d 1129, 1154 (E.D. Wash. 1999) *aff'd,* 305 F.3d 943 (9th Cir. 2002). The CAFO includes "not only the ground where the animals are confined, but also the lagoons as well as the equipment which distributes and/or applies the animal waste produced at the confinement area to fields outside the confinement area." *Id.* at 1133. Therefore, the court held that a discharge from the dairy through a drain, into a canal that connected to a water of the United States, was a discharge by a point source subject to NPDES permitting liability under the CWA § 402. *Id.* at 1145.

In the case at hand, Moon Moo Farm is subject to NPDES permitting for two reasons: first, Moon Moo Farm is an AFO that is further classified as a medium CAFO by virtue of its size and activity, which subjects it to NPDES permitting; second, Moon Moo Farm is not exempt from regulation as a CAFO, and even if it were, its land application runoff is subject to NPDES permitting as a point source.

1. Moon Moo Farm meets the regulatory definition of a medium CAFO, subjecting it to NPDES permitting under the CWA § 402.

Moon Moo Farm is an AFO by virtue of its dairy operations. 40 C.F.R. § 122.23(b)(1) (2014). The cows are housed in a barn and are not pastured, which meets the first prong of the AFO test. R. at 4; *Id.* § 122.23(b)(1)(i). The operation also meets the second requirement—that there be no crops or vegetation sustained in the normal growing season over any portion of the lot. *Id.* § 122.23(b)(1)(ii). Though Bermuda grass is grown on fields belonging to Moon Moo

Farm, there is no vegetation in the lot or facility where the livestock is housed. R. at 5. Because the vegetation requirement is to be examined only with respect to the animal confinement area, Moon Moo Farm is an AFO. *Concerned Area Residents for the Env't v. Southview Farms*, 34 F.3d 114, 123 (2d Cir. 1994).

Moon Moo Farm also meets the regulatory size and activity requirements to be a medium CAFO. Moon Moo Farm has 350 head of milk cows, which satisfies the size requirement. R. at 4; 40 C.F.R. § 122.23(b)(6)(i). To meet the activity requirement, Moon Moo Farm must discharge pollutants into waters of the United States through a man-made ditch, flushing system, or other similar man-made device. *Id.* § 122.23(b)(6)(ii). Because the parties agree that the runoff from the land application fields contain pollutants in the form of nitrates and fecal coliforms, the critical inquiry is whether runoff from land application constitutes a discharge within the meaning of the CWA.

Discharges from Moon Moo Farm's land application subjects it to NPDES permitting liability because runoff from land application fields—which is not considered agricultural discharge—constitutes a discharge subject to NPDES permitting. *Southview*, 34 F.3d at 123; *Waterkeeper*, 399 F.3d at 510; *Henry Bosma Dairy*, 305 F.3d at 955. Discharges from outside the confinement area, but nevertheless from an area in control of the CAFO, are also considered discharges from the CAFO. *Henry Bosma Dairy*, 65 F. Supp. 2d at 1133. As a result, runoff from Moon Moo Farm's land application, which enters Queechunk Canal through the drainage ditch, constitutes a "discharge" subject to NPDES permitting.

Additionally, Moon Moo Farm's discharge through a drainage ditch into Queechunk Canal meets the requirement that the discharge be through a man-made ditch or device. As a result, this Court is only left to find whether such discharge is into waters of the United States. "[D]itches

and canals which lead to larger bodies of water may be considered navigable waters under the CWA." *Parker v. Scrap Metal Processors*, 386 F.3d 993, 1009 (11th Cir. 2004) (quoting *United States v. Eldston*, 108 F.3d 1336, 1342 (11th Cir. 1997)). It is of no consequence that the ditch or canal is man-made. *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170 (D. Idaho 2011). Furthermore, Queechunk Canal also meets both the "relative permanence" and "significant nexus" tests[5] articulated in *Rapanos v. United States* because it flows year-round and diverts water from the Deep Quod River. 547 U.S. 715 (2006); R. at 5. Both parties agree that the Deep Quod River is a "water of the United States" for purposes of the CWA. R. at 7. Consequently, any discharges to Queechunk Canal are discharges to navigable waters.

