C.A. NO. 14-1248

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**IN THE UNITED STATES**
**COURT OF APPEALS FOR THE TWELFTH CIRCUIT**

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**UNITED STATES OF AMERICA,**
*Plaintiff-Appellant,*

and

**DEEP QUOD RIVERWATCHER, INC., AND DEAN JAMES,**
*Plaintiffs-Intervenors-Appellants*

v.

**MOON MOO FARM, INC.,**
*Defendant-Appellee.*

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ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR NEW UNION

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# BRIEF FOR THE UNITED STATES OF AMERICA
*Plaintiff-Appellant*

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ORAL ARGUMENT REQUESTED

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## JURISDICTIONAL STATEMENT

This appeal arises from a grant of summary judgment to the defendant below, Moon Moo Farm, Inc. (the Farm) in the United States District Court for the District of New Union (District Court). R. at 4. The District Court had subject matter jurisdiction over all claims. First, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012) (Clean Water Act or CWA) confers jurisdiction to the district court for the district in which the defendant is located or is doing business. 33 U.S.C. § 1319(b). The Farm is located and does business in the District of New Union, therefore the District Court had jurisdiction over the United States Environmental Protection Agency's (EPA) Clean Water Act claims. R. at 4.

Plaintiff-intervenors Deep Quod Riverwatcher, Inc. (Riverwatcher) and Dean James (James) (collectively, Riverwatcher) brought additional claims under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k (2012). The District Court had jurisdiction over these claims because RCRA § 7002(a) confers jurisdiction to the district court in the district where a RCRA violation or imminent and substantial endangerment occurs. 42 U.S.C. § 6972(a).

Finally, the District Court improperly exercised supplemental jurisdiction over the Farm's trespass counterclaim under 28 U.S.C. § 1367(a) (2012). It should have abstained from doing so. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 30 (1959).

The District Court's Order granted summary judgment to the Farm on all claims and on the Farm's counterclaim. R. at 12. Appellants EPA and Riverwatcher timely appealed. R. at 1; Fed. R. App. P. 4(a)(1)(A). This Court has appellate jurisdiction under 28 U.S.C. § 1291 (2012).

## STATEMENT OF THE ISSUES

I. Is a navigable-in-fact man-made waterway on private property that diverts more than half the flow of another navigable waterway subject to a public right of access under the State of New Union's public trust doctrine?

II. Does the exclusionary rule of the Fourth Amendment to the United States Constitution apply to evidence obtained outside the curtilage of a home by a private citizen?

III. Is a discharge of pollutants from the Farm's fields a discharge from a "point source" if the Farm meets the regulatory definition of a CAFO, and manure from its facility runs into a navigable water as a result of agricultural practices that do not ensure appropriate utilization of the nutrients in the manure?

IV. If the Farm is not a CAFO, are precipitation-related discharges from its fields exempt from Clean Water Act permitting as agricultural stormwater?

V. Does land application of manure-whey soil amendment on fields at an animal feeding operation constitute prohibited "open dumping" of solid waste under RCRA?

VI. Has Riverwatcher established that excess nitrates discharged from the Farm's fields may present an imminent and substantial endangerment to Farmville residents whose drinking water, drawn from waters downstream from the Farm, is subject to a nitrate advisory?

## STATEMENT OF THE CASE

Moon Moo Farm, Inc., the defendant below, owns and operates an industrial dairy ten miles up the Deep Quod River (River) from the City of Farmville in the State of New Union. R. at 4–5. EPA brought this Clean Water Act enforcement action in response to high levels of pollution in the Farm's discharge and in the River. Riverwatcher intervened, bringing two RCRA claims. R. at 7. The Farm counterclaimed that James was liable for trespass during his investigation of the Canal. *Id.* The District Court granted summary judgment to the Farm on all claims. R. at 12.

### 1. Trespass

In the 1940s, a previous owner of the Farm property excavated what is now known as the Queechuck Canal (the Canal) in order to alleviate flooding at the bend in the River adjacent to

the Farm. R. at 5. The Farm owns the land on both sides of, and under, the Canal. R. at 2. Most of the River is diverted into the Canal before returning to the River. R. at 5. The Canal is commonly used as a shortcut past the bend in the River. *Id.* Despite its use as a shortcut, the Farm displays "No Trespassing" signs along the Canal. *Id.* The Canal is fifty yards wide, three to four feet deep, and can be navigated by a canoe or other small boat. R. at 5. The River, which flows year round and empties into the Mississippi River, is also navigable by small boat above and below the Canal. *Id.*

In the late winter and early spring of 2013, Riverwatcher received complaints that the River smelled of manure and was a turbid brown color. R. at 6. On April 12, 2013, Dean James, a member of Riverwatcher, observed and photographed the Farm applying manure to its fields during a significant storm event. R. at 6. In addition, James took samples of brown water flowing from the Farm's fields through a drainage ditch into the Canal. *Id.* Laboratory tests of these samples revealed high levels of nitrates and fecal coliforms. *Id.*

The Farm argues, and the District Court held, that James was trespassing when he entered the Canal and took water samples and photos. R. at 9. On review, EPA and Riverwatcher contend that James's entry cannot be classified as a trespass because the Canal is subject to a public right of access.

**2. Admissibility of Evidence.**

The District Court also held that the evidence James obtained without a warrant was not admissible in a civil enforcement proceeding brought under the CWA. R. at 9. Consequently, the District Court decided that EPA and Riverwatcher were without any admissible evidence to support their claims and granted summary judgment for the Farm. R. at 9, 12. On appeal, EPA

and Riverwatcher assert that even if James was trespassing, the exclusionary rule is inapplicable in this civil enforcement action.

**3. Clean Water Act.**

The Farm houses 350 dairy cows that are not pastured. R. at 4. The Farm collects manure and liquid waste from the barn and conveys it into an outdoor lagoon. R. at 5. In 2012, the Farm began to accept acid whey from a nearby yogurt processing facility, and mix it with the manure in the lagoon. *Id.* The manure-whey mixture is periodically pumped from the lagoon, transported, and sprayed on 150 acres of fields on which the Farm grows Bermuda grass. *Id.* Under its CWA authority, New Union regulates the Farm as a "no-discharge" animal feeding operation (AFO). The Farm does not hold any permit issued pursuant to the CWA's National Pollutant Discharge Elimination System (NPDES) permitting system. *Id.*

After James observed and sampled runoff from the grass fields on April 12, 2013, Riverwatcher properly served on the Farm, the New Union Department of Environmental Quality, and EPA a letter of intent to sue under the citizen suit provisions of the CWA. R. at 7. Before expiration of the post-notice waiting period, EPA commenced this civil enforcement action against the Farm, seeking both civil penalties and injunctive relief. *Id.* Riverwatcher then intervened as a plaintiff in the EPA action. R. at 7.

The District Court recognized that the Farm houses the threshold number of dairy cows to constitute a regulated "Medium CAFO," but held that the Farm is not a CAFO because evidence of the Farm's discharge was deemed inadmissible. R. at 8. In addition, the District Court held that, even if the evidence of the discharge was admissible, the CWA exempted the discharge as agricultural stormwater. R. at 10.

