Team 19

CA. No. 14-1248

In the United States
Court of Appeals for the Twelfth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

DEEP QUOD RIVERWATCHER, INC.
and DEAN JAMES,

Intervenors-Appellants

v.

MOON MOO FARM, INC.

Defendant-Appellee

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

BRIEF FOR MOON MOO FARM, INC.
Defendant-Appellee

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JURISDICTIONAL STATEMENT

Appellant the United States of America, on behalf of the Environmental Protection Agency (EPA), filed a complaint in the district court for New Union and now appeals a final order issued June 1, 2014. The district court granted Moon Moo Farm's motion for summary judgment on all counts and denied the United States' and intervenors'—Riverwatcher and Dean James—motion for summary judgment. The district court had proper subject matter jurisdiction to hear the dispute under 28 U.S.C. §§ 1331, 1367(a) (2014), and pursuant to 28 U.S.C. § 1291 (2014), the Court of Appeals for the Twelfth Circuit maintains jurisdiction over final judgments issued by the district court.

STATEMENT OF THE ISSUES

I. Whether a man-made canal, fabricated with private funds on private property for the sole purpose of alleviating flooding is a "navigable water" under the Clean Water Act or the common law Public Trust Doctrine.

II. Whether samples and photographs taken in the course of an illegal trespass on private property are considered admissible evidence or must be excluded under the Fourth Amendment exclusionary rule.

III. Whether, under the Clean Water Act, Moon Moo Farm, which houses 350 dairy cows and adheres to a thorough Nutrient Management Plan, is a concentrated animal feeding operation requiring a permit under the National Pollutant Discharge Elimination System permitting program or is exempt under the agricultural storm water exemption.

IV. Whether the fertilizer used by Moon Moo Farm qualifies as a solid waste or presents imminent and substantial endangerment to human health, thus subjecting Moon Moo Farm to a citizen suit under the Resource Conservation and Recovery Act.

STATEMENT OF THE CASE

The United States, on behalf of the Environmental Protection Agency, originally brought this civil enforcement action seeking penalties and injunctive relief. R. at 4. The United States alleged that Moon Moo Farm violated the permitting requirements of the Clean Water Act. R. at

4. After properly serving the parties with a letter of intent to sue under the citizen suit provisions of the Resource Conservation and Recovery Act (RCRA), Riverwatcher and James intervened as plaintiffs, joining the United States on the Clean Water Act permitting claims and additionally alleging a cause of action under the RCRA. R. at 7. Moon Moo Farm responded by counterclaiming for common law trespass after James entered the Farm's private property to obtain evidence of stormwater runoff. R. at 4.

The district court disposed of the case by granting Moon Moo Farm's motions for summary judgment on the CWA and RCRA claims as well as the trespass counterclaim. The court awarded the Farm $832,560 in damages. R. at 4, 12. The lower court also denied the plaintiffs' motions for summary judgment, holding:

1. The Queechunk Canal is not a "navigable water;" therefore, James trespassed when he entered the canal on April 12, 2013, and any evidence obtained during this illegal act is inadmissible. R. at 9.

2. Moon Moo Farm is not subject to the National Pollutant Discharge Elimination System (NPDES) permitting program because Moon Moo Farm is not a Concentrated Animal Feeding Operation (CAFO). *Id.*

3. Under the CWA, any discharge from Moon Moo Farm's property is exempt from the NPDES permitting program under the agricultural stormwater exemption. R. at 9–10.

4. Riverwatcher cannot bring a citizen suit against Moon Moo Farm as the Farm's fertilization practices did not constitute open dumping of a solid waste under the RCRA. R. at 10–11.

5. Finally, Riverwatcher cannot bring a citizen suit against Moon Moo Farm under the RCRA because the Farm's fertilization practices were not a proximate cause of Farmville's nitrate advisories and therefore did not present imminent and substantial danger to human health. R. at 11–12.

The United States appeals the district court's decision in regard to the first two issues. Riverwatcher and James join the United States and further contest the final three issues.

STATEMENT OF THE FACTS

Moon Moo Farm's Growing Success

Moon Moo Farm ("Moon Moo" or "the Farm") is a small but prosperous dairy producer in the state of New Union, located ten miles from the city of Farmville. R. at 4. In 2010, Moon Moo expanded its milking herd from 170 to 350 cows to meet the growing needs of a local Greek yogurt producer, Chokos. R. at 5. The Farm's 150 acres are situated on a bend in the Deep Quod River, which provides drinking water to Farmville residents and feeds into the Mississippi River. *Id.*

Moon Moo operates as a sustainable business, using the herd's waste to fertilize the Farm's crop of Bermuda grass. *Id.* The Farm also began assisting Chokos in 2012 by accepting the acid whey from its yogurt production and incorporating it into the fertilization system. *Id.* Fertilizer runs through pipes to an outdoor storage pool, where it is pumped into tanks and spread over the fields. R. at 4–5. The storage pool was designed to accommodate all of the Farm's fertilizer without overflowing during a twenty-five year storm event—defined as five inches of rainfall accruing within twenty-four hours. R. at 5–6.

As a "no-discharge" animal feeding operation, or an operation that typically does not dispense waste directly into waters of the State, Moon Moo must periodically submit a "Nutrient Management Plan" (NMP) to the Farmville office of New Union's Department of Agriculture. R. at 5. New Union has the power to reject an inadequate NMP, though the state infrequently reviews the plans and does not include public comments. *Id.* Moon Moo's NMP diligently outlines its seasonal fertilizer application rates and calculates the crops' expected nutrient uptake, so as to not disrupt the land's equilibrium. R. at 5–6. Though Moon Moo does not hold a permit

issued by the National Pollutant Elimination System (NPDES), the Farm consistently complies with its NMP when fertilizing its Bermuda grass. R. at 5–6.

Farmville's Unfortunate Water Troubles

Over the past decade, Farmville has experienced frequent issues regarding the city's drinking water due to heavy farming in the area. R. at 6–7. In 2002, 2006, 2007, 2009, and 2010, the Farmville Water Authority issued nitrate advisories for water coming from the Deep Quod River. R. at 7. Most recently in 2013, an advisory stated that while drinking water did not pose any risks to adults, children younger than two years of age should drink bottled water. R. at 6. Deep Quod Riverwatcher received complaints concerning the river's odor and color, so on April 12, 2013, Dean James investigated the complaints using his small skiff. *Id.* Ignoring the prominent "No Trespassing" signs, James entered the Queechunk Canal, a manmade channel that cuts through Moon Moo's private property. *Id.* The previous landowner created the channel in the 1940s to remedy flooding on the Farm, though some now use it as a shortcut to the Deep Quod. R. at 5.