2. Even if Moon Moo Farm is exempt from the definition of a CAFO, it is subject to NPDES permitting under the CWA § 402 because its land application runoff is a point source in and of itself.

First, any argument that Moon Moo Farm is exempt from the CWA by virtue of its designation as a "no-discharge" facility is invalid. Moon Moo Farm's designation as a "no-discharge" facility does not exempt it from permitting liability if there is in fact a discharge. The lower court overlooked the fact that operations are entitled to exemption if they discharge *only* during a 25–year, 24–hour storm event. *See Carr v. Alta Verde Indus.*, 931 F.2d 1055, 1060 (5th Cir. 1991) (holding that Alta Verde was a CAFO, and thus a point source, at the time of the discharges because Alta Verde did not discharge *only* in the event of a 25–year, 24–hour storm event). Even though a CAFO is designed to have no discharge except in a 25–year, 24–hour storm event, it becomes subject to NPDES permitting when it discharges in the absence of such

[5] In writing the plurality opinion, Justice Scalia stated that "waters of the United States" should include "only relatively permanent, standing or flowing bodies of water." *Rapanos*, 547 U.S. at 733 (Scalia, J., plurality opinion). Justice Kennedy's concurrence advocated that the correct test is that "waters of the United States" should have "a significant nexus with navigable waters." *Id.* at 759 (Kennedy, J., concurring).

an event. *Id.* at 1060.[6] Hence, because Moon Moo Farm discharged in the absence of a 25–year, 24–hour storm event, it is not exempt by virtue of its prior designation as a "no-discharge" facility.

Second, even if this Court holds that Moon Moo Farm is exempt from the definition of a CAFO, runoff from the land application is a point source in and of itself. *Southview*, 34 F.3d at 118; *see also Henry Bosma Dairy*, 305 F.3d at 955 (holding that liquid manure spreading constitutes a point source discharge). Like the manure spreading in *Southview* and *Henry Bosma Dairy*, Moon Moo Farm's application of liquid manure and acid whey resulted in runoff, which was discharged through a drainage ditch. R. at 6. This constitutes a discharge through "any discernible, confined and discrete conveyance" as required by the CWA. 33 U.S.C. § 1362(14) (2012).[7] Moon Moo Farm's land application runoff through its drainage ditch constitutes a point source discharge of pollutants, subject to NPDES permitting.[8]

Lastly, subjecting Moon Moo Farm to NPDES permitting gives effect to Congress' intent in enacting the CWA. In enacting the CWA, Congress stated that "[t]he objective of this chapter is to *restore* and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). This restoration can only be accomplished by requiring Moon Moo Farm to cease discharging unless done in accordance with a NPDES permit.

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[6] *See also Reynolds v. Rick's Mushroom Servs.*, 246 F. Supp. 2d 449, 456 (E.D. Penn. 2003) (holding that a "no discharge" facility is liable under the CWA when discharges are found and there is no NPDES permit) (citing *United States v. Earth Scis., Inc.,* 599 F.2d 368, 374 (10th Cir. 1979))).

[7] The term "point source" is meant to be interpreted as the "broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Reynolds v. Rick's Mushroom Servs.*, 246 F. Supp. 2d 449, 456 (E.D. Penn 2003) (quoting *United States v. West Indies Transp. Inc.,* 127 F.3d 299, 300 (3d Cir. 1997); *United States v. Earth Scis., Inc.,* 599 F.2d 368, 373 (10th Cir. 1979)).

[8] As already discussed, the Deep Quod River and Queechunk Canal are "waters of the United States."

B. MOON MOO FARM'S RUNOFF FROM ITS LAND APPLICATION OF LIQUID MANURE AND ACID WHEY FALLS OUTSIDE THE SCOPE OF THE AGRICULTURAL STORMWATER DISCHARGE EXEMPTION.

A point source "does not include *agricultural stormwater discharges* and return flows from irrigated agriculture." 33 U.S.C. § 1362(14) (2012) (emphasis added). Federal regulations indicate that land application discharges may be either exempt or require permitting.