EPA and Riverwatcher contend on appeal that the evidence is admissible, and that the Farm is a regulated CAFO which must possess a NPDES permit for the discharge of pollutants from its fields. However, in the event this Court rules that the Farm is not a CAFO, EPA argues that the Farm does not require a permit because the runoff is agricultural stormwater. *Id.* Riverwatcher argues that the Farm requires a permit either way. *Id*. The Farm maintains that it does not require a NPDES permit irrespective of its status as a CAFO. *Id.*

**4. RCRA.**

Because the River's watershed is heavily farmed, nitrate advisories have been periodically required for the downstream Farmville drinking water supply. R. at 7. In April of 2013, the Farmville Water Authority advised its customers that the water was unsafe for infants under two years of age because of high nitrate levels, and that infants should drink only bottled water. R. at 6.

Upon intervening in EPA's CWA action, Riverwatcher brought two claims under the citizen suit provision of RCRA. R. at 7. First, Riverwatcher alleged that the Farm engages in illegal "open dumping" of solid waste when it land applies its manure-whey mixture. The Farm and EPA argued below, and the District Court agreed, that the mixture is not solid waste when land applied and thus cannot constitute open dumping. R. at 11. Second, Riverwatcher claims the nitrate levels in the Farmville drinking water constitute an imminent and substantial endangerment. R. at 4. While the Farm maintains that it cannot be liable for an endangerment because its land application never generates regulable solid waste, EPA and Riverwatcher argue that all the elements of an endangerment are met. *Id.* The District Court granted summary judgment for the Farm on both RCRA claims. R. at 11, 12.

## STANDARD OF REVIEW

A district court may not grant summary judgment unless the movant can show that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This Court reviews the District Court's interpretation of law and grant of summary judgment *de novo*. *Brod v. Omya*, 653 F.3d 156, 164 (2d Cir. 2011). A reviewing court must view the facts and draw reasonable inferences in the light most favorable to the nonmovant. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

## SUMMARY OF THE ARGUMENT

EPA partially appeals the District Court's Order granting summary judgment in favor of the Farm. Most importantly, the District Court improperly excluded evidence that substantiated EPA's enforcement action. In holding that James trespassed, the District Court abused its discretion in exercising supplemental jurisdiction over the Farm's counterclaim. The District Court should have abstained from deciding the issue, because there is no State law on point, the issue is fundamentally one of state sovereignty, and the determination was unnecessary to the federal questions of this case. Further, the District Court incorrectly determined that the Canal is not subject to a public right of access because New Union's highest court would likely hold that the Canal is subject to the State's public trust doctrine (PTD). Additionally, a public right of access to the Canal is protected under the federal navigational servitude.

Relying on its incorrect determination that James trespassed, the District Court held that the evidence obtained by James was inadmissible under the Fourth Amendment to the United States Constitution. In doing so, the District Court failed to recognize that the Fourth Amendment is inapplicable in this civil enforcement action because the Farm did not have a reasonable expectation of privacy in either its fields or in the pollutants discharged from its

drainage ditch. James was also incapable of violating the Fourth Amendment because he was not a member or agent of the government when collecting the evidence at issue.

When properly admitted, the evidence establishes that the Farm is a CAFO that violated the CWA by discharging pollutants from its drainage ditch into the Canal without a NPDES permit. EPA regulations establish that land application discharges from a CAFO are subject to NPDES requirements. Only where a CAFO utilizes appropriate agronomic and conservation practices that ensure appropriate utilization of the nutrients in the manure is a discharge exempt from NPDES permitting.

All parties agree that runoff from the Farm's Bermuda grass fields contained pollutants in the form of nitrates, fecal coliforms, and suspended solids. R. at 7. Scientific evidence indicates that adding acid whey to liquid manure lowers the pH of the soil and reduces the ability of Bermuda grass to utilize nutrients in the manure. R. at 6. In addition, James observed the Farm applying manure during a significant rain event, a practice that nearly always results in excess runoff of nutrients from fields. R. at 6. These facts establish that the Farm's practices do not ensure appropriate utilization of nutrients in the manure. Thus, the Farm's discharges are not exempt as agricultural stormwater. But if this Court finds the Farm is not a CAFO, there is no CWA jurisdiction over the Farm, and it is exempt from NPDES permitting.

In the event that the Farm is exempt from CWA jurisdiction, Riverwatcher is correct that RCRA provides alternative relief. However, the Farm's land application of the manure mixture does not constitute "open dumping" under RCRA because the mixture is beneficially reused as soil amendment, and thus is not "solid waste" when land-applied. It is only when the excess mixture washes into the Canal that it becomes solid waste under RCRA because the mixture is then "discarded." As the generator that disposes of this solid waste in the Canal, the Farm is

liable for the imminent and substantial endangerment that results: dangerously high levels of nitrates in the downstream drinking water of the City of Farmville. Thus, while the District Court correctly dispensed of the open dumping claim, it erroneously granted summary judgment to the Farm on the endangerment claim.

## ARGUMENT

### I. The Queechunk Canal is subject to a public right of access.

The Farm successfully counterclaimed below that James was liable for trespass when he investigated the Canal. R. at 12. The District Court declared that "James's entry into Moon Moo Farm's [sic] was not protected by the public trust doctrine . . . ." R. at 12. The District Court erred in deciding the scope of New Union's PTD under federal law because the PTD is a matter of state law. R. at 9 (citing *Kaiser Aetna v. United States*, 444 U.S. 614 (1979)); 28 U.S.C. § 1652 (2012); *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012) ("[T]he public trust doctrine remains a matter of state law . . . ."). The District Court avoided addressing the PTD under State law because courts of the State have apparently not addressed the issue. R. at 9.

The PTD is fundamentally an aspect of state sovereignty. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 455 (1892). Because the PTD in New Union is virtually unformulated, the District Court should have abstained from deciding the Farm's counterclaim, stayed the proceedings as to the PTD issue, and sent the parties to New Union's State courts to determine the relative rights in the Canal. *Brigham Oil and Gas, L.P. v. North Dakota Bd. of Univ. and Sch. Lands*, 866 F. Supp. 2d 1082, 1090–91 (D.N.D. 2012) (abstaining from decision due to unsettled questions of state PTD); *Thibodaux*, 360 U.S. 25, 30 (holding that a district court ordering parties to get declaratory relief from state court in action for damages under uninterpreted state eminent domain statute is proper). Because the Farm's counterclaim need not be addressed to decide the

remaining federal issues in this case, there was no reason for the District Court to usurp the sovereignty of New Union by declaring the State's law. The District Court, therefore, abused its discretion in exercising supplemental jurisdiction under 28 U.S.C. § 1367(a).

However, if this Court determines that abstention is unwarranted in this case, it is to take into account all relevant data to determine how the highest court in New Union would likely rule on the PTD issue. *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1154 (9th Cir. 2003). Under a principled analysis of all relevant data, it is likely that the highest court in New Union would rule that the Canal is subject to a public right of access under the PTD. Even absent a public right of access under the PTD, the federal navigational servitude provides a defense to the Farm's counterclaim.

### A. The State of New Union would likely hold the Canal in public trust, thus providing a public right of access.

New Union is vested with a sovereign duty to hold in public trust the navigable waters of the State whose beds and waters passed to the State upon its entry to the Union under the equal-footing doctrine. *Martin v. Lessee of Waddell*, 16 Pet. 367, 413–14 (1842); *Idaho v. United States*, 533 U.S. 262, 272 (2001); *Illinois Cent. R. Co.*, 146 U.S. at 453. Generally, navigable waters of a state are subject to the state's PTD, and thus subject to a public right of access. *See, e.g.*, *Adirondack League Club, Inc. v. Sierra Club*, 706 N.E.2d 1192, 1196 (N.Y. App. 1998). New Union's PTD is not necessarily limited to covering those waters which passed under the equal-footing doctrine; the State is free to expand the corpus of the trust by protecting other waters. *See, e.g.*, *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 713 (Cal. 1983) (holding that the core of the PTD is sovereign authority, part of which prevents a party from gaining a vested interest in waters which harm public trust assets). Because the creation of the Canal harmed the

navigability of the River, and the waters of the Canal are navigable, New Union's highest court is likely to subject the Canal to a right of public access under the PTD.