James observed and photographed Moon Moo's fertilizing system as well as brown water leaking from a drainage ditch into the channel after significant rain had fallen the previous day. R. at 6. James also took samples of the runoff water, which contained a high level of nitrates. *Id.* Riverwatcher's expert, Dr. Ella Mae, found that samples of Moon Moo's fertilizer had a pH of 6.1. *Id.* Mae speculated that adding Chokos' acid whey lowered the pH level of the fertilizer and of the soil, which prevented the Bermuda grass from effectively absorbing nutrients. *Id.* Mae further alleged that the unprocessed nutrients most likely leached into the groundwater and into the Deep Quod through runoff that accumulated during the rain, yet Moon Moo's NMP does not prohibit fertilizing crops during a rain event. R. at 6–7.

However, Riverwatcher's own health expert, Dr. Susan Generis, admitted it was impossible to determine whether Moon Moo was a proximate cause of Farmville's 2013 nitrate advisory. R. at 7. Additionally, Moon Moo's expert, Dr. Emmet Green, concluded Bermuda grass was a hardy crop that tolerated soil with a low pH, and applying whey to the soil has been a common farming practice in New Union for over fifty years. R. at 6–7.

STANDARD OF REVIEW

This is an appeal from a final order granting summary judgment on Clean Water Act and Resource Conservation and Recovery Act claims. To succeed on a motion for summary judgment, the moving party must establish that there are no genuine issues of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(a) (2014). This Court will review a grant of summary judgment *de novo*. *Cordiano v. Metcon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009).

SUMMARY OF THE ARGUMENT

The district court correctly held that the Queechunk Canal is not a public trust "navigable water." The canal is private property, constructed with private funds for the owner's personal needs. While conveyances of "navigable waters" are forbidden under the Public Trust Doctrine, the Queechunk Canal was not a "navigable water" at the time of New Union's statehood. The canal was excavated in the 1940s and is, thus, privately owned property. Indeed, the public cannot legally access the canal as it is not burdened by a navigational servitude. One of most essential rights of a property owner is the ability to exclude others, and because the Queechunk is privately owned, Moon Moo has the right to deny the public access. Furthermore, the Clean Water Act (CWA) would exceed its jurisdictional authority under the *Commerce Clause* if it regulated the Queechunk Canal. The canal has no effect on the channels of interstate commerce,

as it does not even traverse the boundaries of Moon Moo's property, let alone cross state lines. This canal serves the property as a flood prevention system, not a great commercial highway. At a maximum depth of a mere four feet, the canal cannot physically support economic activities. Consequently, the canal is not a "navigable water" under the CWA or the Public Trust Doctrine.

Because the Queechunk is private property, Dean James illegally trespassed when he entered the canal on April 12, 2013. The tort of trespass to land merely requires an intent to be on that specific land. Even if James had accidentally navigated his skiff into the canal, unaware that it was private property, he still would have trespassed. Nevertheless, James deliberately disregarded the "No Trespassing" signs posted on the banks of the Queechunk and intentionally steered his skiff onto Moon Moo's property. This Court should not abide James' apathy toward the law. Instead, it should uphold the lower court's finding that James trespassed and that Moon Moo is entitled to not only nominal but also punitive damages.

This Court should also exclude any evidence collected during James' trespass. Under the Fourth Amendment, a person has the right to be secure in his property from any warrantless and unreasonable search and seizures. Typically, the Fourth Amendment only applies to criminal cases when an officer searches a suspect's property, but recent case law has demonstrated that the Amendment also applies in civil cases when an agent acting on behalf of the government inspects another's private property without a warrant. James did not act in has capacity as a private citizen when he trespassed on Moon Moo's property. He investigated the canal in response to complaints filed with Riverwatcher, and thus James functioned as an agent of Riverwatcher and the Environmental Protection Agency (EPA). Therefore, Moon Moo is entitled to protection under the Fourth Amendment and any samples or photographs taken by James are

inadmissible and should be excluded from the evidence as James did not obtain a warrant before pursuing his investigation.

Even if this Court finds James' evidence admissible, Moon Moo is still not liable under the CWA because it is not a point source. Any point source that discharges pollutants into "navigable waters" requires a National Pollutant Discharge Elimination System (NPDES) permit. Because the water runoff from Moon Moo's property was not from a man-made or flushing system, Moon Moo cannot be considered a concentrated animal feeding operation (CAFO), a type of point source. Instead, any discharge from the Farm is excluded from NPDES permitting under the agricultural stormwater exemption. Because the runoff was the direct result of a significant storm event and the runoff was not intentionally channeled into the canal, the Farm is exempt from the NPDES permitting program.

Finally, Riverwatcher cannot file a citizen suit against Moon Moo Farm under the Resource Conservation and Recovery Act (RCRA). To successfully bring an RCRA citizen suit, Riverwatcher must prove that Moon Moo engaged in dangerous land application practices such that solid waste disposal constituted imminent and substantial endangerment to health. However, Moon Moo never disposed of any solid waste, as its fertilizer mixture did not fit under the definition of discarded materials. Moreover, the fertilizer did not pose even a potential risk of endangering human health, as the Farm's land application was not a proximate cause of the nitrate advisories in Farmville.

In light of the lower court's correct findings, Appellee, Moon Moo Farm respectfully requests that this Court affirm the district court's determinations that the Queechunk Canal is not a public trust "navigable water," that any evidence obtained during James' trespass is

inadmissible, that the Farm is not liable under the CWA, and that Riverwatcher improperly brought a citizen suit under the RCRA.

ARGUMENT

I. The Queechunk Canal is not a "navigable water" under the Clean Water Act or the common law Public Trust Doctrine.

The Queechunk Canal is not within the jurisdictional reach of the CWA or the Public Trust Doctrine because it has no effect on interstate commerce and the public never acquired a right to access the canal. There is no definitive test for determining navigability—no "formula which fits every type of stream under all circumstances and at all times." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 404 (1940). Instead, different definitions have arisen corresponding to particular judicial or administrative functions. *Smith v. Abandoned Vessel*, 610 F. Supp. 2d 739, 749 (S.D. Tex. 2009).

Traditionally, "navigable waters" are waters that are navigable in-fact or used "as highways for commerce, over which trade and travel are or may be conducted." *The Daniel Ball, II*, 77 U.S. 557, 563 (1870). The CWA, however, defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7) (2014). Such an expansive interpretation has seemingly swallowed the Act's original intention to "recognize, preserve, and protect the primary responsibilities and rights of the States[.]" *Id.* § 1251(b). Here, the district court properly held that the Queechunk Canal is not subject to the CWA's jurisdiction because (1) Congress overextended its authority under the *Commerce Clause*; (2) the canal is not a public trust "navigable water;" and (3) a navigational servitude does not grant the public access to this privately owned canal.