> [W]here the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

40 C.F.R. § 122.23(e) (2014). The same section, however, expressly states that "[l]and application discharges from a CAFO *are* subject to NPDES requirements." *Id.* § 122.23(e) (emphasis added).

The two provisions both regulating and exempting land application runoff have been interpreted together, meaning that land application runoff may be exempt as agricultural stormwater or may be regulated as a discharge. *Southview*, 34 F.3d at 120. Land application runoff is exempt as agricultural stormwater if caused *primarily* by precipitation but is not exempt merely because it occurred simultaneously with precipitation. *Id.* at 121 ("[A] discharge of liquid manure [will] not be exempt just because it happened to be raining at the time, but a discharge of such manure *caused by* precipitation [will] be exempt.") (emphasis added).

Land application runoff may also be exempt if applied in accordance with a Nutrient Management Plan (NMP). 40 C.F.R. § 122.23(e). An NMP is a plan to manage the nutrients, that is, manure, litter, and process wastewater that a CAFO puts on its agricultural field. *Sierra Club Mackinas Chapter v. Dep't of Envtl. Quality*, 747 N.W.2d 321, 325 (Mich. Ct. App. 2008). The CWA requires the authorized agency in an approved state to conduct a meaningful review of the

NMP and to also provide for public participation pursuant to 33 U.S.C. § 1251(e). *Id.* at 333-34 (citing *Waterkeeper*, 399 F.3d at 500). States may implement their own CWA permit programs as long as the state programs impose standards at least as stringent as those previously mentioned. *Maple Leaf Farms, Inc. v. State Dep't of Nat'l Res.*, 633 N.W.2d 720, 732 (Wis. Ct. App. 2001).

Here, Moon Moo Farm is not entitled to exemption under the agricultural stormwater provision for two reasons: (1) the runoff at issue was not caused primarily by rain, and (2) Moon Moo Farm is not excused by its purported compliance with its NMP.

1. Moon Moo Farm's discharges are not exempt as agricultural stormwater because they are not caused primarily by rainfall.

Moon Moo Farm's discharges are not exempt because they were not primarily caused by precipitation. Both Dr. Green and Dr. Mae noted that the acidity of the mixture being applied prevented the Bermuda grass from absorbing the mixture. R. at 6. Moon Moo Farm is effectively discharging a pollutant onto the surface of the soil, where it rests and will be discharged at the occurrence of rain. It follows that Moon Moo Farm is not entitled to the agricultural stormwater exemption because the runoff was not caused primarily by precipitation; rather, it was caused by the Bermuda grass's inability to absorb the acidic mixture.

The lower court erred in applying *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013), to hold that Moon Moo Farm's land application is exempt as agricultural stormwater because Moon Moo Farm's case is distinguishable. R. at 9. In *Alt*, small amounts of manure and litter from confinement houses were *inadvertently* emitted via ventilation fans and washed away with the rain. 979 F. Supp. 2d at 704. On the contrary, Moon Moo Farm *deliberately* deposits large amounts of manure and acid whey from its operation onto open fields. R. at 5. The amount

deposited and the addition of acid whey, distinguish Moon Moo Farm's case and remove it from the agricultural stormwater exemption.

2. Moon Moo Farm's purported compliance with its NMP is immaterial because of New Union's failure to require compliance as required by the CWA.

Moon Moo Farm claims that its runoff is exempt because it has at all times complied with its NMP. R. at 7, 9. However, Moon Moo Farm's NMP addresses only manure application and neglects to address the addition of acid whey. R. 7, 9. Accordingly, Moon Moo Farm's land application practices are outside the scope of its NMP, removing it from exemption.

In addition, the State of New Union Department of Agriculture (DOA) did not properly approve Moon Moo Farm's NMP. The New Union DOA neither conducted a meaningful review nor allowed public comment. R. at 5. The CWA requires the authorized agency in an approved state to conduct a meaningful review of the comprehensive NMP and allow for public participation. *Sierra Club Mackinas Chapter*, 747 N.W.2d at 333-34 (citing *Waterkeeper*, 399 F.3d at 500). As a result, neither the State of New Union nor Moon Moo Farm is in compliance with the CWA. *Id.*; *see also Maple Leaf Farms*, 633 N.W.2d at 732 (holding that the CWA authorizes states to implement their own programs as long as they impose standards at least as stringent as the federal program). Because the DOA failed to comply with the CWA, Moon Moo Farm's purported compliance with its NMP does not exempt it from CWA liability.