***1. New Union would likely adopt the federal title test of navigability.***

At a minimum, the State is required to hold those waters and lands which passed to the State under the equal-footing doctrine in public trust. *Illinois Cent. R. Co.*, 146 U.S. at 453. Courts determine whether waters and the lands thereunder pass to the state under the equal-footing doctrine through application of the federal title test, which commands that such waters and lands pass if the waters were navigable-in-fact at the time of statehood. *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977). Thus, New Union is likely to adopt the federal title test for determining navigability because it is the first inquiry into determining whether a given water *must* be subject to the PTD.

However, it is unlikely that New Union would only hold those waters which were navigable at the time of statehood subject to the PTD, because to do so would ignore the public's interest in the State's water resources not contemplated by the equal-footing doctrine. *Parks v. Cooper*, 676 N.W.2d 823, 839 (S.D. 2004) ("[A]ll waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public."). State decisions not requiring state ownership of the riverbed for application of the PTD, and thus not requiring title passage to the state under the equal-footing doctrine, are in accord. *Id.* at 835–36 (and cases cited therein); *cf. People v. Emmert*, 597 P.2d 1025 (Colo. 1979).

***2. The Canal and River are navigable-in-fact under the navigability test likely to be adopted by New Union.***

In determining whether a waterway is navigable-in-fact, "use by the public for purposes of transportation and commerce affords the true criterion." *The Montello*, 87 U.S. 430, 441 (1874). This does not mean that a waterway which is only seasonably subject to such use is

navigable-in-fact; the waterway must be "generally and commonly useful." *Id.* at 442 (quoting *Rowe v. Granite Bridge Corp.*, 21 Pick. 344, 347 (Mass. 1838)). It is "the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [waters], and consequently to the exclusion of private ownership." *United States v. State of Utah*, 283 U.S. 64, 83 (1931) (quoting *Packer v. Bird*, 137 U.S. 661, 667 (1891)).

The Canal is "commonly" navigated as a thoroughfare by those traversing the River, indicating that both waters are generally and commonly useful for travel on water. The River flows year round, and because the Canal takes on most of the flow of the River, it is likely that the Canal does as well. R. at 5. Finally, the River is navigable by small boat upstream and downstream of the Canal, connecting the entire waterway to the Mississippi River. R. at 5. These facts establish that both the Canal and River are navigable-in-fact.

### *3. New Union would likely hold the Canal subject to the PTD despite the fact that it was created through artificial means.*

The District Court determined that because the Canal is man-made, it is not subject to the PTD. R. at 9. However, the fact that the Canal was made by artificial means does not necessarily insulate it from PTD application. *See, e.g.*, *Fish House, Inc. v. Clarke*, 693 S.E.2d 208, 212 (N.C. App. 2010); *State ex rel. Medlock v. S.C. Coastal Council*, 346 S.E.2d 716, 718 (S.C. 1986). The highest court of New Union would likely subject the Canal to the PTD despite its artificial creation because the existence of the Canal has injured another navigable body of water: the River. The Farm does not contend that the River is not open to public use. Injury to the public's interest by damaging or diverting a navigable waterway is an ample reason to hold that an artificial waterway over private property should be subject to public use. *E.g.*, *People for Open Waters, Inc. v. Estate of Grey*, 643 So.2d 415, 417 (La. Ct. App. 1994) (citing *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979)). In this case, the Farm attempts to withhold more than

half of the water in the River from the public's use where the Canal is located. R. at 5. The District Court determined that the River is navigable above and below the Canal. *Id.* To hold that the Farm may exclude the public from navigating the Canal in between would squarely conflict with New Union's sovereign duty to ensure the public's right of navigation.

### B. The federal navigational servitude provides an independent federal defense to Moon Moo Farm's trespass action.

Although the District Court's opinion sounds in PTD, it appears to have decided the trespass question on whether the federal navigational servitude provides a public right of access. R. at 9; *Kaiser Aetna*, 444 U.S. at 177. However, contrary to the District Court's determination, insofar as the PTD and the federal navigational servitude are separate concepts arising from separate sovereigns, the navigational servitude provides an independent federal basis for holding that the Canal is subject to a public right of access.

The public maintains a federally-protected right to navigate the navigable waters of the United States. This conclusion follows from two constitutional principles: the constitutional protection of interstate travel, and the paramount authority of Congress over the navigation of the nation's navigable waters. *See Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971); *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824). The Supreme Court has repeatedly acknowledged this public right. *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82, 87 (1913); *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950) ("[T]he owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation . . . .").

A "river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried with other States." *The Montello*, 87 U.S. at 439. Here the Canal is a navigable-in-fact body of

water that connects with the River, another navigable water, which then connects with the Mississippi River, upon which an immense interstate trade may be conducted. R. at 5. Therefore, the Canal is a navigable river of the United States.

Whether a public right of navigation arises in an artificial body of water is a closer question. In *Kaiser Aetna*, the Supreme Court determined that an artificial waterway was not automatically subject to public access under the federal navigational servitude. 444 U.S. at 180. The Court reached this determination because the artificial waterway was an investment-backed improvement whose exclusivity would generate profit, and the creation of which was authorized by the Corps itself. *Id.* There is no evidence that the Canal, unlike the improvements in *Kaiser Aetna*, were intended to generate profit through its exclusivity, or that the Corps had sanctioned the creation of the Canal. Thus, *Kaiser Aetna* is inapplicable.

In the companion case of *Vaughn v. Vermilion Corp.* the Supreme Court again dealt with public rights of access to an artificial canal created using private funds. 444 U.S. 206. In *Vaughn*, the respondent sought an injunction preventing a public right of access to man-made canals which connected other navigable waters. *Id.* at 208. Petitioner contended that it had a federally-protected right to access the canals because the canals diverted or destroyed naturally navigable waterways. The Supreme Court determined that it could not be held as a matter of law, that if the petitioners proved such diversion or destruction, that proof would not constitute a defense under federal law. *Id.* at 209.

The necessary conclusion is that if the petitioners did prove that the canals were created through diversion or destruction of the other naturally navigable waters, it would be a defense to the trespass action. Here, such proof is readily available; the Canal takes more than half of the flow of the River. R. at 5. Thus, it cannot be held as a matter of law that this proof is not a

defense to the Farm's trespass claim, and summary judgment in favor of the Farm is inappropriate.

## II. The evidence acquired by James is admissible because the Fourth Amendment does not apply in this case.

The District Court erred in determining, based solely on James's alleged trespass, that dispositive evidence acquired by James was inadmissible under the exclusionary rule of the Fourth Amendment to the United States Constitution. R. at 9. A trespass is not a sufficient condition to determine a violation of the Fourth Amendment. *United States v. Karo*, 468 U.S. 705, 713 (1984). Even if James was trespassing under State law, the Fourth Amendment does not apply to this case for two reasons: (1) Mr. James was not a governmental actor when he obtained the evidence; and (2) the Farm did not have a reasonable expectation of privacy in its land application operations or its stormwater runoff.