A. The Queechunk Canal is not a "navigable water" under the Clean Water Act because the Federal Government lacks authority to regulate waterways that neither flow between states nor affect interstate commerce.

Congress cannot regulate the Queechunk Canal because it is solely contained within the state of New Union and has no potential or actual effect on interstate commerce. Under the Commerce Clause, "Congress shall have Power . . . To regulate Commerce . . . among the several states." Con. Art. I, Sec. 8, Cl. 3. Intrinsically incorporated into Congress' power to regulate interstate commerce is the power to control navigation. *Appalachian*, 311 U.S. at 404–05. Pursuant to this power, the Supreme Court recognizes three categories that Congress can regulate: channels of interstate commerce; instrumentalities, such as people or things, of interstate commerce; and activities substantially affecting interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559 (1995). When Congress enacts legislation to regulate channels of interstate commerce, it not only has power over economic activities occurring within the channel but also the flow of commerce. *United States v. Deaton*, 332 F.3d 698, 705 (4th Cir. 2003) (finding Congress has the power to prevent the flow of injurious activities in channels of interstate commerce). Therefore, under the first prong of *Lopez*, Congress' power to enact the CWA reaches only to "navigable waters" that are channels of interstate commerce. *Id.* at 706.

Though Congress' authority under the *Commerce Clause* is broad, it is not limitless. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (holding the Migratory Bird Rule exceeded the authority granted to the CWA and "would result in a significant impingement of the States' traditional and primary power over land and water use"); *United States v. Wilson*, 133 F.3d 251, (4th Cir. 1997) (finding the court should "interpret the CWA in light of the constitutional difficulties that would arise by extending the Act's coverage to waters . . . which do not otherwise substantially affect interstate commerce"). Indeed, the CWA's jurisdiction is limited to the "waters of the United States," including all waters used for interstate commerce, all interstate waters, and all other intrastate waters, "the use,

degradation, or destruction of which" could influence interstate commerce. 40 C.F.R. § 122.2. The Queechunk Canal does not fall within these first two categories nor does it adhere to the "other waters" standard.

First, the Queechunk Canal is not an interstate body of water used for commerce between the states. The canal is located wholly within the state of New Union. R. at 5. In fact, it does not even traverse the boundaries of Moon Moo Farm's property. *Id.* Additionally, the canal's central aim is flood mitigation, not commerce created by recreational use by foreign travelers, fishing, or industrial purposes. *Id.*; *see* 40 C.F.R. § 122.2.

The canal further stretches outside of the CWA's jurisdiction because, though it is wholly intrastate, the degradation or destruction of the canal would not influence interstate commerce. Locals sometimes use the canal as a shortcut around a bend in the Deep Quod River. R. at 5. However, if this shortcut ceased to exist, commerce would continue unscathed. Only small skiffs and canoes can navigate the shallow waters of the canal, so larger boats engaging in transporting goods cannot take such a shortcut. *Id.* The Queechunk even discourages outside activity, whether economic or recreational, as evidenced by prominent "No Trespassing" signs firmly planted on its banks. *Id.* The CWA cannot overextend its jurisdiction in order to regulate the Queechunk because it has no effect on the channels of interstate commerce under the first prong of *Lopez*.

Furthermore, "when an administrative interpretation of a statute invokes the outer limits of Congress' power, [the court] expect[s] clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. In *SWANCC*, the Supreme Court held that Congress could not regulate excavation trenches in an abandoned mining site under the CWA. *Id.* at 163. The trenches had evolved into seasonal and permanent ponds, which varied in depth from a few inches to several feet and attracted different species of migratory birds. *Id.* While respondents

argue that the protection of migratory birds is of the utmost national interest, the Court found that regulating these ponds under the Migratory Bird Rule "would result in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

Congress has not clearly communicated its intent to regulate a body of water, like the Queechunk Canal, that is wholly intrastate, manmade, and does not affect interstate commerce. Like the ponds in *SWANCC*, the Queechunk is not a "navigable water" and falls outside of the waters that Congress intended to regulate under the CWA, and unlike these ponds, the Queechunk does not even support significant wildlife. Governing a private waterway such as the Queechunk exceeds the power of Congress under the *Commerce Clause* and encroaches on the States' traditional powers.

B. The Queechunk Canal is not a "navigable water" under the Public Trust Doctrine because Moon Moo Farm privately controls the canal and it is not a naturally occurring waterway.

The Queechunk Canal is not a public trust "navigable water" because it was constructed on private property with private funds after New Union became a state. Originally, the King of England maintained control over "navigable waters" by placing them in a public trust. *Boone v. United States*, 944 F.2d 1489, 1494 n.10 (9th Cir. 1991). However, after the Revolutionary War, the people of the United States held an absolute right over "all their navigable waters and the soils under them for their own common use." *Id.* (quoting *Martin v. Waddell's Lessee*, 41 U.S. 367, 411 (1843)). Once admitted into statehood, the States gained title to their own "navigable waters" as well as the land under these waters in the form of an inalienable public trust. *PPL Mont. LLC v. Mont.*, 132 S. Ct. 1215, 1227–28 (2012).

The State can convey certain property to private owners so long as the property did not contain "navigable waters" or navigable water bottoms at the time the State was admitted to the Union. *Dardar v. Lafourche Reality Co.*, 985 F.2d 824, 827 (5th Cir. 1994) (finding a canal dug in 1948 was not accessible to the public because the property in question contained no "navigable waters" in 1812—the year the Union granted Louisiana statehood—thus the State's transfer to private owners was valid). *See Ill. Cent. R.R. Co. v. Ill.*, 146 U.S. 387, 452 (1892) (finding Illinois could not convey the lands below Chicago's harbor to a private owner because the lands beneath "navigable waters" should be held "in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties").

In this case, the Queechunk Canal was not navigable-in-fact at the time New Union became a state. A previous landowner dug the canal and bifurcated Moon Moo's property in the 1940s, well after New Union had been admitted into the nation as a state. R. at 5. The Court in *Dardar* also found that a canal created in 1948 was not a public trust "navigable water" at the time Louisiana became a state. New Union and Louisiana properly conveyed each parcel of land to private owners before the respective canals were constructed. Therefore, both parcels became private property, as they were not subject to the ebb and flow of "navigable waters" or bottoms of navigable-in-fact waters at the time of statehood.