Moon Moo Farm's land application of liquid manure and acid whey resulted in the discharge of pollutants into waters of the United States. Though the runoff occurred during a rain event, the discharges are not exempt as agricultural stormwater because they were not caused *primarily by* the rain event. Furthermore, Moon Moo Farm's land application is not excused by virtue of its purported compliance with its NMP because the addition of acid whey brings it outside the scope of the NMP. Therefore, Moon Moo Farm is subject to NPDES permitting under the CWA § 402.

IV. MOON MOO FARM IS LIABLE UNDER RCRA § 4005 BECAUSE ITS LAND APPLICATION OF MANURE AND ACID WHEY CONSTITUTES OPEN DUMPING OF A SOLID WASTE AND UNDER RCRA § 7002 BECAUSE IT CREATES AN IMMINENT AND SUBSTANTIAL ENDANGERMENT.

Even if this Court were to find that Moon Moo Farm is not subject to CWA liability, it is nevertheless liable under RCRA Subtitle D, which establishes guidelines for management of solid waste. Moon Moo Farm is liable under two RCRA provisions: first, Moon Moo Farm is liable under RCRA § 4005—prohibiting the open dumping of solid waste—because its land application mixture can be considered a "discarded" material; second, Moon Moo Farm is liable under RCRA § 7002—allowing citizen suit for the creation of imminent and substantial endangerment—because its land application endangers Farmville's citizens and environment. Therefore, this Court should reverse the lower court's holding and rule that Moon Moo Farm is liable under RCRA §§ 4005, 7002.

A. MOON MOO FARM'S LAND APPLICATION PRACTICES VIOLATE THE § 4005 PROHIBITION ON OPEN DUMPING BECAUSE IT CONSTITUTES DISPOSAL OF A SOLID WASTE.

RCRA prohibits the open dumping of solid waste. 42 U.S.C. § 6945(a) (2014). An "open dump" is any facility or site where solid waste is disposed of which is not a sanitary landfill. *Id.* § 6903(14). A "solid waste" includes any liquid or semi-solid material discarded under agricultural operations. § 6903(27). Federal regulations define "discarded" as any material that is abandoned, recycled, or considered inherently waste-like. 40 C.F.R. § 261.2(a)(2)(i) (2014). Material is "abandoned" if it is "[d]isposed of" or "[a]ccumulated, stored, or treated . . . before or in lieu of being abandoned by being disposed of, burned, or incinerated." *Id.* § 261.2(b). However, "[these] criteria do not apply to agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners." *Id.* § 257.1(c)(1). The critical issue is whether Moon Moo Farm is "discarding" its liquid manure and acid whey, bringing it within the definition of solid waste.

The definition of "discarded" has evolved pursuant to courts' interpretations. In *American Mining Congress v. EPA* (*AMC I*), the D.C. Circuit challenged EPA's regulations on reused materials in the petroleum and mining industries. 824 F.2d 1177 (D.C. Cir. 1987). The court held that Congress intended EPA to only have authority over those materials that are "truly discarded, disposed of, thrown away, or abandoned." *Id.* at 1190. The D.C. Circuit later broadened the term "discarded" in *American Mining Congress v. EPA* (*AMC II)*, holding that sludge from waste water may be reclaimed in the future for reuse, but it could still be considered "discarded" material under RCRA. 907 F.2d 1179 (D.C. Cir. 1990).

Reliance on the lower court's analysis on this issue would be unsound because the lower court erred in two respects: first, the court erred in finding that the mixture of liquid manure and acid whey is not within the purview of RCRA because it is not "discarded" as required to be considered solid waste; second, the court erred in holding that the mixture was exempt from RCRA regulation because it constituted a soil fertilizer or conditioner.