### A. The Fourth Amendment does not apply because James is not a government actor.

The Fourth Amendment to the Constitution states, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV. The Fourth Amendment, and thus the exclusionary rule, only applies to actions by the government. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The primary function of the exclusionary rule is to deter misconduct on behalf of the government, and the exclusion of such evidence must provide meaningful deterrence in order for the exclusionary rule to be applied. *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011). Thus, without government action, the exclusionary rule serves no purpose.

In both of the cases cited by the District Court there was undoubtedly government action. R. at 9; *Trinity Indus., Inc. v. Occupational Safety and Health Review Comm'n*, 16 F.3d 1455 (6th Cir. 1994) (reviewing inspection by the Occupational Safety and Health Administration);

*Smith Steel Casting Co. v. Brock*, 800 F.2d 1329 (5th Cir. 1986) (same). James, unlike the government officials at issue in the cases cited by the District Court, is not employed by the government. Accordingly, the question is whether James was acting as an agent of the government when he gathered the dispositive evidence. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 614 (1989).

In determining whether a private person acted as a government agent for the Fourth Amendment to apply to his actions, courts look at the totality of the circumstances. *Id.* In conducting this inquiry, courts consider: (1) whether the government has directed or dominated the actions of a private party; (2) whether the government was knowledgeable of the private party's actions; and (3) whether the private party collected the evidence for their own private interests or in the interest of assisting the government. *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971); *United States v. Jacobsen*, 466 U.S. 109, 113–14 (1984); *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982).

First, there is no evidence that the EPA directed or dominated James into gathering the evidence, or even that EPA was knowledgeable of James's actions. Second, there is no evidence to support that James gathered the evidence to assist EPA in enforcing the CWA. The District Court specifically found that James conducted his investigation of the River in response to complaints about the River's water quality. R. at 6. Nothing shows that EPA made any of these complaints, that EPA directed Riverwatcher to investigate, or that EPA was even aware of these complaints. The fact that Riverwatcher and James sought to conduct their own lawsuit against the Farm under the CWA, and intervened when EPA filed its own suit against the Farm, further rebuts a conclusion that James had intended to assist EPA in enforcing the law. R. at 7. Rather,

the evidence supports a conclusion that James along with Riverwatcher intended to use the evidence to maintain their own suit.

### B. Moon Moo Farm did not have a reasonable expectation of privacy in any of the evidence James gathered.

A claim of a Fourth Amendment violation must be justified by a reasonable expectation of privacy in the items searched or seized. *Oliver v. United States*, 466 U.S. 170, 177 (1984). Such a reasonable expectation of privacy exists when an individual has "exhibited an actual (subjective) expectation of privacy" and the expectation is one that "society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (J. Harlan, concurring); *Smith v. Maryland*, 422 U.S. 735, 740 (1979). Fourth Amendment protection does not extend to "open fields" outside the curtilage of the home. *Oliver*, 466 U.S. at 178. Where no such reasonable expectation of privacy exists, the Fourth Amendment, and thus the exclusionary rule, is inapplicable. *See Smith*, 422 U.S. at 740. It is the burden of the person or entity asserting the Fourth Amendment to prove that it has a reasonable expectation of privacy in the place searched and a property interest protected by the Fourth Amendment in the item seized. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998); *United States v. Padilla*, 508 U.S. 77, 82 (1993). The Farm has failed to meet this burden.

#### *1. The Farm does not have a reasonable expectation of privacy in its land application operations or in the existence of the drainage ditch and the water flowing from it.*

Although there is not a set rule for determining when an individual has a reasonable expectation of privacy in a given area "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver*, 466 U.S. at 178. This principle applies despite the fact that the Farm placed "No Trespassing" signs on its property along the Canal. *Id.* at 179 (holding that the erection of "No

Trespassing" signs does not provide an expectation of privacy because the public or law enforcement may view the activities from the air). Here, the Farm's land application operations, its drainage ditch, and the water flowing from it could be seen by anyone flying over or passing by the Farm's operations. Thus, even if the Farm thought that it had privacy in its operations, the drainage ditch, and the water flowing from it, such an expectation is not reasonable.

***2. The Farm does not have a property interest protected by the Fourth Amendment in the stormwater running off its fields and through its drainage ditch.***

Once the water leaves the fields of the farm and deposits into the Canal, it is similar to trash being left outside which any person has access to. *See United States v. Hajduk*, 396 F. Supp. 2d 1216, 1225 (D. Co. 2005); *see also Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 63–65 (1st Cir. 2004). The Supreme Court has determined that there is no reasonable expectation of privacy in trash that is left outside to be picked up by a trash collector, partially because the defendant had abandoned the property. *California v. Greenwood*, 486 U.S. 35, 40–41 (1988). Consequently, the Farm forwent any property interest protected by the Fourth Amendment in its stormwater runoff once that water left its fields and deposited into the Canal; it was essentially abandoned. As the stormwater leaving the farm is the functional equivalent of trash once it leaves the Farm's fields, the Farm has no reasonable expectation of privacy or protectable property interest in it, and thus the Fourth Amendment does not apply to James's collection of stormwater samples from the drainage ditch.

## III. Moon Moo Farm is a CAFO point source, and unpermitted discharges from its land application area violate the Clean Water Act.

The CWA "prohibits the discharge of a pollutant by any person from any point source to navigable waters except when authorized by a permit issued under the [NPDES])." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005); *see also* 33 U.S.C. §§ 1311(a), 1342(a).

The Farm concedes the discharge at issue in this case contained "pollutants." R. at 7. In addition, the Canal, a navigable-in-fact perennial tributary of the River, qualifies as a "navigable water." *See* 40 C.F.R. § 122.2 (2014); *Rapanos v. United States*, 547 U.S. 715 (2006). Thus, the issue in this case is whether the Farm's discharge can be characterized as "from a point source."

When Congress passed the CWA in 1972, it specifically included the term "concentrated animal feeding operation*"* in the definition of "point source." 33 U.S.C. § 1362(14). In 1987, Congress amended the definition of "point source" to exclude "agricultural stormwater discharges," creating what is now known as the "agricultural stormwater exemption" (ASE). Water Quality Act of 1987, Pub. L. No. 100-4 § 503, 101 Stat. 7, 75 (1987) (amending 33 U.S.C. § 1362(14)). Congress provided no definition of the term "agricultural stormwater," leaving EPA to interpret any ambiguity as to the relationship between CAFOs and the ASE. *Waterkeeper Alliance*, 399 F.3d at 497. *See also Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.").

In 2003, EPA clarified its interpretation of the term "agricultural stormwater" as it relates to CAFOs, and defined when discharges from CAFOs qualify for the ASE. [NPDES] Permit Regulation and Effluent Limitation Guidelines and Standards for [CAFOs], 68 Fed. Reg. 7176, 7197 (Feb. 12, 2003) (codified at 40 C.F.R. §§ 122.2, 122.42, pt. 412) [hereinafter 2003 Rule]. EPA explained that precipitation-related discharges which result from improper manure application practices cannot qualify for the ASE. *Id.* In *Waterkeeper Alliance*, the Second Circuit upheld this interpretation during the permissible period for challenging the rule. 399 F.3d at

509.[1] Today, EPA regulations and guidance, in addition to the relevant case law, establish that the Farm is a CAFO whose observed discharge does not qualify for the ASE.