In addition, the Queechunk Canal is a manmade canal, created for the purpose and enjoyment of private landowners. Illinois could not transfer the land under Chicago's harbor to a railroad company in *Ill. Cent. R.R. Co.* because the public used the harbor not only for recreation but also for commerce. On the other hand, locals rarely use the Queechunk Canal and only as a shortcut. R. at 5. The canal progresses directly through Moon Moo's private property, whereas

Chicago's harbor, at the time of Illinois' statehood, was not only subject to the ebb and flow of the Great Lakes but also surrounded by public property. Because a previous owner created the canal long after New Union became a state and it is only used for the purpose of private flood prevention, the Queechunk Canal is not a "navigable water" subject to an inalienable public trust.

C. The Queechunk Canal is not a "navigable water" because the public never acquired a right of access through a navigational servitude.

Navigational servitudes arise out of the *Commerce Clause*, allowing the public unrestricted access to some "navigable waters." *Dardar*, 985 F.2d at 832. Such servitudes recognize the importance of the public's concern for interstate commerce and the ability to navigate waters that flow between the States. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). However, they do not extend to all "navigable waters." *Id.* at 178. Instead, navigational servitudes give the public access to waterways that are "continuous highways," linking states together in trade and commerce. *Id.* When defining the limits of a navigational servitude, "the United States Supreme Court made clear that a waterway must be naturally navigable and not made so artificially." *Smith*, 610 F. Supp. 2d at 749 (citing to *Kaiser*, 444 U.S. at 178).

Additionally, a property owner's right to exclude the public's right of access is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser*, 444 U.S. at 176. A private landowner can rebut the presumption that a servitude exists by demonstrating that his or her interests outweigh the public's interests. *Dardar*, 985 F.2d at 834–35 (finding a canal dredged on private property with private funds was not subject to a navigational servitude because "the construction of the canal did not interfere with or obstruct preexisting navigable waterways").

In *Kaiser Aetna*, the Supreme Court weighed a number of factors to determine whether a navigational servitude granted the public access to Kuapa Pond. 444 U.S. at 179. First, though

the pond was a naturally occurring formation, it had always been recognized as privately owned. *Kaiser*, 444 U.S. at 178. Next, before owners expanded the pond, turning it into a marina, it was not navigable. *Id.* Finally, private owners converted the pond into a navigable marina with private funds. *Id.* at 178–179. The Court found that, before being improved, Kuapa Pond—a 523-acre lagoon with two openings into a "navigable waterway of the United States"—was not a "great navigable stream . . . [in which] private ownership is inconceivable." *Id.* at 179 (quoting *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 69 (1913)).

The public never gained access to the Queechunk Canal because it is not a continuous commercial highway nor is it a naturally occurring body of water. As previously discussed, the Queechunk falls entirely within the state of New Union and is too shallow to support any type of commerce. *See supra* Part I.A. Moon Moo's property interest in the canal far outweighs the public's interest in using the Queechunk for commercial or recreational reasons. The Farm has clearly demonstrated, by posting "No Trespassing" signs, that it has a strong interest in keeping the canal private. R. at 5. In fact,, the canal is not a naturally occurring body of water. The previous owner used private funds to excavate the canal on his personal, private property, which he sold to Moon Moo. *Id.* If the Court were to find that a navigational servitude had been granted, it would be depriving Moon Moo of its essential right to exclude others from its private property.

Furthermore, if the Supreme Court found the public was not entitled to use Kuapa Pond, then a navigable servitude should not burden the Queechunk Canal. First, the public is more likely to have a strong interest in Kuapa rather than the Queechunk. The canal is only fifty yards wide and at most, only four feet deep. This is a small fraction of the 253 acres that Kuapa occupied. *Id.* Kuapa also supported a thriving fishing industry, whereas the Queechunk does not

provide any commercial value. The public also recognized that Kuapa was privately owned, just as the locals know from the prominent "No Trespassing" signs that the Queechunk is private property. R. at 5. Before improvements, Kuapa was not considered navigable, though it flowed directly into "waters of the United States." The Queechunk did not even exist before the 1940s, when someone dug a trench on privately owned land to alleviate flooding. *Id.* For these reasons, this Court should affirm the lower court's finding that the Queechunk Canal is not a public trust "navigable water" or a "water of the United States."

II. Any samples and photographs procured on April 12, 2013 are inadmissible, as James illegally trespassed to obtain them, and this Court should exclude such evidence under the Fourth Amendment.

This Court should uphold the district court's finding that any evidence obtained during James' investigation is inadmissible and should be excluded. Evidence is typically admissible if it is relevant, reliable, and probative of a consequential fact. Fed. R. Evid. 401, 402. Nevertheless, evidence may be excluded for a myriad of reasons. Excluding evidence has long been a remedy for unreasonable and warrantless searches or seizures in violation of the Fourth Amendment. S. Doc. No. 112-9, at 1446 (2014), *available at* http://www.gpo.gov/fdsys/pkg/GPO-CONAN-REV-2014/pdf/GPO-CONAN-REV-2014-10-5.pdf.

Congress originally enacted the Fourth Amendment to protect against government invasions or trespass on a citizen's private premises. *United States v. United States Dist. Court*, 407 U.S. 297, 321 (1972). However, the main purpose of the Amendment is to protect people and their privacy rather than property. *Warden v. Hayden*, 387 U.S. 294, 304 (1967). Consequently, it is necessary to exclude evidence illegally obtained during James' investigation in order to protect Moon Moo's privacy.

A. James displayed a flagrant disregard for the law by trespassing on Moon Moo Farm's private property.

The tort of trespass to land results from "an unauthorized entry upon the land of another, and may occur when one enters—or causes something to enter—another's property." *Russell v. Altom*, 546 Fed. App'x. 432, 435 (5th Cir. 2013) (quoting *Barnes v. Mathis*, 353 S.W.3d 760, 764 (Tex. 2011)). The first element of trespass is possession, and to posses the property in question, one must occupy or control the area. Restatement (Second) of Torts § 157(a) cmt. a (1965). Intent is an implicit and subtle element of trespass to real property. *Id.* § 163 cmt. b. Animus or wrongful motive is not required. *Id.* Instead, the trespasser need only intend to be on that particular property, even if he innocently mistook private premises for public land. *Id.* However, if the trespasser knows that his entry onto the property is illegal and without the consent of the landowner, the court may award the landowner punitive as well as nominal damages. *Id.* § 163 (e).

James knowingly trespassed on Moon Moo's private property. As discussed, Moon Moo controls and privately owns the Queechunk Canal, and the public has no right of access or navigational servitude to use it. *See supra* Part I.C. Therefore, the Farm possesses the land on either side of the canal as well as the canal itself.