First, in analyzing whether the mixture is "discarded," the district court erred in its application of *Oklahoma v. Tyson Foods, Inc.* and *Safe Air v. Meyer.* R. at 11. In *Oklahoma v. Tyson Foods*, the court held that land application of poultry litter was not "disposal" and was therefore not a solid waste because the material had value as a marketable product, fertilized the soil, served as a soil amendment, and improved the pH of the soil. No. 05-CV-0329-GKF-PJC, 2010 U.S. Dist. LEXIS 14941, at *34, *39 (N.D. Okla. Feb. 17, 2010). In *Safe Air v. Meyer*, the court found that ash from field-burning practices was not a solid waste because it returned nutrients to the soil, increased sunlight absorption, and was a useful practice in growing bluegrass. 373 F.3d 1035 (9th Cir. 2004). Both of these holdings center on the fact that the

activity *benefited* the land to which it was applied, in contrast to Moon Moo Farm's application, which was *harmful*.

Moon Moo Farm's land application of manure and acid whey is distinguishable from both *Safe Air v. Meyer* and *Oklahoma v. Tyson Foods*. Dr. Ella Mae, an agronomist, stated that the lower pH of the mixture lowers the pH of the soil, effectively preventing the Bermuda grass from taking up the nutrients in the manure. R. at 6. Furthermore, even if the manure component of the mixture is not "discarded" when applied to the land, the acid whey component is considered "discarded" because it has served its purpose: yogurt production. R. at 5; *see Ecological Rights Found. v. Pac. Gas and Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (holding that a material is "discarded" if it has served its intended purpose). Thus, unlike the cases relied upon by the district court, Moon Moo Farm's application of liquid manure and acid whey is not beneficial to the soil. Rather, it is a harmful, "discarded" material, making it a solid waste.

The lower court erred in a second respect by finding that the liquid manure and acid whey mixture is exempt from the definition of "solid waste" as a soil fertilizer or conditioner. Harmful mixtures cannot be applied to the soil under the guise of a fertilizer solely for the purpose of claiming exemption under RCRA. *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, No. 13-CV-3019-TOR, 2013 U.S. Dist. LEXIS 87758, at *12, *13 (E.D. Wash. June 21, 2013) (holding that a practice which is not "agronomic" cannot be exempt as a fertilizer). The Bermuda grass was unable to absorb the mixture because of the acidity caused by the addition of acid whey. R. at 6. Unlike the typical application of manure as a fertilizer, Moon Moo Farm's addition of acid whey created an acidic mixture, which the Bermuda grass was unable to absorb. R. at 6. Such application is not "agronomic" or beneficial; as such, it cannot be characterized as a fertilizer or conditioner.

The district court erred in finding that the liquid manure and acid whey mixture is not "discarded" and therefore not within the definition of solid waste. The district court further erred in finding that Moon Moo Farm's land application of liquid manure and acid whey constitutes soil fertilizer or conditioner. Because the mixture is a harmful, acidic mixture as opposed to a fertilizer or conditioner, Moon Moo Farm cannot claim exemption under this regulation. Therefore, this Court should reverse the lower court and hold that Moon Moo Farm is subject to liability for violating the open dumping provision under RCRA § 4005.

B. RUNOFF FROM MOON MOO FARM'S LAND APPLICATION PRACTICES IS SUBJECT TO REGULATION AS AN IMMINENT AND SUBSTANTIAL ENDANGERMENT BECAUSE IT IS A CONTRIBUTING CAUSE OF A THREAT TO HUMAN OR ENVIRONMENTAL HARM.

RCRA § 7002 authorizes a citizen suit against a person handling, storing, treating, transporting, or disposing of any solid waste, which may present an imminent and substantial endangerment to health or the environment. 42 U.S.C. § 6972(a)(1)(B) (2012). As discussed, the liquid manure and acid whey mixture constitutes a solid waste; hence, the only issue remaining is whether there exists an imminent and substantial endangerment.

RCRA § 7002 requires only a low standard of connectivity between the defendant and the harm caused. In *Jones v. Inmont*, the court held that RCRA grants broad authority to courts to deal with environmental concerns under the imminent hazard provision. 584 F. Supp. 1425, 1431 (S.D. Ohio 1984); *see also Gen. Elec. Co. v. Aamco Transmissions*, 962 F.2d 281, 286 (2d Cir. 1992) (holding that there must only be *some nexus* between the potentially responsible party and the disposal).