### A. Moon Moo Farm is a "Medium CAFO."

EPA regulations define what constitutes an Animal Feeding Operation (AFO), and which AFOs qualify as CAFOs. 40 C.F.R. § 122.23(b) (2014). The Farm meets the regulatory definition , and is presently regulated as, an AFO. *See* 40 C.F.R. § 122.23(b)(1); R. at 5. An AFO that houses between 200 and 699 mature dairy cows is defined as a "Medium CAFO" if, at the facility, pollutants are discharged into waters of the United States through a "man-made ditch" or "other similar man-made device."[2] 40 C.F.R. § 122.23(b)(6). In 2010, the Farm increased its "milking herd" from 170 to the current 350 cows, meeting the CAFO size threshold.[3] R. at 5.

A "man-made ditch" or "other similar man-made device" has been defined by EPA as "a conveyance constructed or caused by humans that transports wastes (manure, litter, or process wastewater) to waters of the U.S." Office of Wastewater Mgmt., EPA, NPDES Permit Writers' Manual for CAFOs (2012) [hereinafter 2012 Permit Writers' Manual], *available at* http://perma.cc/V2S7-Z3KY. "If human action was involved in creating the conveyance, it is man-made even if natural materials were used to form it. A man-made channel or ditch that was

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[1] Pursuant to 28 U.S.C. § 2112 (2012), petitions to review the 2003 Rule were consolidated before a single court. The Second Circuit reviewed the petitions, and the decision of that court is now binding in all circuits. In addition, Section 509(b)(1) of the CWA bars the Farm from facially challenging the 2003 Rule. 33 U.S.C. § 1369(b)(1). When issues surrounding EPA's 2003 interpretation of the ASE were raised in front of the Fifth Circuit in 2009, the court refused to consider them. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 754 (5th Cir. 2011); *see also Crown Simpson Pulp Co. v. Costle*, 445 U.S. 93 (1980).

[2] This is one of two discharge criteria listed in Section 122.23(b)(6)(ii), however the second is inapplicable to these facts. R. at 8.

[3] All 350 cows are in the "milking herd." R. at 5. Because a dairy cow normally begins to produce milk only after calving, this Court can presume that at least 200, if not all, of the Farm's 350 cows are "mature" for purposes of the CAFO definition. *See* EPA, Lifecycle Production Phases, *available at* http://perma.cc/379Z-WCVW.

not created specifically to carry animal wastes but nonetheless does so is considered a man-made device." *Id.* Because it is reasonable to presume the Farm's drainage ditch was excavated by humans in order to drain farmland, it meets the discharge requirement of 40 C.F.R. § 122.23(b)(6)(ii). In sum, the Farm is a "Medium CAFO" because it satisfies both the size and discharge criteria.

In 2007, EPA required that by February 27, 2009, any AFO that "increases the number of animals in confinement to a level that would result in the operation becoming defined as a CAFO . . . must seek NPDES permit coverage." Revised Compliance Dates Under the [NPDES] Permit Regulations and Effluent Limitations Guidelines and Standards for [CAFOs], 72 Fed. Reg. 40,245, 40,247 (July 24, 2007) (codified at 40 C.F.R. 122.23(g)(3)(iii)). Thus, by the time the Farm increased its herd to 350 cows in 2010, a NPDES permit was required for regulated discharges. Yet rather than obtain a NPDES permit, the Farm decided to voluntarily certify as a "no-discharge" AFO, an option created by EPA in 2008 following the *Waterkeeper* decision. Revised [NPDES] Permit Regulation and Effluent Limitations Guidelines for [CAFOs] in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418, 70,424 (Nov. 20, 2008) [hereinafter 2008 Rule]. The no-discharge certification option has since been eliminated. [NPDES] Permit Regulations for [CAFOs]: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494, 44,494 (July 30, 2012) (codified at 40 C.F.R. pt. 122). Yet even before it was eliminated, the voluntary certification option did not insulate the Farm from being held liable for unpermitted discharges that do not qualify for the ASE. 2008 Rule at 70,427.

### B. The observed discharge of pollutants from Moon Moo Farm's fields does not qualify for the agricultural stormwater exemption.

A "land application area" is land under the control of an AFO owner or operator to which manure, litter, or process wastewater from the production area is or may be applied. 40 C.F.R. §

122.23(b)(3). Generally, "[l]and application discharges from a CAFO are subject to NPDES requirements." 40 C.F.R. § 122.23(e) (2014). The Farm applies manure from its operation on its grass fields. R. at 5. EPA regulations explain the limited circumstances in which a discharge from the Farm's fields may qualify for the ASE, and therefore not require a NPDES permit:

> [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) (emphasis added).

The District Court failed to fully analyze section 122.23(e) when it wrote that the regulation "specifically exempts as agricultural stormwater landspreading that is performed in accordance with a NMP, as the Farm's landspreading was." R. at 9. The Farm does possess, and is in compliance with, a State-issued NMP. R. at 5. However, EPA has made clear since 2003 that polluted runoff from agricultural land application fields can constitute a point source discharge requiring a NPDES permit even when manure is applied in compliance with a state-issued NMP. *See, e.g.*, Letter from Benjamin H. Grumbles, Assistant Administrator, EPA Office of Water, to Thomas R. Carper, U.S. Senator (Jan. 16, 2009). To qualify for the ASE, section 122.23(e) specifically requires "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)." The Farm's practices do not meet this standard for two reasons: (1) The Farm is not applying its manure to its land application area in accordance with appropriate agronomic and conservation practices; and (2) its NMP is procedurally inadequate.

### *1. Unrebutted evidence demonstrates that Moon Moo Farm's land application practices do not ensure appropriate utilization of nutrients in the manure.*

In order to qualify for the ASE, all CAFOs (with or without a NPDES permit) that are land applying manure to land they control, must do so in accordance with a nutrient management system that ensures minimum runoff from land application areas. National Resources Conservation Service, U.S. Dept. of Agriculture, [CAFO] Rule Executive Summary [hereinafter USDA Executive Summary], *available at* http://perma.cc/5SDL-WVDZ. This requirement involves ensuring that nutrients are applied to the land application area in accordance with appropriate agronomic and conservation practices. *Id.* The Farm's use of acid whey fails to take into account the nutrient needs of the Bermuda grass it grows, and its application of manure during significant rainfall events is an inappropriate conservation practice that results in excess nutrient runoff. Consequently, the Farm's observed discharge did not qualify for the ASE.

All parties agree that on April 12, 2003, runoff from the Farm's land application fields contained pollutants in the form of nitrates, a chemical waste. R. at 7. Dr. Ella Mae, an agronomist, provided an explanation for this occurrence. R. at 6. According to Dr. Mae, the lower pH (increased acidity) of the liquid manure resulting from adding acid whey lowers the pH of the soil. *Id.* This lower pH prevents the Farm's Bermuda grass from effectively taking up the nutrients in the manure. *Id.* In addition, Dr. Mae opined that unprocessed nutrients from the Farm's fields are released into the environment, including the River, through runoff during rain events. *Id.* The Farm's expert, Dr. Emmet Green, did not dispute that acid whey reduces nitrogen uptake by the grass. *Id.* These expert opinions establish that the Farm's management practices do not ensure appropriate utilization of nutrients in the manure and cannot qualify for the ASE.