On April 12, 2013, James ignored the prominent "No Trespassing" signs at the mouth of the Queechunk Canal and steered his skiff directly onto Moon Moo's property. R. at 5–6. Trespass merely requires that James intended to be on that particular property. James, however, not only intended to navigate the Queechunk Canal, but he also recognized that it was private property and callously disregarded any warnings by steering his skiff into the channel. R. at 6. Because James deliberately trespassed, the district court did not err by awarding damages in the form of attorney's fees to the Farm. R. at 12.

B. The evidence that James obtained during his illegal trespass is inadmissible because the Fourth Amendment protects citizens and their private property from warrantless administrative searches and seizures.

Under the Fourth Amendment, people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable [and warrantless] searches and seizures." U.S. Const. amend. IV. Historically, the Fourth Amendment only applied in criminal cases to warrantless search and seizures by officers or agents of the government. *See* S. Doc. 112-9, at 1378. An individual is a government agent if he acts to assist law enforcement instead of furthering his own objectives, and the government knows of or joins in his actions. *United States v. Becerra-Garcia*, 397 F.3d 1167, 1172 (9th Cir. 2005) (finding two rangers were acting as government agents not as private citizens when they "assist[ed] the tribal police department and Border Patrol by policing the remote corners of [an Indian] reservation").

However, the Supreme Court has also recognized that, under the Fourth Amendment, administrative inspections must be performed pursuant to a warrant. *See Camara v. Mun. Court*, 387 U.S. 523 (1967) (finding a resident could demand that city building inspectors produce a warrant in order to search his home, as a warrantless administrative search would violate his Fourth Amendment rights); *see also, See v. City of Seattle*, 387 U.S. 541 (1967) (holding the Fourth Amendment barred a fire inspector from searching a locked commercial warehouse without a warrant). In *Camara*, the Court explained that while an inspection of private property "is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime . . . the Fourth Amendment interests at stake in these inspection cases are [not] merely 'peripheral.'" 387 U.S. at 530. Therefore, it is against the public policy underlying the Fourth Amendment to solely protect criminal suspects and their private property from warrantless search and seizures but not citizens plagued by administrative searches. *Id.*

Given the facts at hand, James served as an agent of the government when he illegally trespassed and stole samples from Moon Moo's property. James was not acting in his capacity as a normal citizen when he entered Moon Moo's property but as a proxy for an environmental organization called Riverwatcher. R. at 4. The organization functions in concert with other government bodies, such as the New Union Department of Agriculture, to help citizens resolve problems arising from the Deep Quod River. R. at 5–6. On the day of his trespass, James was responding to citizens' complaints. R. at 5. Just as the two rangers in *Becerra-Garcia* functioned on behalf of the government by investigating the reservation, James also acted outside of the scope of private citizenship when he policed the waters of the Queechunk. James was not furthering his own objectives but trying to gather evidence to pursue litigation against Moon Moo Farm.

Therefore, any evidence that James procured without a warrant in his capacity as a government agent is inadmissible under the Fourth Amendment exclusionary rule. Moon Moo has the right to privacy on its own property. Similarly, the resident's home in *Camara* and the owner's locked commercial warehouse in *See* were both protected from warrantless searches. If fire inspectors in *See* and city building inspectors in *Camara* were prohibited from investigating private property without a warrant, then the Fourth Amendment should also forbid the warrantless environmental inspection that James performed.

Even if James is not found to be a government agent, this Court should still not allow the Environmental Protection Agency to subvert the principal purpose of the Fourth Amendment: to protect people and their privacy from unreasonable government invasion. If government entities are permitted to use evidence obtained by citizens through illegal activities, it will promote government corruption as well as advocate that private citizens should break the law. This Court

should not condone James' trespass nor should it allow the EPA to reap the rewards of an illegal act. Accordingly, the evidence, which James procured during his trespass, is inadmissible evidence and should be excluded.

III. Moon Moo Farm does not require a National Pollutant Discharge Elimination System permit as the Farm does not discharge pollutants from a point source and any discharge is exempt under the agricultural stormwater exemption.

The district court properly found that fertilizer runoff from Moon Moo's farm did not flow from a point source into a "navigable water" and therefore is not subject to the National Pollutant Discharge Elimination System (NPDES) permitting program. The CWA imposes strict limitations on the discharge of pollutants in furtherance of the Act's original purpose, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Consequently, the CWA requires that the Environmental Protection Agency (EPA) issue an NPDES permit for any addition of a pollutant from a point source to "waters of the United States." 33 U.S.C. §§ 1311(a), 1342(a)(1). Though the reach of the CWA is expansive, Congress limited the scope of NPDES permits to only discharges emitted from a point source or "any discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel . . . [or] concentrated animal feeding operation." 33 U.S.C. § 1362(14). Though the list is not exhaustive, this Court should not interpret the definition "so broadly as to read the point source requirement out of the statute." *Cordiano*, 575 F.3d at 219.

The jurisdiction of the NPDES program does not extend to nonpoint sources, such as agricultural stormwater runoff. *Id.* Nonpoint source pollution is not defined by statute, but "it is widely understood to be the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source. *League of Wilderness Defenders/Blue Mts. Biodiversity Poject v. Forsgen*, 309 F.3d 1181, 1184 (9th Cir. 2002); *United*

States v. Plaza Health Lab., 3 F.3d 643, 652 (2d Cir. 1993 (finding "[n]onpoint source pollution is, generally, runoff: salt from roads, agricultural chemicals from farmlands, oil from parking lots, and other substances washed by rain"). Whether discharge originates from a point source or a nonpoint source is a fact specific inquiry, which must take into consideration the plain language as well as the context of the statute. *Cordiano*, 575 F.3d at 219. Although point sources are subject to NPDES permitting requirements, local and state governments largely control and manage discharges from nonpoint source. *Id*. at 220.

If Moon Moo's farmland is subject to any regulation, it should be by the state of New Union as a nonpoint source, not by NPDES permitting. First, the Farm is not a point source because it is not a concentrated animal feeding operation (CAFO). The discharge from the Farm was not a result of any discernible, confined, and discrete conveyance but nonpoint source runoff. Lastly, even if the Farm is considered a point source, the discharge falls under the broad category of agricultural stormwater runoff and is exempt from liability under the NPDES permitting program.

A. Even though Moon Moo Farm meets the size requirements under the Clean Water Act, it is not a concentrated animal feeding operation because it did not employ a man-made device to discharge pollutants into "navigable waters."

Concentrated animal feeding operations (CAFO) are agricultural enterprises that house a multitude of animals or livestock. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d 2005). The EPA closely regulates the management of CAFOs, as they not only generate millions of dollars but also millions of tons of manure every year. *Id.* A medium CAFO is defined as an animal feeding operation that houses 200 to 699 mature dairy cows and discharges pollutants into "waters of the United States through a man-made ditch, flushing system, or other similar man-made device." 40 C.F.R. § 122.23(b)(6).