By virtue of this lenient standard, causation under RCRA § 7002 can be established without evidence of "but for" causation. It is only necessary to establish that the defendant "contributed to" an imminent and substantial endangerment. *Aiello v. Town of Brookhaven*, 136 F. Supp. 2d

81, 112 (E.D.N.Y. 2001); *see also AG of Oklahoma v. Tyson Foods, Inc.,* 565 F.3d 769, 777 (10th Cir. 2009) (holding that there is a "low hurdle" to establish causation under RCRA § 7002, which requires only a *minor* causal link). The plain meaning of "contribute to" is "to have a share in any act or effect." *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1384 (8th Cir. 1989). Additionally, this plain meaning is not to be considered in a vacuum, but in the context of Congress' legislative intention—for RCRA to be a remedial, liberally applied statute. 42 U.S.C. § 6902; *see Aiello*, 136 F. Supp. 2d at 112 (applying a liberal standard in a RCRA analysis because of the statute's intended remedial nature).

Similar to its relaxed causation requirement, RCRA § 7002 has a low standard in the "harm" required to sustain a cause of action. The statute does not require *actual* harm but only requires that the disposal of the waste "may present" harm. *Parker v. Scrap Metal Processors,* 386 F.3d 993, 1015 (11th Cir. 2004) (citing *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 486 (1996)) (emphasis added). RCRA was written with "expansive language" conferring authority to grant relief to eliminate any risk. *United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982). This risk need not be related only to humans, as the statute indicates that environmental harm will suffice. *Id.* at 214 (holding that spillage which harmed trees constituted imminent and substantial endangerment even though there was no immediate harm to humans).

In the instant case, the district court erred in two respects: first, the court erred in finding that Moon Moo Farm could not be liable under RCRA § 7002 without proof that it was the "but for" cause of the endangerment; second, the court erred in holding that nitrate advisories affecting only infants were not a sufficient harm to sustain a cause of action under RCRA § 7002.

First, Moon Moo Farm may be held liable under the imminent and substantial endangerment provision for being a contributing cause to the nitrate advisories. Dr. Generis' statement that

Moon Moo Farm "contributed to" the problem is a sufficient causal link needed to sustain a cause of action. R. at 7. This allegation meets the low hurdle of finding a nexus between the defendant and the harm at issue. *See Gen. Elec. Co. v. Aamco Transmissions*, 962 F.2d 281, 286 (2d Cir. 1992) (holding that there must only be some nexus between the party in question and the harm). Therefore, because of the nexus between Moon Moo Farm and the nitrate advisories, there is sufficient causation to establish liability under RCRA § 7002.

Second, the district court erred in applying *Davies v. National Cooperative Refinery Association*, 963 F. Supp. 990 (D. Kan. 1997), to find that nitrate advisories were not sufficient to trigger liability because they affected only infants. R. at 11, 12. Contrary to *Davies*, liability can be triggered by a relatively low amount of harm. The statute does not require actual harm but only requires that the disposal of the waste *may present* harm. 42 U.S.C. § 6972(a)(1)(B); *see Price*, 688 F.2d at 1015. Therefore, the mere threat of harm is sufficient to meet the low hurdle of establishing that the solid waste *may present* imminent and substantial endangerment to health and the environment.

The nitrate advisories and impact on the environment is a sufficient harm to sustain a cause of action. Farmville's nitrate advisories were caused by fecal coliforms, raising concerns about the safety of the drinking water. R. at 6, 7. In particular, infants were at risk based upon the contaminants in the water, so much so that they were to be given bottled water. R. at 11. This meets the low standard articulated by the cases above. Additionally, the injury to the Deep Quod River based upon the fecal coliforms and suspended solids found by the water-testing laboratory is also sufficient to sustain a cause of action. *See Price*, 688 F.2d at 214 (holding that spillage that harmed trees was sufficient harm under RCRA § 7002). Furthermore, the turbid brown color and manure smell of the Deep Quod River may support a cause of action in and of itself as an

aesthetic harm. R. at 6. In environmental actions, courts have regularly allowed aesthetic harm to sustain a cause of action. *Aiello*, 136 F. Supp. 2d at 105, 106 (citing *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (holding that aesthetic harm establishes standing to seek judicial review under the Administrative Procedure Act)).