James also observed manure spreading operations taking place on the Farm's fields during a significant storm event. R. at 6. According to Dr. Mae, land application of manure

during a rain event, like the one the Farmville Region experienced between April 11 and 12, 2013, is a very poor management practice and will nearly always result in excess runoff of nutrients from the fields. R. at 6. The Farm's own expert, Dr. Green, noted that nothing in the Farm's NMP prevents it from land applying manure during a rain event. R. at 7. In May 2010, EPA released guidance stating that a NMP that does not "take into account timing restrictions for manure related to saturated soil, wet weather and frozen or snow-covered ground" does not ensure appropriate utilization of the nutrients in the manure. Office of Wastewater Mgmt., EPA, *Implementation Guidance on CAFO Regulations – CAFOs That Discharge or Are Proposing to Discharge* 8 (May 28, 2010), *available at* http://perma.cc/K6JQ-5XU6. Accordingly, EPA stated that to qualify for the ASE, technical standards contained in a NMP must address *timing* considerations as to when land application should be delayed or prohibited. 2012 Permit Writers' Manual at 6-15. The fact that the Farm's NMP allows for application of manure during significant storm events demonstrates that it does not ensure appropriate utilization of nutrients in the manure.

***2. Moon Moo Farm's NMP is procedurally inadequate.***

In *Waterkeeper Alliance*, the Second Circuit held that the 2003 Rule unlawfully allowed permitting authorities to issue NPDES permits to CAFOs without reviewing the terms of a NMP or making the NMP available for public comment. 399 F.3d at 498–504. As a result, EPA decided that in order to qualify for the ASE, permitted CAFOs must follow a NMP which is reviewed by the public and permitting agency. 2008 Rule at 70,418. Unpermitted CAFOs, like the Farm, are required to have and use a similar nutrient management system that meets these same standards if they too wish to qualify for the ASE. USDA Executive Summary at 2. The New Union Department of Agriculture (DOA) did not review the Farm's NMP, and the State did

not provide for public review of the NMP. R. at 5. Because the Farm's NMP was not subject to these procedural steps, the Farm cannot rely on it to qualify for the ASE.

Nor can the Farm rely on its voluntary "no-discharge" certification to avoid these procedural requirements. While the 2008 Rule did not require "no-discharge" CAFOs to have their NMP reviewed by the public or reviewed and approved by the permitting authority, 2008 Rule at 70,426, the Rule did require certified CAFOs to update their NMPs if any nutrient practices changed over time. *Id.* at 70,430. Thus, when the Farm began applying acid whey to its fields in 2012, altering its nutrient management practices, it was required to update its NMP and to follow the updated regulatory protocols applicable to NMPs in NPDES permits. *Id.*

**C. EPA deserves deference for its regulatory interpretation.**

EPA's longstanding interpretation and consistent application of its CAFO regulations is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In the 2003 Rule, EPA expressly defined the scope of the ASE as it relates to runoff from CAFO land application areas. As demonstrated by the guidance documents and technical assistance cited above, EPA's current interpretation is not a *post hoc* rationalization or a convenient litigating position developed for this particular enforcement action. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012). Following the Second Circuit's decision upholding EPA's interpretation of the ASE as it relates to CAFOS, EPA has repeatedly and consistently explained that discharges caused by management practices like those at the Farm do not qualify for the ASE. EPA does not attempt to hold the Farm liable based on an interpretation adopted after the Farm began discharging without a permit. The fact that EPA is offering an interpretation specific to these facts in an enforcement proceeding does not prohibit this Court from deferring to it.

The District Court cited *Alt v. U.S. E.P.A.*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013) for the proposition that manure created in a CAFO can still constitute agricultural stormwater when washed into a waterbody. R. at 9. The court in *Alt* expressly declined to defer to EPA's interpretation of its CAFO regulations because it decided the regulations do not speak directly to discharges within the context of CAFO "farmyard" runoff. *Alt*, 979 F. Supp. 2d at 712. However in doing so, the court made clear that EPA regulations do in fact speak directly to discharges from land application areas. *Id.* Therefore, even the *Alt* court's analysis, which EPA believes is flawed, does not mitigate against strong deference in this case.

## IV. If Moon Moo Farm is not a CAFO, precipitation-related runoff from its land application area does not require a NPDES permit.

A discharge of pollutants does not require a NPDES permit unless it emanates from a point source. 33 U.S.C. §§ 1311(a), 1342(a). The term point source "does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Applicable regulations state that "[t]he following *do not require NPDES permits:* Any introduction of pollutants from nonpoint-source agricultural and silvicultural activities, including *storm water runoff from* orchards, *cultivated crops*, pastures, range lands, and forest lands, *but not discharges from concentrated animal feeding operations as defined in § 122.23*." 40 C.F.R. § 122.23(e) (emphasis added). This regulation balances Congress's inclusion of CAFOs in the definition of point source and its unqualified exclusion of agricultural stormwater from the definition of point source. If this Court determines the Farm is not a CAFO, this balance is not required, and any precipitation-related runoff from the Farm's land application area is not subject to NPDES permitting requirements.

If the Farm is not a CAFO, regulation of nonpoint runoff from its fields is up to New Union alone. *See, e.g.*, *Hiebenthal v. Meduri Farms*, 242 F. Supp. 2d. 885, 888 (D. Or. 2002)

(rejecting a citizen's claim of CWA jurisdiction over alleged over-application of fruit processing wastewater to an orchard). Evidence shows that the Farm is applying the manure mixture in excess of agronomic rates, but the CWA is without jurisdiction without a point source. 33 U.S.C. § 1311(a).

### A. Outside of the CAFO context, Moon Moo Farm's NMP need not meet NPDES standards.

Congress left regulation of non-CAFO agricultural stormwater discharges to the states. *See Water Keeper Alliance, Inc. v. Smithfield Foods, Inc.*, No. 4:01-CV-27-H(3), 2001 WL 1715730, at *3 n.3 (E.D.N.C. Sept. 20, 2001) (noting that Plaintiffs could not challenge a state waste management plan using the CWA). Thus, AFOs with fewer animals than listed in the regulations, or that are otherwise not defined or designated as CAFOs, are treated as nonpoint-source polluters that are to dispose of their animal waste under *voluntary* best management practices. State Compendium, Programs and Regulatory Activities Related to Animal Feeding Operations (May 2002); *see also* EPA & USDA, Unified National Strategy for Animal Feeding Operations (1999). For a NMP that is developed as part of a state program, it is up to the state reviewing the plan to decide whether it is sufficient to meet requirements for participation. So while the Farm's manure management practices do not satisfy CWA requirements for CAFOs, its voluntary participation in New Union's non-NPDES program represents the best possible means of managing the water quality and public health impacts from its operation.

### B. The presence of a drainage ditch on Moon Moo Farm's property does not convert agricultural stormwater into point source pollution.

Unlike regulated CAFOs, non-CAFO AFOs automatically qualify for the agricultural stormwater exemption without a NMP that complies with the requirements set forth in 40 C.F.R. § 122.42(e) (2014). In addition, the ASE is unqualified: an otherwise regulated point source

"does not include agricultural stormwater discharges." 33 U.S.C. § 1362(14). EPA expressly lists "excess fertilizers, herbicides, and insecticides from agricultural lands" as nonpoint-source pollution. EPA, What is Nonpoint Source (NPS) Pollution? Questions and Answers, *available at* http://perma.cc/RC6Z-RLHF. Thus, even though "ditch" is listed in the definition of point source, any discharge in this case consists of manure, which is considered agricultural stormwater if it is not from a CAFO point source. *See Fishermen Against Destruction of Env't, Inc. v. Closter Farms*, 300 F.3d 1294, 1297 (11th Cir. 2002) (finding that water from farmlands qualified for the ASE when it was pumped through a culvert into a lake).