The most common way that pollutants from a CAFO infiltrate the water is through the improper land application of animal waste to fields. *Waterkeeper*, 399 F.3d at 494. However, effective land application is an efficient form of recycling, as the nutrients in animal waste and wastewater can be used to fertilize crops. *Id.* Developing and implementing a nutrient management plan ensures that land applications comply with the "best management practices" of the effluent limitations guidelines *Id.* at 499. In fact, under NPDES permitting guidelines, CAFOs must implement a nutrient management plan. 20 C.F.R. § 122.42(e)(1). Best management practices for land application also include determining appropriate application rates, analyzing the nitrogen and phosphorus content in the manure and soil, and inspecting equipment. *Id.* § 412.4(c).

An NPDES permitting authority can also designate an operation to be a CAFO if it is a "significant contributor of pollutants to the waters of the United States." 40 C.F.R. § 122.23(c). Such permitting authorities include State agencies approved by the EPA. *Id.* § 122.23(c)(1)(i). Farms and animal feeding operations, however, do not have a duty to apply for NPDES permits unless they are CAFOs and an actual discharge occurred. *Waterkeeper*, 399 F.3d at 504 (holding the EPA "exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate that they have no potential for discharge"). Furthermore, if a CAFO can avoid liability by establishing that it "was designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge[,]" and the operator may consider "climate, hydrology, topology, and the man-made aspects of the CAFO" when deciding whether, under the circumstances, it discharges or proposes to discharge. *Nat'l Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 746 (5th Cir. 2011) (quoting 73 Fed. Reg. 70,423 (Nov. 20, 2008)).

Simply because Moon Moo falls within the size requirements of a medium CAFO does not mean that the Farm is a CAFO or requires an NPDES permit. Moon Moo increased its milking herd just a few years ago from 170 to 350 milking cows. R. at 5. Previously, the Farm would have fallen thirty cows short of meeting the threshold number of animals required to qualify as a medium CAFO. Now, however, the Farm meets the minimum, yet it still houses significantly less than the maximum 699 cows needed to be a medium CAFO. Appellants argue that simply by meeting the size requirements, Moon Moo should be regulated as a "point source," but there are two parts to the CAFO test.

Moon Moo has not discharged pollutants into "waters of the United States" through a man-made system. Even if this Court finds evidence from James' trespass admissible and that the Queechunk Canal is a "navigable water," Moon Moo fails the second step of the CAFO test. All of the waste from Moon Moo's herd runs through a series of pipes, which culminate in an outdoor lagoon, where the waste is stored and used as fertilizer. R. at 5–6. Moon Moo has not created any man-made channels or ditches that discharge pollutants into the Queechunk Canal. Therefore, any samples that James' took during his illegal trespass came from runoff water, seeping from the ground after a heavy storm the proceeding day.

Moreover, the state of New Union designated Moon Moo Farm as a "no-discharge" animal feeding operation, meaning the operation will not normally discharge into "waters of the United States" unless there is a 25-year storm event. R. at 5. Thus, the State has recognized that Moon Moo is not a significant pollutant contributor under 40 C.F.R. § 122.23(c), and it does not have a duty to apply for an NPDES permit as it does not discharge or propose to discharge pollutants. Additionally, the EPA has authorized New Union to issue NPDES permits, yet the state has failed to recognize the Farm's need for such a permit. R. at 5–6. Finally, New Union

already treats the Farm as if it were permitted by requiring it to submit Nutrient Management Plans. R. at 5.

Moon Moo's Nutrient Management Plan is just as effective as those required by the NPDES permitting program. In compliance with the "best management practices" of the NPDES's effluent limitations guidelines, the Farm's plans include fertilizer application rates and analysis of the soil's nutrient uptake where crops are grown and the fertilizer is spread. *Id.* Though the Farm has not been issued an NPDES permit because it has not been labeled a CAFO, the state has, nonetheless, treated Moon Moo as if it held a permit. Thus, this Court should not penalize Moon Moo because the state failed to issue an arbitrary permit, and the Farm consistently adheres to the guidelines and purpose proposed by the NPDES permitting program.

B. Discharge from Moon Moo Farm occurred as a result of agricultural stormwater runoff and *not* as a result of discernable, discrete, confined conveyances into "waters of the United States."

The CWA specifically excludes agricultural stormwater runoff from the definition of "point source." 33 U.S.C. § 1362(14). This is partly because point sources are discrete, confined, discernable conveyances, whereas agricultural stormwater typically occurs through broad natural runoff water caused by precipitation. *See Nat'l Pork Producers*, 635 F.3d at 743 (stating this exemption arises "when rainwater comes in contact with manure and flows into navigable waters"); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 842 n.8 (9th Cir. 2003) (finding "[d]iffuse runoff, such as rainwater that is not channeled through a point source, is considered nonpoint source pollution and is not subject to federal regulation"); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 121 (2d Cir. 1994) (finding the agricultural stormwater exemption generally applies to discharges as a result of heavy rain).

Agricultural stormwater runoff has largely been considered nonpoint source pollution, which is exempt from NPDES permitting. *Concerned Area Residents*, 34 F.3d at 120. The main difference between this exemption and a point source is the latter requires channels to transport the discharge into "waters of the United States." *Waterkeeper*, 399 F.3d at 510 (point source must "be 'channelized' in order to fall within the EPA's regulatory jurisdiction"). *See also, Sierra Club v. Abston Constr. Co., Inc*., 620 F.2d 41, 47 (5th Cir. 1980) ("Although the point source definition excludes unchanneled and uncollected surface waters, surface runoff from rainfall, when collected or channeled by coal miners in connection with mining activities, constitutes point source pollution"). The plain text of the CWA requires point sources to include a conveyance, which automatically evokes the image of structures, like pipes and tunnels, intentionally moving pollutants into the water. *See* 33 U.S.C. § 1362(14).

When analyzing whether a discharge is exempt from CWA regulation as agricultural stormwater, the first and most important question to address is whether the runoff was a direct result of the rain or "simply occurred on days when it rained." *Concerned Area Residents*, 34 F.3d at 121 (finding that the rain was but one reason that some of the liquid manure spread across the Farm's fields became runoff). Furthermore, courts are more likely to find the runoff exempt when the operation practices effective land application. *Nat'l Pork Producers*, 635 F.3d at 744 (finding agricultural stormwater discharge "to include land application discharge, if the land application comported with appropriate site-specific nutrient management practices"). If the discharge was a consequence of precipitation and not funneled through a manmade channel into "waters of the United States," then it is an agricultural stormwater exemption. *Alt v. EPA*, 979 F. Supp. 2d 701 (N.W.D. W.Va. 2013) *aff'd* 758 F.3d 588 (4th Cir. 2014) (finding litter and manure

from a large chicken farm that washed from a field into "navigable waters" because of rain was an agricultural stormwater discharge).