Any argument that Moon Moo Farm should not be held liable because its operation is not the situation for which RCRA was created is ill founded. A broad interpretation of RCRA § 7002, which encapsulates Moon Moo Farm's situation, better serves the underlying policy behind RCRA. RCRA was written with "expansive language," conferring authority to grant relief to eliminate *any* risk of harm. *Price*, 688 F.2d at 213-14. Moreover, one court has applied RCRA to discharges from dairy operations nearly identical to Moon Moo Farm. *See e.g.*, *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, No. 13-CV-3019-TOR, 2013 U.S. Dist. LEXIS 87758 (E.D. Wash. June 21, 2013).[9] Therefore, RCRA is best served by imposing liability based on environmental harm and harm to a portion of the community that is caused by discharges from Moon Moo Farm.

The lower court erred in holding that Moon Moo Farm was not liable under RCRA § 7002 by virtue of insufficient causation and harm. Sufficient evidence was presented to establish Moon Moo Farm's liability under RCRA § 7002. Moon Moo Farm was a contributing cause of the nitrate advisories, establishing a sufficient nexus for causation. Also, the threat of harm to the environment and to human health is sufficient—regardless of its scale—to meet the harm required to establish liability. Accordingly, this Court should reverse the district court's holding

[9] *See also Cmty. Ass'n for Restoration of the Env't v. R & M Haak*, No. 13-CV-3026-TOR, 2013 U.S. Dist. LEXIS 87757 (E.D. Wash. June 21, 2013); *Cmty. Ass'n for Restoration of the Env't v. D & A Dairy*, No. 13-CV-3018-TOR, 2013 U.S Dist. LEXIS 87791 (E.D. Wash. June 21, 2013).

and rule that Moon Moo Farm is liable under RCRA § 7002 as a contributing cause of harm to the environment and a portion of the population.

CONCLUSION

For the above reasons, Deep Quod Riverwatcher and Dean James ask this Court to reverse the district court's holding. The district court erred on all four issues: Queechunk Canal *is* public trust navigable water of the State of New Union; even if it is not, the evidence of Moon Moo Farm's pollution is still admissible because the exclusionary rule *does not apply* in this proceeding; Moon Moo Farm's discharges *are* subject to NPDES permitting under the CWA § 402; and, in the alternative, Moon Moo Farm's land application of liquid manure and acid whey subject it to liability under RCRA §§ 4005 and 7002. The district court's grant of Moon Moo Farm's motion for summary judgment was inappropriate, and to hold otherwise would be a disservice to "the chemical, physical, and biological integrity" of the nation's environment. 33 U.S.C. § 1251(a) (2012). This Court should reverse and remand for further proceedings consistent with the applicable law outlined above.

APPENDIX

40 C.F.R. § 122.23(b)(6); Medium CAFO defined

CODE OF FEDERAL REGULATIONS

Title 40
Protection of Environment

Parts 100 to 135

Revised as of July 1, 2013

Containing a codification of documents
of general applicability and future effect

As of July 1, 2013

Published by the Office of the Federal Register
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as a Special Edition of the Federal Register

(1) *Animal feeding operation* (''AFO'') means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(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.

(2) *Concentrated animal feeding operation* (''CAFO'') means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) *Large concentrated animal feeding operation* (''Large CAFO''). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or

(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) *Medium concentrated animal feeding operation* (''Medium CAFO''). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(D) 750 to 2,499 swine each weighing 55 pounds or more;

(E) 3,000 to 9,999 swine each weighing less than 55 pounds;

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or

(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) *Small concentrated animal feeding operation* (''Small CAFO''). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) *How may an AFO be designated as a CAFO?* The appropriate authority (*i.e.*, State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) *Who may designate?*—(i) *Approved States.* In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) *States with no approved program.* The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below