An AFO that is not a CAFO can be classified as a point source if its runoff becomes a "discharge associated with industrial activity." 33 U.S.C. § 1342(p)(2)(B); 40 C.F.R. § 122.26(b)(14) (2014). However, industrial activity includes "facilities subject to storm water effluent limitation guidelines [and] new source performance standards," 40 C.F.R. § 122.26(b)(14)(i), and if the Farm is not a CAFO, it is not a facility subject to effluent limitations guidelines or new source performance standards.

**C. Prior cases finding agricultural runoff to be point source pollution involved CAFOs.**

Prominent cases that have dealt with manure runoff from land application areas have dealt with it in the CAFO-context, and are therefore inapplicable to AFOs that are not CAFOs. For example, in *Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 114 (2d Cir. 1994), the Second Circuit determined that Southview, a farm housing more than 2,000 dairy cows and encompassing 1,100 crop acres, was a CAFO. This finding lead the court to "hold that the liquid manure spreading operations are a point source within the meaning of CWA section 1362(14) *because the farm itself falls within the definition of a [CAFO]* and is not subject to the agricultural exemption." *Id.* at 115 (emphasis added). So while the court did make

more specific findings as to machinery and swales also constituting point sources, those holdings were prefaced with the fact that Southview is a CAFO. Even if one were to remove this gloss, in the present case there is no evidence of non-precipitation-related discharges, as there was in that case. *Id.* at 121.

The same was true in *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002), where the Ninth Circuit determined that two farms housing over 2,500 mature cattle each constituted CAFOs subject to NPDES permitting. *Id.* at 955. According to the court, "[d]efining a CAFO to include any manure spreading vehicles, as well as manure storing fields, and ditches used to store or transfer the waste serves the purpose of the CWA to control the disposal of pollutants . . . ." *Id.* Had the farms not been CAFOs, these other points of discharge would not have been covered by the NPDES program.

## V. Moon Moo Farm is not engaged in "open dumping" because the manure mixture is not solid waste when land applied.

Riverwatcher makes a claim in the alternative[4] that the Farm has violated Subtitle D of RCRA if it has not violated the CWA. R. at 10. Subtitle D prohibits "open dumping," which is the disposal of solid waste in any facility other than a regulated sanitary landfill. 42 U.S.C. §§ 6903(14), 6944–45. Thus, the applicability of the open-dumping prohibition hinges on whether the Farm's manure mixture is "solid waste." Section 1004(27) of RCRA defines "solid waste" as "any garbage, refuse . . . and other *discarded material*, including solid, liquid, [or] semisolid . . . material resulting from industrial, commercial, mining, and agricultural operations . . . ." 42

[4] The definition of solid waste excludes some discharges subject to NPDES permitting. 42 U.S.C. § 6903(27). However, because Riverwatcher pled its RCRA claims in the alternative, this Court need not address the scope of this exclusion. R. at 10.

U.S.C. § 6903(27) (emphasis added). EPA regulations implementing the open-dumping ban reiterate this statutory definition verbatim. 40 C.F.R. § 257.2 (2014).[5]

In determining whether soil amendment applied to land constitute "discarded material," courts have looked to whether the materials are handled in a manner constituting disposal or are beneficially used. *E.g.*, *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *10 (N.D. Okla. Feb. 17, 2010) (holding that land-applied chicken manure was not solid waste because, even if it was not fully utilized, it was "applied to the normal beneficial usage for which [it] was intended"); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1043 (9th Cir. 2004) (determining that grass field residue burned in place was not solid waste because farmers "reuse[d] the residue in a continuous farming process"). Legislative history supports this reasoning. H.R. Rep. No. 94-1491, 94th Cong., 2nd Sess., at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6239–41 ("Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.").

Courts have looked to several factors to determine whether land-applied materials are beneficially used, including: (1) whether the material has market value; (2) whether the party intended to throw the material away or to put it to a beneficial use; (3) whether the material is actually being reused or merely has the potential to be reused; and (4) whether the material is

[5] EPA has expounded upon the definition of solid waste, but only in the context where the waste would be "hazardous" for purposes of RCRA Subtitle C. 40 C.F.R. § 261.2 (2014); 40 C.F.R. § 261.1(b) (2014). EPA's expanded definition does not apply to this case because, as Riverwatcher concedes, the Farm is not engaged in any activity that might trigger Subtitle C. R. at 10. To the extent this Court would find that definition persuasive here, it states that materials are solid waste if abandoned, discarded, or thrown away. 40 C.F.R. § 261.2(a)–(c). Materials destined for beneficial reuse in a continuous process, even if they would be "hazardous waste" if discarded, are not solid waste. *Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1051–52 (D.C. Cir. 2000) (citing *Am. Mining Cong. v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987).

reused in the same industry or by the original owner rather than a salvager or recycler. *Tyson Foods*, 2010 WL 653032, at *11 (relying on *Safe Air*, 373 F.3d at 1043).

Applying these factors, it becomes clear that at the time the Farm applies the manure mixture to its fields, the mixture is not discarded, and is therefore not solid waste. Although the Farm does not purchase the whey, the Farm's treatment of the mixture indicates that it is valuable. Moreover, there is no indication that the Farm is being paid to dispose of manure or whey. To the contrary, whey application is a long-standing practice in New Union, indicating whey is valuable to crop production. *See* R. at 6. In addition, the Farm's treatment of the mixture shows an intent to reap the amendment benefits, rather than to throw the mixture away. As to the third factor, the Farm is actually using the mixture, rather than merely alleging a hypothetical reuse. Finally, the Farm is both the original owner and the ultimate user of land-applied manure. R. at 4–5. Even though the Farm is not the original owner of the whey, the whey is still used within the dairy industry. Therefore, like the poultry litter in *Tyson Foods* and grass residue in *Safe Air*, the Farm's mixture is not "discarded" when land-applied, and thus is not subject to the open dumping ban.

Even if this Court decides that land-applied soil amendments are solid waste, EPA regulations expressly exempt "agricultural wastes, including manures and crop residues, returned to the soil as fertilizers or soil conditioners" from the open dumping ban. 40 C.F.R. § 257.1(c)(1) (2014). Whey is not expressly mentioned, and courts have yet to address whether whey is included in this definition. However, whey is an ultimate product of the dairy herd, returned to the soil to grow silage. Thus, the Farm is exempt by regulation from the open dumping requirement, even if the manure mixture meets the definition of solid waste.

## VI. Riverwatcher has established an imminent and substantial endangerment.

Riverwatcher further claims that the Farm is liable for an "imminent and substantial endangerment" under RCRA section 7002. 42 U.S.C. § 6972(a)(1)(B). While the manure mixture is not solid waste when land applied, it is solid waste when it escapes the Farm and can no longer serve its beneficial purpose. The Farm's disposal of this waste into the Canal endangers the citizens of downstream Farmville, and the Farm is therefore liable.

### A. Excess manure mixture is discarded when it runs off Moon Moo Farm's fields, and becomes solid waste under RCRA.

As a threshold issue to its endangerment claim, Riverwatcher must establish that the manure mixture at some point becomes discarded material, and thus solid waste, under RCRA. *See* 42 U.S.C. § 6972(a)(1)(B). "Material is not discarded until after it has served its intended purpose." *Ecological Rights Found. v. Pac. Gas and Elec.*, 713 F.3d 502, 515 (9th Cir. 2013) (citing *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001).