The discharge from Moon Moo's land into the Queechunk Canal was a direct result of heavy rainfall. The day before James illegally took samples from the Farm's runoff, there was a "significant storm event." R. at 6. When significant rain falls, it pools and eventually forms paths in the ground, running downhill. The so-called "drainage ditch" from which James took his samples was nothing more than a stream of runoff water from the heavy rains the night before. These streams were distinctly different from the manmade channels that qualify as point sources. In *Sierra Club*, the court found runoff caused by rain constituted a point source because it was artificially channeled into "navigable waters" by miners through their mining activities. The facts at hand are decidedly different. Our case is more similar to *Alt*, where manure washed across field and into "navigable waters" due to a heavy rainstorm, and unlike *Concerned Area Residents*, rain was not one of many explanations for the discharge, it was the *only* reason. The farmers in *Concerned Area Residents* practiced unsafe and ineffective land application techniques by covering their fields in an excess of liquid manure, whereas Moon Moo has always practiced land application in conformity with its Nutrient Management Plan. R. at 6.

Courts have held that the agricultural stormwater exemption includes land application discharge if the application complied with adequate nutrient management practices, and Moon Moo has consistently observed such practices. The Farm submits a detailed Nutrient Management Plan, which is approved by the New Union Department of Agriculture, and while the Appellants argue that land application during a rain event is a poor management practice, there is no clause in Moon Moo's Nutrient Management Plan that prohibits it from fertilizing before, after, or even during a storm. R. at 5–7.

Moon Moo is not subject to liability under the NPDES permitting program. The Farm is not a CAFO and therefore not a point source, and any discharge from the Farm on the day of James' trespass is protected under the agricultural stormwater exemption's umbrella. Because the Farm has consistently practiced applying fertilizer subject to a nutrient management plan that monitors the absorption and application rates of the fertilizer, Moon Moo has abided by the best management practices proscribed by the EPA in order to avoid potential discharge. Finally, flooding caused by a significant storm event was the sole reason for the runoff, which qualifies as agricultural stormwater. For the aforementioned reason, this Court should uphold the district court's ruling that Moon Moo did not violate the CWA by discharging pollutants into a "navigable water" and failing to obtain an NPDES permit.

IV. Riverwatcher cannot bring a Resource Conservation and Recovery Act citizen suit against Moon Moo Farm because the Farm practices safe fertilization techniques that do not jeopardize human health or the environment.

Moon Moo Farm is not subject to a citizen suit under the Resource Conservation and Recovery Act (RCRA) because its land application practices do not constitute solid waste disposal in a manner that would cause imminent and substantial endangerment to human health. Congress developed the RCRA to bridge any loopholes under the CWA and "establish the framework for a national system to insure the safe management of hazardous waste." *Am. Mining Cong. v. EPA*, 824 F.2d 1177,1179 (D.C. Cir. 1987). The Act serves as "a comprehensive statute [governing] the treatment, storage, and disposal of solid waste . . . so as to minimize the present and future threat to human health and the environment." *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996) (quoting 42 U.S.C. § 6902(b)).

The Environmental Protection Agency (EPA) predominantly enforces both the CWA and the RCRA; however, private citizens also have the ability to file an action under either of these

acts. 42 U.S.C. § 6972; 33 U.S.C. § 1365. Under the RCRA, a citizen may file an action against any person who has violated any of the Act's standards or regulations under 42 U.S.C. § 6901 or "against any person . . . who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, 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)(A)–(B). The statutory language governing claims brought by private citizens and claims brought by the United States is almost identical. *Cordiano*, 575 F.3d at 206. Thus, the analysis concerning the two types of litigation will be very similar. *Id.*

Riverwatcher and James claim that Moon Moo's land application methods imminently and substantially endanger human health. R. at 11. However, the State has approved Moon Moo's practices through its Nutrient Management Plan. Riverwatcher cannot bring an action against the Farm under an RCRA citizen suit because Moon Moo does not practice open dumping of solid waste and its land application methods are healthy and safe.

A. Moon Moo Farm's fertilizer is not a solid waste as it consists of manure and acid whey, which are not discarded, but used in a continuous recycling process to nourish the Farm's crops of Bermuda grass.

As a threshold matter, this Court must determine whether Moon Moo disposed of solid waste during its land application. It did not. The RCRA defines "solid waste" as "any garbage, refuse, sludge . . . [or] other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations[.]" 42 U.S.C. § 6903(27). As Moon Moo Farm uses animal waste and acid whey—not "garbage, refuse, or sludge"—in its fertilization methods, the question at issue is whether these substances qualify as discarded materials. *Id.*

"Discarded material" is not defined under the RCRA. However, the Act's legislative history demonstrates that such materials are the type contributing to the ever-increasing waste products overflowing from landfills. *Safe Air v. Meyer*, 373 F.3d 1035, 1045 (9th Cir. 2004). The term is meant to apply to any material, which has been abandoned, thrown-out or rejected. *Am. Mining Cong.*, 824 F.2d at 1190 (finding Congress intended to extend liability only to waste that had been "truly discarded, disposed of, thrown away, or abandoned").

Discarded materials are not those which would cause "[a]n increase in reclamation and reuse practices[, which] is a major objective of the Resource Conservation and Recovery Act." *Safe Air*, 373 F.3d at 1045 (quoting H.R. Rep. No. 94-1491, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239). In fact, Congress clearly stated that agricultural products recycled and reused as fertilizers do not fall within the scope of discarded materials. H.R. Rep. No. 94-1491, at 3 ("Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of legislation"). In *Safe Air*, growers burned Kentucky bluegrass and used the residue to condition and add nutrients to the soil. 373 F.3d at 1045. The Ninth Circuit Court found that because the growers used the residue in a "continuous farming practice" and intended to benefit the earth and produce more crops of Kentucky bluegrass, the residue was not solid waste because it was not discarded material. *Id.*

Finally, solid waste is typically a product that has served its intended purpose and is no longer suitable for commercial and consumer use. *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 515 (9th Cir. 2013) (holding a wood preservative that "leaks, spills, or otherwise escapes" is not a solid waste because it is serving its intended purpose as a general biocide); *No Spray Coal., Inc. v. City of New York*, 252 F.3d 148, 150 (2d Cir. 2001) (finding

"pesticides are not being 'discarded' when sprayed into the air with the design of effecting their intended purpose").