Courts have endorsed a "functional analysis" to determine when over-applied soil amendments can become solid waste. *E.g., Smithfield Foods*, 2001 WL 1715730, at *4–5; *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, No. 13-CV-3016-TOR, 2013 WL 3179575, at *1 (E.D. Wash. June 21, 2013) (employing the same analysis as four other opinions issued the same day against four other dairies). This functional analysis means that manure applied to land can, after its beneficial purpose is complete, be considered discarded and meet the definition of RCRA solid waste. *Cow Palace*, 2013 WL 3179575, at *4–5. While pinpointing exactly when over-applied soil amendments become "discarded" may be difficult, the idea that over-applied materials can *"never* become discarded" is "untenable." *Id.* at *4 (emphasis in original). Indeed, in *Safe Air*, the Ninth Circuit made much of the fact that the record indicated

all of the grass residue was beneficially reused, meaning nothing ever left the fields. 373 F.3d at 1043–45.[6]

Conversely, the Farm's land application practices have resulted in high levels of nitrates and fecal coliforms running into the Canal from its fields. R. at 6. These discarded pollutants do not serve any beneficial purpose to the Farm or its crops as they flow into the River and eventually to Farmville. Thus, these materials are plainly solid waste.

**B. Riverwatcher has established that the Farm's solid waste presents an imminent and substantial endangerment to Farmville residents.**

Citizens may bring suit against any past or present generator of solid waste who contributes to the "handling . . . or disposal of any solid or hazardous waste which *may present* an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B) (emphasis added). Riverwatcher has adequately demonstrated all of the statutory elements of an imminent and substantial endangerment: (1) the Farm is a present generator of solid waste, (2) whose disposal of solid waste (3) may present an imminent and substantial endangerment to the health of the citizens of Farmville. *See* 42 U.S.C. § 6972(a)(1)(B). The subsection above establishes that the Farm is discarding solid waste. This waste is disposed of once it is discharged into water and permitted to enter the environment. 42 U.S.C. § 6903(3). The only issue is whether this waste "may present" an imminent and substantial endangerment.

[6] The approach taken in these cases is consistent with that of EPA's own pursuit of endangerment enforcement under RCRA § 7003 against farms that over-apply manure. *See* Consent Decree, *United States v. Seaboard Foods, Inc.*, No. CIV-06-989-R (Jun. 25, 2007) (settling an enforcement action in which EPA considered over-applied swine effluent as "discarded material" and therefore solid waste); Complaint at ¶ 12, *United States v. Seaboard Foods, Inc.*, No. CIV-06-989-R (Sept. 14, 2006). EPA found nitrate levels in the surrounding groundwater in harmful amounts, and issued an administrative order to abate the endangerment. *Id.* at ¶ 22.

"May present" is an expansive standard, requiring a relatively low level of risk to establish an actionable endangerment. *See Maine People's Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 288 (1st Cir. 2006); *Interfaith Cmty. Org. v. Honeywell Int'l., Inc.*, 399 F.3d 248, 258–59 (3d Cir. 2005); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004); *Cox v. City of Dallas*, 256 F.3d 281, 299 (5th Cir. 2001); *Dague v. City of Burlington*, 935 F.2d 1343, 1355 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992); *Crandall v. City and County of Denver, Colo.*, 594 F.3d 1231, 1237 (10th Cir. 2010). The Tenth Circuit's explanation in *Crandall* is the most instructive. The *Crandall* court explained, "[a] finding of imminency . . . does not require a showing that actual harm will occur immediately, as long as the risk of threatened harm is present." *Crandall*, 549 F.3d at 1237 (internal quotations and citations omitted). Thus, an actionable endangerment is present where there is a threatened or potential harm, and such endangerment is substantial when "there is reasonable cause for concern that someone or something may be exposed to risk of harm." *Id.* at 1237 (internal quotations and citations omitted). The injuries themselves need not be imminent, as long as the danger of injury is. *Id.* at 1238 (citing *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 486 (1996)).

Although the record is silent as to the exact levels of nitrates present in Farmville's drinking water, the EPA requires that drinking water providers take action at nitrate levels above the maximum contaminant level (MCL) established under the Safe Drinking Water Act (SDWA). EPA, Basic Information about Nitrate in Drinking Water, [hereinafter Nitrate in Drinking Water], *available at* http://perma.cc/F2VT-WRB6. The nitrate MCL is 10 mg/L. 40 C.F.R. pt. 257, App. I (2014). At that level, infants below six months of age who drink the water could become seriously ill and, if untreated, may die of cyanosis, also known as "blue baby syndrome" caused by excess nitrate metabolites in the blood. Nitrate in Drinking Water, *supra*.

This ongoing risk of serious health effects meets the permissive "may present" endangerment requirement because injury is already "presented." Indeed, the City of Farmville has warned its drinking water customers that the nitrate levels are unsafe for infants below two years of age, indicating that levels may be even higher than the MCL meant to protect infants under six months of age. R. at 6.

The endangerment is adequately linked to the Farm because water samples reveal that the Farm's nitrate waste makes its way into the City's water supply via the Canal and River. R. at 5–6. Accordingly, Riverwatcher has demonstrated everything required for an endangerment, conferring liability on the Farm for "such . . . action as may be necessary." *See* 42 U.S.C. § 6972(a). The District Court therefore erred in denying Riverwatcher summary judgment on the issue of endangerment liability. Even if Riverwatcher is not entitled to summary judgment, the record at least compels reversal of summary judgment to the Farm because Riverwatcher has raised genuine issues of material fact as to the endangerment presented by the Farm.

The District Court improperly relied on *Davies v. National Co-op. Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997). Not only is the reasoning of *Davies* incorrect, the portion discussing RCRA endangerment is unpersuasive dicta, expounded only after the court expressly abstained from reaching the endangerment on the merits. *Id.* at 999. The court stated that, even though the carcinogenic risk from the groundwater supply was hundreds of times that which the EPA deems unacceptable, there was no risk because "plaintiffs have been warned of the danger and are able to occupy the property without serious risk to their health by" drinking bottled water. *Id*. By characterizing plaintiff's injury as a mere "inconvenience," the *Davies* court was mistaken about the expansive "may present" standard.

To adopt *Davies*' reasoning is to transfer the burden of endangerments to those endangered, rather than leaving it on those creating the endangerment. Such a burden shift directly contravenes Congress's intent in enacting section 7002(a)(1)(B), which was to invoke federal courts to intervene when there is "but a risk of harm." *United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982) (citing H.R. Rep. No. 96-191, 96th Cong., 1st Sess. at 45 (1979) and H.R. Rep. No. 93-1185, 93d Cong., 2nd Sess., (1974) *reprinted in* U.S.C.A.N.N. 6454, 6488).

Additionally, the District Court's requirement of "but-for" causation is incorrect. RCRA section 7002 provides relief against those whose "contribution" to generation, handling, or disposal of solid waste may present an endangerment. 42 U.S.C. § 6972(a)(1)(B). The statute does not say the contributor need be the largest, or even a significant contributor. *See id.* Instead, the statutory language exhibits Congress's intent for federal courts to wield "broad and flexible equity powers" to address threats to human health. *See Price*, 688 F.2d at 211. The Farm's own expert witness, Susan Generis, conceded that it was her opinion that the Farm's discharges contributed to the April 2013 nitrate advisory. R. at 7. In sum, the Farm is liable under the correct standard.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm the District Court in part and reverse in part. This Court should affirm the grant of summary judgment to the Farm on two issues. First, if the Farm is not a CAFO, runoff from its fields does not require a NPDES permit. Second, the Farm is not engaged in open dumping. The District Court's determinations on the remaining issues warrant reversal. The District Court improperly excluded evidence that establishes the Farm is in violation of the CWA. Further, Riverwatcher has established an imminent and substantial endangerment under RCRA.