The liquid manure and acid whey that Moon Moo Farm used as a fertilizer and soil conditioner is not "solid waste." The mixture is not the type of product that Congress intended to protect against by including "discarded materials" in the RCRA's statutory construction. The legislative history explicitly states that agricultural products, such as Moon Moo's fertilizer, shall not be regulated by the RCRA because they are nourishing the soil and bringing nutrients to new crops.

Even the acid whey that Moon Moo has added to its fertilizer would not be considered discarded material. Though the whey produced by the Chokos Plant is acidic, it is not dangerous, and it is being used for its intended purpose. Moon Moo intended to use the whey as a soil conditioner to help produce its crop of Bermuda grass. This is a practice that farms in New Union have used for over seventy years. R. at 6. Furthermore, the whey is not a discarded material simply because the Chokos Plant has given it to Moon Moo. A significant goal of the RCRA is to increase recycling substances and reusing materials for beneficial purposes. Moon Moo is doing just that: reusing the whey by incorporating it into the Farm's fertilizer and using it to grow new crops. Just as the growers in *Safe Air* used the residue from burning bluegrass in a "continuous farming process," Moon Moo is also using the whey and manure mixture in a cycle to fertilize its crops, which it harvests and uses as silage. R. at 5.

The liquid manure and whey combination is not the type of product the Farm would discard. It is serving its intended purpose by fertilizing and conditioning the soil. The Farm intentionally spreads the fertilizer over its fields through an intricate system of pipes and lagoons. R. at 5. Like a pesticide, fertilizer is distributed intentionally, not tossed away like

garbage. Because Moon Moo is using the fertilizer for its intended purpose as well as continuing a farming cycle by reusing the manure and liquid whey to grow crops, the fertilizer is not a solid waste under the RCRA's definition.

B. Moon Moo Farm's fertilizer does not constitute an imminent and substantial endangerment to health because it was not a proximate cause of the nitrate advisories in the city of Farmville.

In order to succeed in its imminent and substantial endangerment citizen suit under the RCRA, Riverwatcher must prove three things. First, Riverwatcher must demonstrate that Moon Moo has either been "a generator or transporter" of a solid waste or "an operator of a solid or hazardous waste treatment, storage or disposal facility[.]" *Prisco v. A & D Carting Corp.*, 168 F.3d 593, 608 (2d Cir. 1999). Riverwatcher must also show that the Farm contributes to "the handling, storage, treatment, transportation, or disposal of solid or hazardous waste" and finally that "the solid or hazardous waste in question may present an imminent and substantial endangerment to health and the environment." *Id. See also* 42 U.S.C. § 6972(a)(1)(B); *Cordiano*, 575 F.3d at 211–12 (finding the plaintiff failed to produce sufficient evidence demonstrating the likelihood that a substance would "in fact result in harm to human health" and that any harm would be severe").

The term "imminent and substantial endangerment" must be broken down and each individual word must be examined to determine what substances Congress intended to regulate. *Cordiano*, 575 F.3d at 210. Courts have interpreted "imminent" to mean a "risk of threatened harm is present." *Id.* (quoting *Dague v. City of Burlington*, 935 F.2d 1343, 1356 (2d Cir. 1991)). The risk need not be immediate, but actual harm must be substantial. *Dague*, 935 F.2d at 1356. A risk of harm is not substantial if it is "remote in time, completely speculative in nature or *de minimis* in degree." *United States v. Reilly Tar & Chem. Corp.,* 546 F. Supp. 1100, 1109 (D.

Minn. 1982). The risk, however, "is 'substantial' if it is serious." *Cordiano*, 575 F.3d at 211. Finally, Courts have found that "endangerment" simply means that there is a potential or threatened harm. *Id.* Disposing of a solid waste "without careful planning and management can present danger to human health and the environment." 42 U.S.C. § 6901(b)(2).

Even if the Farm's fertilizer is found to be a "solid waste," Moon Moo's land application of the manure and whey fertilizer does not constitute an imminent and substantial endangerment to human health. First, there is no risk of harm or potential harm. Farmville has been experiencing difficulty with its drinking water for years. R. at 7. Even before the Farm expanded its milking herd and operations, the city issued five nitrate advisories in less than a decade. *Id.* Four of the nitrate advisories occurred within a five-year period—in 2006, 2007, 2009, and 2010—demonstrating that this is a common occurrence that the city of Farmville has accepted. *Id.* Riverwatcher's own health expert, Dr. Susan Generis, even admitted in a deposition that it was impossible to determine whether Moon Moo was a proximate cause of the 2013 nitrate advisory. *Id.* Also, the harm that has occurred is minimal, as the high nitrate level in the city's drinking water does not pose any health risks to adults. R. at 6.

It is clear that if there is a threatened harm, it is "completely speculative in nature" and "*de minimis* in degree." Though the nitrate levels in James' illegal samples were elevated, the threat of harm was not substantial. Riverwatcher's agronomist found that the fertilizer had an elevated pH, constituting a weak acid, which could make it difficult to absorb. *Id.* However, another agronomist explained Bermuda grass, which Moon Moo grows, tolerates a large range of pH conditions. *Id.* It is very unlikely that Moon Moo's fertilizer had an effect on the nitrate levels in Farmville, especially because the Deep Quod's watershed is littered with other farms that heavily contribute to the health of the river and the safety of the drinking water. R. at 7.

Moon Moo also piously adheres to its Nutrient Management Plan, which outlines specific application rates and nutrient uptake rates. R. at 5. Moon Moo Farm has carefully planned and managed its land application practices to ensure that it follows all CWA and RCRA guidelines in order to prevent any danger to human health or the environment.

CONCLUSION

Moon Moo Farm respectfully requests that this Court affirm the district court's findings. First, the Queechunk Canal is not a "navigable water" or a "water of the United States" under the Public Trust Doctrine, and Congress cannot overextend the Clean Water Act's jurisdiction in order to regulate the canal. Next, any samples or photographs taken by Dean James on April 12, 2013 should be excluded under the Fourth Amendment as he trespassed and investigated the Farm without a warrant. This Court should further find that Moon Moo Farm did not violate the Clean Water Act, as any discharge from the Farm was the product of a significant storm event. Finally, Riverwatcher could not bring a citizen suit against Moon Moo under the Resource Conservation and Recovery act because the Farm did not dispose of any solid waste in a manner that caused imminent and substantial endangerment of human life. For the above reasons, this Court should uphold the lower court's grant of summary judgment in favor of Moon Moo Farm.

Respectfully submitted,

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Counsel for Moon Moo Farm, Inc.